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Case Number 52,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

STATE'S REPLY BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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Dated: September 9, 2016

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page**

Statutes and Rules

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

Argument

Reyes contends that the State did not oppose amendments or the ever-increasing scope of the evidentiary hearings and therefore the procedural bars do not apply to any of his claims. (Ans. Brf. at 20-21). Reyes is inaccurate both as to the facts and the law. On May 8, 2012, the first day of the evidentiary hearings, the State requested that the Superior Court limit the evidentiary hearing to the claims for which Reyes requested a hearing, which were limited to the penalty phase. (B676). Reyes, however, asked the court to take testimony on "a very small section related to "some documents, which are part of the exhibit notebook provided to the State." (B676). Reyes acknowledged that they re-reviewed the file and discovered a possible additional claim related to co-defendant Cabrera's statements to a defense investigator. (B676). Reyes suggested that the court take testimony and then later decide whether those claims were time-barred or did not warrant review in the interest of justice. (B676). The court ruled that it would prefer "to have everything in front me and then sort it out in the post-hearing process." (B676-77). Only then did the State have the opportunity to respond that it did not have the evidentiary documents that Reyes referenced until the day before the hearings started, "so in terms of claims going to the guilt phase, we were not on notice that those would be handled." (B677). The court stated, "If that

creates a problem, … I'll give the time to check into it further." (B677). The State thanked the court and responded that in light of this turn of events, there was the possibility that the State would need to call rebuttal witnesses. (B677). Thus, the record does not comport with Reyes' bold contention that State did not oppose the increased scope of the evidentiary hearings. Op. Brf. at 21. Rather, the State made a record of its position and Reyes acknowledged that his additional claims raised, after his October 2009 motion for postconviction relief, may be procedurally barred, which they were.[1]

The Superior Court's *sua sponte* Fifth Amendment claim, raised after the evidentiary hearings, was untimely, otherwise procedurally barred and prejudiced the State. Reyes' protestations aside Superior Court manifestly misunderstood its role when it disregarded the procedural bars applicable to Reyes' claims. Reyes had five years to amend and re-amend his motion, and he did so.[2] Thereafter, Reyes' time-barred claims should have been summarily dismissed. The Superior Court further erred in raising its own claim long after the conclusion of the hearings and post-evidentiary briefing. Reyes' attempt to justify the Superior Court's actions by relying on a Third Circuit federal habeas corpus case, *Smith v. Horn*, to suggest that the judge may, at any time, raise state postconviction claims

[1] Del. Super. Ct. Crim. R. 61(b)(6). Reyes never sought permission to amend his second amended motion. Had he done so, it is clear that the State would have objected.
[2] *See State v. Reyes*, 2016 WL 358613, at *2 (Jan. 27, 2016).

for a capital petitioner is unavailing.[3] When considering a motion under Superior Court Criminal Rule 61, courts must consider the procedural bars before reaching the merits of the claims.[4]

Instead of properly applying the exceptions to the procedural bars found in Rule 61(i)(4) and (5), the Superior Court simply erroneously stated that it would consider new claims because "there was a miscarriage of justice pursuant to Rule 61(i)(5)," and "that reconsideration of otherwise procedurally barred claims is warranted in the interest of justice pursuant to Rule 61(i)(4)."[5] For renewed claims, the Superior Court failed, as required by Rule 61(i)(4), to determine if any new law made retroactive in collateral review existed or was applicable to Reyes' claims or any new factual information that was not available when the prior trial judge considered and rejected the claims.

Reyes' claims raised subsequent to the second amended motion for postconviction relief should be dismissed as untimely, and previously decided claims should be denied as procedurally defaulted pursuant to Rule 61(i)(4).

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[3] *See Smith v. Horn*, 120 F.3d 400, 408-09 (3d Cir. 1997) (discussing whether to consider a claim raised by petitioner under a "miscarriage of justice" exception especially in light of fact that State failed to raise procedural bars).
[4] *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).
[5] *Reyes*, 2016 WL 358613, at *4.

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

The Superior Court's request on June 23, 2015 for supplemental briefing on the court-raised issue of Reyes' waiver of his Fifth Amendment rights, was the first time any suggestion was made that Reyes wanted to testify at trial but did not because he was afraid the jury would hear about his conviction for the Otero murder. Despite having first filed for postconviction relief in 2004, and after several amendments and protracted postconviction evidentiary hearings with supplemental briefing over the course of 10 years, Reyes never raised the claim that he misapprehended the waiver of his right to testify. Even though it was Reyes' burden to raise and prove claims in postconviction,[6] the Superior Court raised the claim 11 years into litigation of Reyes' first postconviction motion, and then Reyes adopted the claim. Subsequently, he added a related claim that trial counsel was deficient for failing to move to exclude the Otero conviction at trial under DRE 609[7] and, thereafter, failed to support either claim with record evidence. Nevertheless, the Superior Court ignored the procedural bars and granted relief under Rule 61(i)(5). This was error.

The record does not support the Superior Court's postconviction finding that Reyes wanted to testify in the guilt phase, but decided against it in mistaken

[6] *See Younger v. State*, 580 A.2d 552, 555 (Del. 1990).
[7] *See* Reyes' Supplemental Brief, dated August 24, 2015. (B3073-77).

reliance that the State would not present evidence of his involvement in the Otero murder to the jury during the penalty phase. The Superior Court's Fifth Amendment ruling is contrary to the established law of the case, untimely, otherwise procedurally barred under Rules 61(i)(4) and (i)(5), and, in any case, meritless, as is any related claim of ineffective assistance of counsel.

The law of the case doctrine also prohibited the Superior Court from reevaluating the trial court's finding that Reyes' 2001 waiver of his right to testify at trial was knowing, intelligent and voluntary. The trial court conducted a comprehensive colloquy, and no facts, nor the law, have changed regarding waivers of constitutional rights.[8] Reyes argues that the record only establishes that he agreed with trial counsel that it would not be a good idea for him to testify at trial and that trial counsel did not file a motion to exclude Reyes' prior conviction. (Ans. Brf. 29). But what Reyes fails to acknowledge is that the burden was on him, as the movant, to show that he had been deprived of a substantial constitutional right before he was entitled to any relief.[9] Reyes' failure to allege his claim in a timely fashion and then question trial counsel at the evidentiary hearings[10] and provide other evidence to prove deficient performance is fatal to his

[8] *Cf. State v. Wright*, 67 A.3d 319, 323 (Del. 2013) (finding "no basis for Superior Court to reconsider the admissibility of Wright's confession" raised *sua sponte* because "the Superior Court did not have any new evidence.").

[9] *See Younger*, 580 A.2d at 555.

[10] Because neither the Fifth Amendment nor the DRE 609 claims were raised prior to the evidentiary hearings, trial counsel was not asked why Reyes and counsel agreed it was not a

claim. Reyes failed to make a showing of a constitutional deprivation. Nor did he make a showing that in the interests of justice, the Superior Court should have reviewed his waiver anew. Moreover, the Superior Court's insistence on pursuing the Fifth Amendment claim that it raised *sua sponte*, without considering evidence or argument to the contrary, and the lack of record support for its decision, mandates reversal of its grant of relief.

The law of the case doctrine and Rule 61(i)(4) also precluded the Superior Court from revisiting the trial court's ruling on the admissibility of the excerpt of Reyes' prior testimony from the Otero trial. Based on no new facts, the Superior Court incorrectly found Reyes' testimony to be inadmissible character evidence under DRE 404.[11]

On direct appeal, this Court found, as the trial court determined, that the record reflected that Reyes' statements were corroborated by Santos' independent statements to the police, and were thus relevant evidence under DRE 402 and not unfairly prejudicial under DRE 403.[12] The Superior Court's decision thereafter to grant relief on this claim, after finding Reyes' statements to be inadmissible character evidence that undermined his right not to testify, was error.[13] The Superior Court was prohibited from revisiting the issue in the first instance, but in

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good idea he not testify or why they did not file motion under DRE 609. Reyes cannot now speculate as to the reasons and simply proclaim deficient performance.

[11] *Reyes*, 2016 WL 358613, at *7.

[12] *Reyes v. State*, 819 A.2d 305, 311-12 (Del. 2003).

[13] *Reyes*, 2016 WL 358613, at *7.

any event, incorrectly found the statement that Reyes lied to Santos was impermissible character evidence.

Reyes' statements were statements against interest[14] specifically related to facts about his role in the murders of Rowe and Saunders. The comment that Reyes lied to his girlfriend, could be, as the trial judge stated, construed to mean "that he did not tell her the whole thing." (B67). This was echoed by the State, who stated that his comment could be taken to mean that he was lying to his girlfriend about beating someone in the basement. (B63). The trial judge and this Court both correctly held that the statements introduced by the State were relevant. The Superior Court, in postconviction, erroneously found them to be impermissible character evidence, infringing on Reyes' right to testify. In making its finding, the Superior Court did not explain its reasoning as to how this impacted Reyes' right to testify.

In sum, the Superior Court had no basis to *sua sponte* raise a Fifth Amendment claim and revisit the trial court's ruling on Reyes' waiver to testify; nor did it have a basis to revisit this Court's ruling, and that of the trial court, regarding Reyes' statements to Santos. The Superior Court failed to consider Rule 61's procedural defaults or the law of the case doctrine. Reyes' Fifth Amendment rights were not violated and he validly waived his right to testify at trial.

[14] *See* DRE 804(b)(3).

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

The Superior's Court finding that the trial court, by scheduling Cabrera's sentencing after Reyes' trial, rendered Cabrera to be unavailable as a witness in Reyes' trial, was incorrect. The Superior Court further erred and misapplied the law by ruling that had Cabrera testified, he "*may* have introduced reasonable doubt regarding Reyes' role,"[15] and therefore, Reyes was entitled to relief.

In March 2001, Cabrera's trial counsel advised Cabrera that testifying at Reyes' trial would "seriously undermine your chances of success in your appeal, or during any other Postconviction action." (A66). Cabrera's counsel however authorized an *off the record* meeting between Cabrera and Reyes counsel. (A66). In that meeting, Cabrera summarized a similar statement he had previously given his defense investigator that he and Reyes had not committed the murders, but that Neil Walker had. (A156-57). Cabrera thereafter advised that if he was called to testify at Reyes' trial, he would take his counsel's advice and assert his Fifth Amendment privileges and refuse to testify. (A158; A92).

Reyes' counsel properly did not seek introduction of Cabrera's statements at Reyes' trial and, when postconviction counsel attempted to present Cabrera's

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

statement at the evidentiary hearing, the Superior Court refused to consider the substance of the statements in the absence of Cabrera's testimony. (A231-32). Postconviction counsel attempted to render Cabrera's statements admissible by calling Cabrera to testify at the hearings, but on August 29, 2012, he refused and invoked his Fifth Amendment rights. (A235a-c). The substance of Cabrera's statements remained unadmitted. And, under the present record, it is clear that regardless of the timing of Cabrera's sentencing, Cabrera was unavailable to testify.

Contrary to the Superior Court's postconviction ruling, Cabrera's statements were not admissible under DRE 804(b)(3)'s declaration against-interest exception and trial counsel was not ineffective for failing to pursue that argument. The bulk of Cabrera's statements did not qualify as reliable self-inculpatory statements of an unavailable declarant. Cabrera's statements were uncorroborated by anyone but Cabrera.[16]

In *Smith v. State*, this Court stated that the policy behind DRE 804(b)(3) is that self-inculpatory statements are inherently reliable and trustworthy.[17] However, as the United States Supreme Court said in *Williamson v. United States*:

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[16] *See Neal v. State*, 80 A.3d 935, 949 (Del. 2013).

[17] *See Smith v. State*, 647 A.2d 1083, 1087 (Del. 1994); *Williamson v. United States,* 512 U.S. 594, 599 (1994) ("reasonable people, even reasonable people who are not especially honest, tend not to make self-incriminatory statements unless they believe them to be true"); *United States v. Matthews*, 20 F.3d 538, 545 (2d Cir. 1994) ("people do not ordinarily make statements damaging to themselves unless they are true") (quotation omitted).

> Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confessions non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.[18]

In *Smith*, this Court found this reasoning of the United States Supreme Court persuasive and adopted it.[19]

Cabrera's statements to trial counsel and the defense investigator were mostly self-exonerating - he claimed that neither he nor Reyes were guilty, but rather someone else committed the murders. These self-serving statements were not admissible.[20] Contrary to Reyes' claims, the bulk of Cabrera's statement, essentially all the portions that implicated Walker in the murders as opposed to Cabrera or Reyes, were inadmissible.

Essentially, Reyes argues that the following statement Cabrera gave to the investigator would be admissible under DRE 804(b)(3):

> CABRERA states WALKER did not come back for a "good 2 hours". As soon as WALKER took off, CABRERA realized his gun was missing he claims he returned to the fight scene to look for it and didn't find it. 2 hours later when WALKER came to his house, CABRERA asked him where he had been. REYES was not at the house at the time. He states WALKER told him, "Everything's taken

[18] *Smith*, 647 A.2d at 1087-88 (citing *Williamson*, 512 U.S. at 599).
[19] *Smith*, 647 A.2d at 1088.
[20] *Id.*; *see also Neal*, 80 A.3d at 950.

> care of." CABRERA asked, "He's all right"? WALKER responded, "Don't worry, Everything's cool" (A62).

Reyes is incorrect. This statement, given by Cabrera to his own defense investigator in August of 1997, denied any involvement in the murders, was self-serving and uncorroborated. The statement, therefore, would have been inadmissible hearsay at trial.

Reyes ignores the need for corroborating circumstances clearly indicating the trustworthiness of Cabrera's statements. There was none. The fact that Walker and Cabrera fought two months later at a bar adds nothing to this analysis. Because Cabrera's statements, in the absence of Cabrera's testimony, were inadmissible, counsel cannot be faulted for failing to seek their admissibility. The Superior Court's finding that trial counsel's performance was objectively unreasonable for failing to have "at least attempted" to seek admissibility is simply untenable. The Superior Court failed to properly apply *Strickland*'s[21] two prong test to this claim and erred in granting relief.

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

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

In postconviction, the Superior Court disagreed with this Court's finding that while incarcerated with Reyes, Roderick Sterling overheard Reyes tell another inmate, Ivan Galindez, that he committed the Rockford Park murders with Cabrera.[22] The Superior Court based this finding upon a 2008 interview of Sterling in Jamaica by Reyes' postconviction private investigator. But the Superior Court had already considered and rejected this interview in 2012 when the trial judge denied Reyes' request for a formal deposition of Sterling as part of the postconviction proceedings. Reyes and the Superior Court ignored Rule 61(i)(4)'s procedural bar, and that the Superior Court's 2012 ruling was law of the case on the issue. Moreover, the Superior Court erred in determining that the State violated its *Brady* obligations by failing to provide impeachment information about Sterling to the defense.

In January 1998, Sterling gave a detailed interview that provided previously unknown details of the murders of Rowe and Saunders and led to the arrests of Cabrera and Reyes. Sterling testified at trial about what "[he] overheard [Reyes] say to Ivan Galindez." (A79). Sterling testified that he provided information because he wanted to obtain on a deal on his charges of sexual intercourse

[22] *See Reyes*, 819 A.2d at 309.

involving a small child and, as a result, he did receive an extremely favorable deal that once he testified, he would plead to a reduced charge and be immediately turned over to INS for deportation. (A81-82).

After Sterling's 2008 interview in Jamaica, postconviction counsel declared that Sterling's story had changed. But the trial judge considered the 2008 interview and disagreed, and in 2012 denied Reyes' request for a formal deposition stating that: "No glaring changes or inconsistencies appear, and he made no statement that what he said at trial was not truthful."[23] This ruling was the law of the case. Reyes ignores this ruling. The Superior Court in its postconviction decision, ignores this ruling. The Superior Court erred in reconsidering the 2008 interview without new evidence and in finding that, as a result of the 2008 interview, Sterling "learned details of the Rockford Park murders from Galindez and not Reyes," and therefore Reyes' Sixth Amendment rights were violated.[24]

The Superior Court further erred in ruling that the State committed a *Brady* violation by failing to disclose impeachment evidence in the form of Sterling's history of alcohol and drug use, convictions, and treatment.[25] Not only is the claim barred by Rule 61(i)(3), but Reyes has failed to show a colorable claim for relief under Rule 61(i)(5). Sterling's presentence investigation report was not

[23] *State v. Reyes*, 2012 WL 8256131, at *9 (Del. Super. Ct. Nov. 13, 2012).
[24] *Reyes*, 2016 WL 358613 at *9.
[25] *See Reyes*, 2016 WL 358613 at *9.

discoverable material in the possession of the State. Presentence officers prepare reports at the court's direction for the court's *confidential* use.[26] The information from Sterling's presentence report about Sterling's history of drug and alcohol use and treatment was neither suppressed by the State, nor material. There simply is no support for the Superior Court's decision to reverse its prior ruling that it would not consider the presentence investigation and, instead, use it to find that the State violated its *Brady* obligation.

Nor is there any support for the Superior Court's determination that Reyes' trial counsel provided ineffective assistance with respect to its handling of issues regarding Sterling. The Superior Court's ruling that trial counsel's objection to Sterling's testimony at trial on hearsay grounds was not thorough or accurate enough, and therefore constituted deficient performance, is incorrect.[27] Again, the Superior Court inappropriately based this ruling on Sterling's 2008 interview.[28] The Superior Court was procedurally barred from reinterpreting the substance of Sterling's trial testimony and his 2008 interview. Moreover, trial counsel cannot be faulted at the time of trial for Sterling's alleged change of story or claimed lack of memory more than seven years later.

[26] *See Duross v. State*, 494 A.2d 1265, 1270 (Del. 1985); *State v. Honie*, 1999 WL 167733 (Del. Super. Ct. Feb. 5, 1999).
[27] *Reyes*, 2016 WL 358613 at *17.
[28] *Id.*

Reyes argues that trial counsel did not effectively cross-examine Sterling. The opposite is true. Trial counsel effectively cross-examined Sterling on his prior conviction for raping a small child, that he both sold and used drugs, his ability to overhear the conversation between Reyes and Galindez, and his impetus for testifying. (A82-91). Trial counsel's cross-examination of Sterling was objectively reasonable and Reyes and the Superior Court have failed to show how the use of any more information about Sterling's drug use would have changed the outcome of Reyes' trial.

Reyes makes much of Sterling's "missing" letter. Sterling requested to speak to the police about the Rockford Park murders. Either Galindez wrote the letter for him, or Sterling wrote it, or someone else wrote it. Who the scrivener for the letter was changes nothing.[29] The State did not introduce Sterling's letter as evidence at trial and no one disputed that he requested to speak to the State about the murders. Because the contents of the letter were known, there was no basis to believe the letter contained any incriminating or exculpatory evidence and therefore, no reason to request a missing evidence instruction.[30] Sterling's damaging testimony was Reyes' problem, not the letter offering to provide information. Reyes had the opportunity to cross-examine Sterling on what he

[29] Reyes argues that the record is abundant as to the crucial importance of the letter and the lack of any evidence to sustain any conviction. Reyes offers no support for that contention. Ans. Brf. at 49.

[30] *See Lunnon v. State*, 710 A.2d 197, 199 (Del. 1998).

overheard, and his basis of knowledge, which is what the Constitution requires. Reyes has failed to show deficient performance on the part of counsel, and, moreover, he has failed to show how he suffered any prejudice from trial counsel's failure to ask for a missing evidence instruction.

The record further fails to support the Superior Court's finding, and Reyes' argument, that trial counsel was ineffective for failing to call Galindez to testify at trial. There is nothing in the record to support this claim. Rather, Reyes argues that Galindez may have been able to answer certain questions that may have been able to assist him at trial and provide a different result.[31] That is patently insufficient. Here, Reyes had to show that he had been deprived of a substantial constitutional right before he was entitled to any relief,[32] and this Court need not address conclusory and unsubstantiated postconviction relief claims because speculation of a different result is not enough.[33] Reyes did not raise the claim that trial counsel should have called Galindez to testify at trial until after the evidentiary hearings. Counsel did not call Galindez at the evidentiary hearings to substantiate his allegations. Reyes merely offered Galindez's prepared affidavit, which was not subject to cross-examination. The record supports that Reyes was not fluent in Spanish as Reyes, himself, admitted at Cabrera's trial for Otero's

[31] Ans. Brf. at 50-51.
[32] *Bailey*, 588 A.2d at 1130 (citing *Younger v.* 580 A.2d at 555) (emphasis added).
[33] *See Younger*, 550 A.2d at 555; *Zimmerman v. State*, 1991 WL 190298, at *1 (Del. Super. Ct. Sept. 17, 1991) (citations omitted); *State v. Dividu*, 1992 WL 52348, at *2 (Del. Super. Ct. Feb. 12, 1992) ("[M]ovant has failed to provide any factual support for his perfunctory allegations.).

murder. (A64). Reyes offers nothing substantial now to indicate otherwise.[34] Reyes failed to satisfy his burden of proof that trial counsel provided ineffective assistance of counsel. The Superior Court abused its discretion by ignoring the law of the case, the procedural bars, and the facts in the record, to find that trial counsel was ineffective.

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

V. THE SUPERIOR COURT ERRED IN ASSERTING A FREE STANDING CLAIM THAT THE TRIAL COURT DID NOT PROPERLY CONSIDER REYES' AGE IN SENTENCING.[35]

Reyes did not raise a freestanding claim that the trial court failed to give Reyes' youth proper consideration as a mitigating factor, but raised only an ineffective assistance of trial counsel claim for failure to properly present adequate mitigation evidence regarding Reyes' youthfulness and brain development. Because the ineffective assistance of counsel claim was properly before the court, the Superior Court inappropriately *sua sponte* considered the freestanding claim where it should have limited its consideration of the claim to the *Strickland* standard. Not only was the free-standing claim time-barred under Rule 61(i)(1), it was otherwise barred under Rule 61(i)(3) and (i)(4).[36] There is no exception to the procedural bars for the claim the Superior Court independently raised, and relief should not have been granted on that basis.

The Superior Court relied upon United States Supreme Court law that had not been decided at the time of trial or sentencing, and then misapplied that law to the facts of this case. The Superior Court disagreed with the weight the trial judge gave the Otero murder as an aggravator and found that "[t]he weight attributed to the Otero crime, for purposes of the penalty phase for the Rockford Park murders,

[35] In his Answering Brief, Reyes adds an argument that trial counsel was "deficient for failing to present this evidence to the jury." Because this argument is also part of Claim VI, the State responds to the argument in Claim VI.
[36] *Reyes*, 819 A.2d at 317-18.

is inconsistent with the constitutional standards established by the United States Supreme Court for youthful offenders, especially in consideration of the relationship between Cabrera and Reyes."[37] The Superior Court has offered no reasoned argument for its decision that the trial judge should not have considered this crime as a significant non-statutory aggravator and erred in making this finding.

There can be no dispute that, regardless of Reyes' age when he and Cabrera killed Otero, the Otero murder was appalling, and, like the murders of Saunders and Rowe, it was planned and *not* the result of a rash or spontaneous decision as one would expect from an impulsive, youthful, offender. Nevertheless, the trial court considered Reyes' young age as the main factor in mitigation, noting that not only did he have a very dysfunctional upbringing and essentially no father,[38] but coupled with his young age, Reyes was more vulnerable to Cabrera's influence. Even so, Reyes' youth and difficult childhood, and Cabrera's strong influence, was not enough to outweigh his decision to participate in the murders of his classmates because of a dispute over marijuana, and his lack of remorse. The Superior Court's current finding that the sentencing court failed to properly consider Reyes' youth in mitigation is not supported by the record. The court in its sentencing decision specifically considered: 1) the hallmark features of chronological age

[37] *Reyes*, 2016 WL 358613, at *11.
[38] *Id.* at *16.

(immaturity, impetuosity, and the failure to appreciate consequences); 2) the family and home environment from which the youthful offender could not extricate himself; 3) the circumstances surrounding the homicide offense (including the offenders[‘] involvement and the effects of peer pressure); 4) the vulnerabilities to negative influence; 5) the features that distinguish adolescents from adulthood; and 6) the possibility of rehabilitation.[39] The simple fact that the Superior Court, fifteen years after the trial, does not agree with the trial judge’s decision on sentencing, is not a legal basis upon which to vacate the legally imposed sentence.

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

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

Reyes argues that the Superior Court properly found that trial counsel caused him *Strickland* prejudice in the penalty phase by: 1) pursuing an unreasonable mitigation strategy; 2) failing to object to several instances of prosecutorial misconduct; and 3) allowing the State to present improper rebuttal about Reyes' allocution. (Ans. Brf. at 59-60). Reyes and the Superior Court are incorrect.

A. Mitigation

The Superior Court found trial counsel's penalty phase presentation fell short of minimal acceptable standards of performance in capital cases.[40] Reyes agrees, arguing that trial counsels decision to pursue a strategy that "focused only on negatives and the risk factors for violence – was an unreasonable strategic decision." (Ans. Brf. at 59). But the Superior Court misapplied the *Strickland* standard and, in doing so, erred in granting Reyes relief on this claim.

It cannot be understated how daunting it was to present a mitigation case when at the time of Reyes' penalty phase for two murders, he was already serving a twelve-year prison sentence for Murder Second Degree for assisting the same co-defendant in killing Otero. This was a formidable obstacle for counsel to overcome, and they were not confident they could save Reyes' life, nor should they

[40] *Reyes*, 2016 WL 358613, at *20-28.

have been. Having the burden of trying to save the life of a now three-time convicted murderer, counsel reasonably decided that focusing on his positive attributes would be a mistake and would lessen their credibility. Instead, counsel emphasized the effect Reyes' horrible childhood had on him, essentially presenting a plea for mercy. (A168; A170). Trial counsel used a strategy that had been successful for them in a previous capital case – showing that Reyes' upbringing was rife with factors that put him at risk of becoming involved in violence. (A168-69; A171).

Reyes acknowledges that trial counsel hired an experienced private investigator, mitigation expert and a child psychologist to assist in the penalty phase. Reyes agrees that the mitigation expert, Carolyn Burry, interviewed many family members and presented a genogram reconstructing Reyes' family history to provide consistent patterns of family and societal issues and their impact on Reyes. (Ans. Brf. at 64). These patterns included violent behavior, incarceration, child maltreatment, low parental involvement, substance abuse, frequent school transitioning, delinquent peers, exposure to family and street violence, and a teenage mother. (Ans. Brf. at 65). Reyes nevertheless argues that the evidence he provided in postconviction presented a more thorough mitigation case that highlighted his attributes and reasons to spare his life. But that is not the appropriate standard.

Based upon the "Predictors of Youth Violence" study, the trial mitigation specialist, Dr. Burry, testified that Reyes' behavior was not really his choice but a result of his upbringing. (*See* A103-07). Reyes' postconviction mitigation specialist Delores Andrews did the same thing Dr. Burry did, and echoed that Reyes was fatherless, his mother was unfit, and that he was raised by other family and surrounded by criminal activity, drugs and alcohol. (A193-95). Much like Dr. Burry, she opined that Cabrera was a father figure to Reyes that was ultimately malignant. (A196). Andrews added that the people associated with the wrestling community were a second family for Reyes that provided "nurturing, attention, concern," "interest in his wrestling achievements" and were "extraordinarily significant in his development." (A196).

Reyes' trial counsel presented three family members in the penalty phase who provided background history about Reyes and talked about his attributes and their love for him: Reyes elderly grandmother - Candida Reyes, Reyes girlfriend - Elaine Santos, and R.S., Santos' twelve-year-old son, whom Reyes' treated as an adopted son. Santos told the jury that her and Reyes' small daughter were in the courtroom. Santos also reported that Reyes' mother failed to appear for the pre-trial meeting with trial counsel about the penalty phase.[41] (A124). Thus, the

[41] Trial counsel recalled contrary to what Reyes argues now, that Reyes' mother, Ruth Comeger, was not cooperative with the penalty phase and testified at the postconviction hearings that "I remember that she didn't come to the penalty phase. I wanted her to come to the penalty phase

family witnesses corroborated the expert testimony about Reyes' dysfunctional upbringing, and added the positive element of Reyes' ability to love and be loved.

Dr. Harris Finkelstein testified in the penalty phase that he completed a psychological evaluation of Reyes.[42] Dr. Finkelstein testified that because of Reyes' interesting psychological profile, part confident and capable and part unsure of himself, Reyes sought validation from others, easily becoming hopeless despite his successes. (A110-11). That is why, Dr. Finkelstein explained, that Reyes succumbed to Cabrera who asked him to do terrible things. (A111). Dr. Finkelstein stated that Reyes made poor decisions, and he was well-suited to a highly structured environment like prison, because of the daily rules and predictable life. (A112).

To the extent Reyes argues that Dr. Finkelstein damaged his case by admitting on cross-examination that he diagnosed Reyes with a "personality disorder not otherwise specified with narcissistic and antisocial personality features," (Ans. Brf. at 67), he fails to accurately represent the trial record. Dr. Finkelstein explained that Reyes did not "meet all criteria for a particular personality disorder" and it was not really a diagnosis that was based on his

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and testify, and she didn't show up. All right?" (B740). At some point, they thought, "I think we're better off saying his own mother didn't show up." (B740).

[42] While Reyes states Dr. Finkelstein's evaluation was hampered by lack of record gathering (Ans. Brf. at 66), Reyes is not a psychology expert, and Dr. Finkelstein did not say he was hampered in any way. Rather, Dr. Finkelstein stated, "I felt like I knew enough about my test findings to render my diagnosis." (B596).

behavior but mostly on his data using a few selected points from history. (B599-600). Dr. Finkelstein stated that Reyes presented with the antisocial features of failure to conform to social norms with respect to lawful behaviors and impulsivity (A601), but argued with the State regarding the remaining criteria. As to the ones with which he agreed, Reyes can hardly deny them.

Moreover, in postconviction, Reyes presented Dr. Mack to testify that he diagnosed Reyes with a mild neurocognitive disorder not otherwise specified, and personality disorder not otherwise specified with borderline antisocial paranoid and schizotypal features. (A201-02; A215). Dr. Mack opined that the brain does not fully mature until age 25, but that all brains mature at a different rate. (A207-08; A223). In addition, damaging to Reyes' penalty case, Dr. Mack stated that although Reyes had a difficult childhood and was exposed to traumatic event(s), he did not experience ongoing symptoms. (A211-13).

Clinical psychologist Dr. Dewey Cornell, did not really add anything when he testified for Reyes at the postconviction hearings. Much like the mitigation presented in 2001, Dr. Cornell opined that Reyes was young and immature when he committed the murders (A186), and he agreed that Reyes "had the decks stacked against him." (A848).

The Superior Court failed to even consider the State's expert, Dr. Steven Samuel, a forensic psychologist, who testified at the evidentiary hearings. Reyes

argues that the court was correct to give no weight to Dr. Samuel. (Ans. Brf. at 79), but that is not what occurred here. The court failed to even acknowledge Dr. Samuel, making no credibility finding whatsoever. Whether or not Dr. Samuel was credible the court was required to consider how the jury and the trial court would have been impacted not just by Reyes' additional expert, but also the State's. Dr. Samuel reviewed records, interviewed Reyes, and completed a report. (A253-57).[43] Dr. Samuel disagreed that Reyes had cognitive disorder otherwise non-specified and testified there was no objective evidence in Dr. Mack's report to support his diagnosis of a mildly damaged brain. (A270; A273). Dr. Samuel testified that everyone's brain matures at a different rate and it was entirely possible to have a fully developed brain by age 18. (A280-81). Dr. Samuel agreed with Dr. Mack and Dr. Finkelstein's determination that Reyes exhibited features of an antisocial personality disorder. (A266-67; A269; A272).

Reyes argues that "[t]he lack of evidence presented to the jury on brain development and Luis' brain function in particular was significant, because these deficits contributed to Luis' failure to 'recognize the danger and inappropriateness of the situation he was in' and rather, become psychologically dependent on [Cabrera], to feel loyalty and obligation to do what Mr. Cabrera asked him to do.'" (Ans. Brf. at 80-81) (B849). That point was ably made by trial counsel in the

[43] Dr. Samuel's report is located A236-47.

penalty phase. Trial counsel made all the points that Reyes argues in postconviction needed to be made. Trial counsel had already capably showed that Reyes was exposed to physical abuse, emotional abuse, drug use, crime, and of course, the malignant influence of Luis Cabrera, to which, because of his physical and mental makeup, Reyes' easily succumbed. Because none of these postconviction experts provided substantially new or different information, the Superior Court erred in finding that this testimony would have changed the outcome of the trial.

Because a reviewing court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct,"[44] arguments asserting ineffective assistance in 2001, based on trial counsel's lack of reliance on scientific understanding of brain development, which was still a "developing" scientific field in 2005, and is still developing, cannot be a valid basis for an ineffective assistance of counsel claim. Reyes presented no evidence to support his argument that an objective standard of reasonableness in 2001 required defense counsel to present the neurodevelopmental significance of youth as a mitigating factor, or if they had, that it would have changed the outcome. Reyes did not demonstrate, and the Superior Court should not have found, ineffective assistance of counsel.

[44] *Strickland*, 466 U.S. at 689-90. *Accord Bobby v. Van Hook*, 558 U.S. 4 (2009).

The simple fact is that Reyes' prior conviction for murder could not be overcome, nor could the two ensuing murders he committed with Cabrera. The Superior Court's second-guessing of defense counsel's strategy over fifteen years later is precisely what *Strickland* and its progeny counsel against.

The Superior Court erred in finding that Reyes had established actual prejudice resulting from counsel's strategy at the penalty phase. In *Wong v. Belmontes*,[45] the United States Supreme Court directed that "the reviewing court must consider all the evidence—the good and the bad—when evaluating prejudice." Here, the Superior Court unquestionably holds to the simplistic "more-evidence-is-better" approach that the United States Supreme Court rejected in *Belmontes*.[46] The Superior Court, by erroneously finding that the jury recommendation *might have been* different had they heard more evidence in combination *with less evidence* about Reyes' role in the murder of Otero, is speculative and insufficient to meet *Strickland's* actual prejudice prong.

B. Penalty Phase Closing Arguments

Reyes agrees with the Superior Court's finding that trial counsel was ineffective in the penalty phase by failing to object when the prosecutor: 1) argued that a life sentence would leave one of the murders unpunished; 2) characterized mitigation factors as excuses; 3) called Reyes monstrous; 4) argued that the jury

[45] 558 U.S. 15, 26 (2009) (citing *Strickland*, 466 U.S. at 695-96).
[46] *Id.* at 25.

should send a "message to the community;" and 5) misled the jury about Reyes' involvement in prison programs. Reyes further alleges that appellate counsel was ineffective for failing to raise these issues on appeal. (Ans. Brf. at 84-93).

Because the applicable statutory aggravating factor that allowed the jury to consider a sentence of death was that Reyes' course of conduct "resulted in the deaths of 2 or more persons where the deaths are a probable consequence of the defendant's conduct,"[47] the prosecutor's statements about the second murder going unpunished were not a cry for vengeance, but rather permissible argument, consistent with the statutory aggravator, that the jury impose additional punishment for the additional crime.[48] Nor were the prosecutor's references to the Otero murder inaccurate as the facts were presented to the jury. Reyes offers no legal support to the contrary.

It was not prosecutorial misconduct for the prosecutor to make the singular comment, "Folks, although she didn't say it and she never did say it, that is an attempt to excuse what he has done and we submit you should reject that attempt for exactly what it is." (B629). Reyes misstates the facts of *Taylor v. State*.[49] In Taylor, as here, the prosecutor's single comment *did not* draw an objection[50] (see Ans. Brf. at 89), and the *Taylor* Court found that the prosecutor's comment was not

[47] 11 *Del. C.* § 4209(e)(1)(k).
[48] *See Rodden v. Delo*, 143 F.3d 441, 447 (8th Cir. 1998).
[49] 32 A.3d 374 (Del. 2011).
[50] *Taylor*, 32 A.3d at 386-87.

unfairly prejudicial.[51] The same is true here. Reyes tries to salvage the claim by arguing that you can find error here when you cumulate all the instances of prosecutorial misconduct with this one. Reyes does not point to any specific unfair prejudice resulting from the sole reference to "excuse" during the lengthy State's closing. And neither did the Superior Court.

Reyes' claims the prosecutor's reference to Reyes as someone who was "monstrous" because he killed again and again, was prosecutorial misconduct that should have garnered an objection. But, the prosecutor's argument responded to Reyes' allocution statement that he was not a "cocky, insensitive, no-feeling, cold-blooded killer." (A134). The prosecutor's comment, taken in context, was not improper.

Nor is there any merit to Reyes' claim and the Superior Court's finding, without reference to relevant authority, that trial counsel improperly failed to object to the prosecutor's appeal to the jury's sense of community. This Court has ruled that the jury acts as the conscience of the community in determining whether the death penalty is the appropriate punishment, and through their recommendation, plays an integral role in the sentencing result.[52] The prosecutor's reference, here, like the others, was proper.

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[51] *Id.* at 387.

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

The Superior Court found, and Reyes continues to assert, that trial counsel was ineffective for failing to object to and rebut the State's characterization of Reyes' involvement in prison rehabilitation programs. The Superior Court took out of context the State's argument as does Reyes. The prosecutor's arguments were proper, regardless of whether Reyes was ineligible for prison rehabilitation classes for some amount of time. Therefore, trial counsel did not perform below an objective standard of reasonableness by not objecting. Nor did Reyes show how he suffered any prejudice. In fact, the sentencing judge made no reference to Reyes' lack of rehabilitative efforts.[53]

Because all of the prosecutor's references, taken individually, or cumulatively, did not amount to prosecutorial misconduct, Reyes failed to show that trial counsel provided ineffective assistance of counsel for not objecting to any one alleged instance. And because the underlying claims are meritless, appellate counsel was not deficient in electing not to raise them. The Superior Court erred in finding that Reyes had met his burden of alleging prejudice with substantiation, or showed that, but for errors made by counsel, the outcome of the proceedings would have been different.

[53] *See State v. Reyes*, 2002 WL 48641, at *16 (Del. Super. Ct. Mar. 14, 2002).

C. Reyes' Allocution

Reyes argues that the State's letter to Reyes's stating that it "would consider" a plea to first degree murder in exchange for not pursuing the death penalty in exchange for a truthful proffer, was a plea offer. (Ans. Brf. at 95). But, by its very terms, the letter was not an offer. Because Reyes misinformed the jury that he refused a plea offer by the State, the prosecutor, in rebuttal was allowed to read a letter into the record clarifying that the State had never offered Reyes a plea bargain.[54] (B639). Reyes' counsel did not object, nor should they have. But the Superior Court found, and Reyes argues, that counsel was ineffective for failing to object to the prosecutor's reading of the letter. Both Reyes and the Superior Court have failed to properly consider the record.

Trial counsel explained to Reyes the parameters of allocution, and counsel were satisfied that he understood. (A631). The trial court conducted a lengthy colloquy with Reyes about his allocution decision and the risks and benefits involved. (A131-33). The trial court warned Reyes about presenting matters outside of the guilt phase record or that exceeded the limited parameters permitted in allocution. (A132). Reyes stated "I fully understand what I can say and what I can't say." (A132-33).

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

Reyes nevertheless made untruthful and inadmissible statements about plea bargaining between the State and defense. (A134-36). Faced with a ruling that Reyes' statements exceeded the limits of allocution, trial counsel had to make a decision. (A137). They could have insisted that Reyes be placed under oath and be cross-examined rather than agreeing to let the State read the letter into the record. But if counsel had chosen to let Reyes testify, the letter would likely have been admitted when the State used the letter in cross-examination. Reyes argues that he would have testified that he thought a plea had been offered and would have made other beneficial statements. (Ans. Brf. at 96). But Reyes has failed to present that evidence, and could have, in the postconviction hearings. Reyes cannot now try to admit his own unsworn statements, not subject to cross-examination, through briefing. Trial counsel made a reasonable choice to have a sterile letter read into the record rather than allow their client, who had demonstrated his inability to follow the rules for allocution, to be subject to rigorous cross-examination.

In any case, the defense tried to curtail the amount of information the jury heard from the letter. Defense counsel suggested a shorter, more concise statement that the prosecutor could make to the jury: "we never made an outright plea [offer], what we did was said if he accepted responsibility and made a statement, then we would have considered that or we would have made that plea." (A137). The

prosecutor, however, requested that the State be permitted to read the letter. Defense counsel agreed, on the condition that the prosecutor identify the statement as a letter written to counsel and that it not be admitted into evidence. (A137). The State used the letter to correct the record, and the misapprehension that Reyes left with the jury, that the State did not think the death penalty was appropriate for him as evidenced by a plea offer. Limiting the correction to the reading of the letter, identified as such and not admitted into evidence, was a reasonable way to allow the State to correct the record without subjecting Reyes to cross-examination.

The Superior Court erred in finding deficient performance. In light of the clear context for the reading of the letter, Reyes cannot and did not establish any prejudice from his counsels' decision not to object to the reading of the letter.

CONCLUSION

The Superior Court failed to properly apply the procedural bars of Criminal Rule 61 in granting Reyes postconviction relief. By allowing Reyes to add new claims, and by *sua sponte* raising its own claims, after the consolidated amended postconviction motion and the State's response had been filed and the evidentiary hearings had been completed, the Superior Court failed to properly consider the law of case and the timeliness of the claims.

The Superior Court erred in ruling that Reyes' Fifth Amendment rights were violated at trial. The trial court found, after a colloquy, that Reyes had validly waived his right to testify. The Superior Court, in postconviction, was bound by the trial court's ruling and erred in granting relief on this untimely and procedurally barred claim.

The Superior Court also erred in faulting the trial court and trial counsel for Cabrera's unavailability as a witness and mistakenly determined that Cabrera's testimony would have been admissible. Cabrera, on the advice of counsel, still refused to testify at the postconviction hearings. Cabrera's self-serving statements to trial counsel were inadmissible hearsay.

Roderick Sterling's testimony did not violate Reyes' Sixth Amendment rights. The trial judge, during the postconviction proceedings, found that Sterling had not recanted his trial testimony. The successor judge was bound by those

findings. Further, the Superior Court erred in finding that the State violated its *Brady* obligations by failing to provide defense counsel with Sterling's confidential court generated and court-retained PSI. Also, trial counsel cross-examined Sterling about his plea agreements, criminal history, drug use and treatment, precluding a finding of prejudice from any lack of access to Sterling's PSI.

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

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

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

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