



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK HOWARD,)	
)	
Defendant-Below,)	
Appellant,)	No. 649, 2014
)	COURT BELOW: In the Superior
v.)	Court of Delaware, in and for New
)	Castle County
STATE OF DELAWARE,)	I.D. No. 0611014197
)	
Plaintiff-Below,)	
Appellee.)	

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONSii

NATURE OF PROCEEDINGS1

SUMMARY OF THE ARGUMENT2

STATEMENT OF FACTS4

ARGUMENT

I. MR. HOWARD’S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1 §§ 4 AND 7 OF THE DELAWARE CONSTITUTION WERE DENIED AS THE RESULT OF THE TRIAL COURT’S FAILURE TO PROVIDE A UNANIMITY INSTRUCTION AND TRIAL COUNSEL’S INEFFECTIVENESS AT TRIAL AND ON APPEAL.....7

II. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A BILL OF PARTICULARS IN VIOLATION OF MR. HOWARD’S SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER ARTICLE 1, §§ 4 AND 7 OF THE DELAWARE CONSTITUTION.....16

III. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY ADVISE MR. HOWARD OF HIS RIGHT TO TESTIFY IN VIOLATION OF MR. HOWARD’S SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND HIS RIGHTS UNDER ARTICLE 1, §§ 4 AND 7 OF THE DELAWARE CONSTITUTION.....22

IV. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE IN LIMINE TO PROHIBIT THE ADMISSION OF MR. HOWARD’S PRIOR BAD ACTS IN VIOLATION OF MR. HOWARD’S SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE U. S. CONSTITUTION AND HIS RIGHTS UNDER ARTICLE 1, §§ 4 AND 7 OF THE DELAWARE CONSTITUTION.....27

V. MR. HOWARD’S RIGHT TO A FAIR TRIAL WAS DENIED DUE TO CUMULATIVE DUE PROCESS ERROR IN VIOLATION OF MR. HOWARD’S SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER ARTICLE 1, §§ 4 AND 7 OF THE DELAWARE CONSTITUTION.....31

VI. THE SUPERIOR COURT ERRED BY NOT HOLDING AN EVIDENTIARY HEARING OR REQUIRING A NEW AFFIDAVIT FROM TRIAL COUNSEL IN VIOLATION OF MR. HOWARD’S FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER ARTICLE 1, §§ 4 AND 7 OF THE DELAWARE CONSTITUTION.....33

CONCLUSION35

October 27, 2014 Superior Court’s Memorandum opinion and order.....Exhibit A

July 19, 2013 Delaware Supreme Court order.....Exhibit B

CERTIFICATION OF SERVICE

TABLE OF CITATIONS

U.S. CONSTITUTION

U.S. Cont. Amend. VI.....	Passim
U.S. Cont. Amend. XIV.....	Passim

DELAWARE CONSTITUTION

Art.1, § 4.....	Passim
Art.1, § 7.....	Passim

STATUTES AND RULES

Delaware Supreme Court Rule 18.....	13
Superior Court Criminal Rule 61	Passim
Delaware Rule of evidence 404.....	28

CASES

Federal Cases

<i>Gideon v Wainwright</i> , 372 U.S. 335 (1963).....	12,23
<i>Jackson v. Denno</i> , 378 U.S. 368 (1964).....	35
<i>Keeney v. Tamayo-Reyes</i> , 504 U. S. 1 (1992).....	35
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470 (2000).....	14
<i>Smith v. Horn</i> , 120 F.3d 400 (3d. Cir. 1997).....	8
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	Passim
<i>Townsend v Sain</i> , 372 U.S. 293 (1963).....	35
<i>U.S. ex rel. Sullivan v Cuyler</i> , 631 F.2d 14 (3d Cir. 1980).....	32
<i>U.S. v Beros</i> , 833 F.2d 455 (3d Cir. 1987).....	8
<i>U.S. v Moskovits</i> 844 F.Supp. 202 (E.D.Pa. 1993).....	23,25
<i>U.S. v. Driber</i> , 546 F.2d 18 (3d Cir. 1976).....	35
<i>U.S. v. Sampson</i> , 980 F.2d 883 (3d Cir. 1992).....	28
<i>United States v. Addonizio</i> , 451 F.2d 49 (3d Cir. 1971).....	17

State Cases

Brown v. State, 729 A.2d 259 (Del. 1999).....8
Dawson v. State, 673 A.2d 1186 (Del. 1996).....7,16,22,27,31
Dobson v. State, 2013 WL 5918409 (Del. 2013).....2,17,18,20,21,30
Getz v. State, 538 A.2d 726 (Del. 1988).....3,28,30
Hall v. State, 788 A.2d 118 (Del. 2001).....7,16,22,27,31
Home v. State, 887 A.2d 973 (Del. 2005).....15,34
Howard v. State, 2009 WL 3019629 (Del. 2009).....6,9,13,14,25
Lovett v State, 516 A.2d 455 (Del. 1986).....16,17
Luttrell v. State, 97 A.3d 70 (Del. 2014).....2,18,20,21
Mulligan v. State, 761 A.2d 6 (Del. 2000).....30
Outten v. State, 720 A.2d 547 (Del. 1998).....33
Pierce v. State, 911 A.2d 793 (Del. 2006).....10
Pope v. State, 632 A.2d 73 (Del. 1993).....29
Probst v. State, 547 A.2d 114 (Del. 1988).....2,5,6,8,9,11,13
Stevenson v State, 709 A.2d 619 (Del. 1998).....8
Swan v. State, 28 A.3d 362 (Del. 2011).....7,16,22,27,31
Taylor v. State, 822 A.2d 1052 (Del. 2003).....13
Wright v. State, 405 A.2d 685 (Del. 1979).....12,23,32

NATURE OF THE PROCEEDING

On June 13, 2008, Mr. Howard was found guilty of two counts of sexual solicitation of a child, one count of unlawful contact in the second degree, one count of attempted sexual contact in the second degree, and nine counts of indecent exposure in the first degree. Mr. Howard was sentenced on August 1, 2008 to five years at level V, suspended after two years at supervision level V. (A78-85)

On October 14, 2009, this Court affirmed the conviction after full briefing and an oral argument held on August 12, 2009. (DE 56, A8)¹ On September 21, 2010, Mr. Howard filed a timely *pro se* motion for post conviction relief. (DE 57, A8) On February 28, 2012, the Superior Court denied Mr. Howard's motion for post conviction relief (DE 78, A11) which he *pro se* appealed on March 26, 2012 (DE81, A11) Briefing occurred in relation to the direct appeal which resulted in this Court on August 19, 2013 remanding the case to the Superior Court for appointment of counsel and amended briefing and reconsideration. Exhibit B; (DE 93, A13)

With counsel appointed Mr. Howard filed an amended Rule 61 petition on May 5, 2014. (DE 132, A105-157) On October 27, 2014, the Superior Court denied Mr. Howard's Rule 61 petition (DE 144, A20) and a notice of appeal was filed on November 24, 2014. This is Mr. Howard's opening brief.

¹ The Docket entries are assigned DE _ and are attached as A1-20 to the appendix.

SUMMARY OF THE ARGUMENT

The Superior Court committed multiple errors by denying all of Mr. Howard's claims that were raised in the Amended Rule 61 Petition.²

1. The Superior Court erred by failing to provide a unanimity instruction as outlined in *Probst v. State*, 547 A.2d 114, 121 (Del. 1988), due to the State presenting and arguing multiple factually different theories of liability. Furthermore, Trial Counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) for failing to request a unanimity instruction at trial and for failing to file a motion for reargument with the Delaware Supreme Court due to this Court's mistaken belief that the *Probst* argument was orally withdrawn. *See Howard v. State*, 2009 WL 3019629 *3 n. 2 (Del. 2009)

2. Trial Counsel was ineffective for failing to move for a bill of particulars as multiple counts of the indictment were worded identically, covered the same time period, and uncharged crimes were presented to the jury without any limiting instruction. Mr. Howard's case is significantly similar to *Dobson v. State*, 2013 WL 5918409 (Del. 2013) and *Luttrell v. State*, 97 A.3d 70 (Del. 2014) in which this Court reversed and remanded for new trials.

² The Superior Court's order is attached as Exhibit A and hereinafter referred to as (Denial pg. _)

3. Trial Counsel was ineffective for failing to properly advise Mr. Howard on his right to testify as Trial Counsel was mistaken as to what acts the State was alleging Mr. Howard committed. Furthermore, Trial Counsel never advised Mr. Howard that offering a financial benefit to a child to exhibit himself with partial or complete nudity would constitute a prohibited sexual act nor discussed the pros and cons of testifying. This resulted in Mr. Howard testifying and inadvertently admitting to a number of charges. Without his testimony, there is a reasonable probability that he would not have been found guilty.

4. Trial Counsel was ineffective for failing to file a motion in limine to prevent the admission of Mr. Howard's prior bad acts which occurred in Delaware and the surrounding states. The failure to request the court to perform a *Getz v. State*, 538 A.2d 726 (Del. 1988) analysis or request a limiting instruction prejudiced Mr. Howard by allowing the jury to consider the prior bad acts for a propensity purpose.

5. Mr. Howard's right to a fair trial was violated due to cumulative error in relation to the above argued Trial Court errors and Trial Counsel's ineffectiveness.

6. If reversal is not warranted, in the alternative Mr. Howard asserts that the Superior Court erred by denying Mr. Howard's request for an evidentiary hearing as Trial Counsel was not required to submit an affidavit addressing the new claims of ineffectiveness raised in the amended motion.

STATEMENT OF FACTS

Prior to trial, Trial Counsel filed several motions in limine to exclude witness testimony of JK and others.³ (DE 11,16,33) JK⁴ was a 14 year old male child at the time of the events in question who knew the Mr. Howard as a family friend. (T1:3; A29)⁵ Beginning in 2005, JK and the Mr. Howard would spend time together doing various activities such as biking while BK would spend overnights at Mr. Howard's residence. (T1:7-20; A30-33) BK, who is JK's younger brother, would have been approximately 11 years old in the same time frame noted above. (T1:94; A52) BK also spent time with the Mr. Howard but in a less active role. (T1:96-8; A52-53)

At trial, JK testified to what was characterized as strange behavior on the part of Mr. Howard. (T1:24-6; A34-35) This included a number of "bets" and "dares" that were made with Mr. Howard. (T1:27-30; A35-36) JK further testified to other acts that Mr. Howard performed. (T1:31; A36); (T1:36; A37); (T1:61-62; A43); (T1:86; A50) Another form of behavior that JK complained about was massages given and received by Mr. Howard. (T1:63-74; A93-96) JK also testified to a number of incidents involving the Mr. Howard that occurred outside the state of Delaware.

³ The following presentation of specific facts does not encompass each fact or piece of evidence. It is intended to provide the factual basis for the claims presented in this motion.

⁴ Due to being minors, the two boys are referred to as JK and BK.

⁵ The June 5, 2008 trial transcript is assigned T1; June 9th trial transcript is T2; June 10th trial transcript is T3; June 11th trial transcript is T4; June 12th trial transcript is T5.

(T1:53-61; A41-43); (T1:86-88; A50) JK also testified to a number of incidents with Mr. Howard concerning masturbation. (T1:35-37; A37); (T1:52; A41) BK testified to a number of different situations with Mr. Howard involving what was characterized as strange behavior. (T1:100-107; A53-55)

After the testimony of JK and BK, a sidebar discussion was held. During which the State addressed the need to assign names and facts to each count of the indictment to provide clarity. (T2:98-100; A56)

After the State rested, Mr. Howard took the stand in his own defense. He denied some of the allegations and testified that certain actions did occur but were not sexual in nature. (T4:135-144; A58-60); (T4:172-187; A61-65)

During closing arguments the State described to the jury which specific acts corresponded with each specific count of the indictment.⁶ (T5:22-26; A68-69)

On direct appeal, Mr. Howard argued that the Trial Court was required to provide a single theory unanimity instruction under *Probst v State*, 547 A.2d 114, 121 (Del. 1988). (A86) At oral arguments before this Court, Trial Counsel argued that a unanimity instruction was required while orally withdrawing his insufficiency of the evidence argument. (A86) In denying all of Mr. Howard's claims, this Court

⁶ The indictment is located in A23-28 of the appendix. It should be noted that the handwriting on the indictment was written by Trial Counsel.

mistakenly concluded that the *Probst* unanimity argument had been withdrawn at oral argument and therefore this Court's September 22, 2009 issued opinion did not rule upon all of the issues raised by Mr. Howard on direct appeal and includes a ruling on the insufficiency of the evidence argument which was actually withdrawn at oral argument. *Howard v. State*, 2009 WL 3019629 *3 n. 2 (Del. 2009) Thus, the Supreme Court's opinion did not address the unanimity argument, requiring Mr. Howard to raise it in the Amended Petition. Furthermore, Trial Counsel did not file a motion for reargument which would have allowed this Court to withdraw its opinion and issue a new ruling addressing the unanimity argument raised on appeal.

In response to Mr. Howard's *pro se* Rule 61 petition, Trial Counsel filed an affidavit admitting that: a unanimity instruction should have been requested (A97-98); a bill of particulars should have been filed if the unanimity instruction was not required (A102); a limiting instruction should have been requested due to how the out of state acts of Mr. Howard with JK were intertwined with other bad act evidence (A98); he never advised Mr. Howard that offering financial benefit to a child to exhibit himself with partial or complete nudity constituted a prohibited sexual act (A101); he never discussed the pros and cons of testifying with Mr. Howard. (A101); Trial Counsel was not required by the Superior Court to file an affidavit to respond to the new arguments raised in the Rule 61 Amended Petition filed by Counsel.

I. MR. HOWARD’S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1 §§ 4 AND 7 OF THE DELAWARE CONSTITUTION WERE DENIED AS THE RESULT OF THE TRIAL COURT’S FAILURE TO PROVIDE A UNANIMITY INSTRUCTION AND TRIAL COUNSEL’S INEFFECTIVENESS AT TRIAL AND ON APPEAL.

QUESTION PRESENTED

Did the Superior Court err in denying Mr. Howard’s claim that the Trial court erred in failing to provide a single theory unanimity instruction? Mr. Howard preserved this issue as he raised it in his Amended Petition for Post Conviction Relief. (A119,128,130)

SCOPE OF REVIEW

This Court reviews ineffective assistance of counsel claims *de novo*. *Swan v. State*, 28 A.3d 362, 391 (Del. 2011) Questions of law are reviewed *de novo*. *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996) Claims of a constitutional violation are reviewed *de novo*. *Hall v. State*, 788 A.2d 118, 123 (Del. 2001)

MERITS OF THE ARGUMENT

The Superior Court erred in denying Mr. Howard’s claim that the Trial Court erred by failing to provide a single theory unanimity instruction. The Superior Court held that no instruction was necessary as the State’s theory of liability on each charge of sexual solicitation of a minor was unequivocal and created no potential for jury

confusion. (Denial pg. 12) The Superior Court's opinion is incorrect as the State presented evidence and argued that Mr. Howard committed multiple acts against both of the alleged victims during different days in different situations.

A. Applicable law.

The Sixth Amendment of the United States Constitution requires that a conviction by a jury must be unanimous as to the defendant's specific illegal action. *Probst v State*, 547 A.2d 114, 121 (Del. 1988) (citing *U.S. v Beros*, 833 F.2d 455, 462 (3d Cir. 1987) As such, this Court has previously held that “[a] more specific unanimity charge is required if (1) a jury is instructed that the commission of any one of several alternative actions would subject the defendant to criminal liability, (2) the actions are conceptually different and (3) the state has presented evidence on each of the alternatives.” *Probst* at 121; *see also Brown v State*. 729 A.2d 259 (Del. 1999); *Stevenson v State*, 709 A.2d 619 (Del. 1998). Additionally, providing an incorrect jury instruction may violate the due process clause of the Fourteenth Amendment of the United States Constitution. *Smith v Horn*, 120 F.3d 400, 414 (3d. Cir. 1997)

B. The Superior Court was required to issue a single theory unanimity instruction to the jury.

Mr. Howard's argument that the Trial Court was required to provide a single theory unanimity instruction pursuant to *Probst* was originally raised on direct appeal

during briefing. *Howard v. State*, 2009 WL 3019629 *1 (Del. 2009) During direct appeal oral argument before this Court, Trial Counsel consistently advanced that a unanimity instruction was required while orally withdrawing the insufficiency of the evidence argument. (A86) As the direct appeal unanimity argument was not ruled upon by this Court in its opinion at the direct appeal stage,⁷ this issue is still ripe and properly presented to this Court having been addressed in Mr. Howard's Rule 61 Amended Petition. (See A119-121)

The Superior Court denied Mr. Howard's Amended Petition finding that a unanimity instruction was not necessary as "the State's theory of liability on each charge of sexual solicitation of a minor was unequivocal and created no potential for jury confusion." (Denial pg. 12) The Superior Court further held that "Defendant attempted to cause the same prohibited sexual act-nudity. Moreover, the acts presented and argued by the State were not conceptually different... [t]he same is true regarding acts presented and argued by the State with respect to all other counts of the indictment." (Denial pg. 12)

The Superior Court's denial was erroneous as the court mistakenly relied upon *Pierce v. State*, 911 A.2d 793, 798 (Del. 2006) in concluding that "the acts presented and argued by the State were not conceptually different." (Denial pg 12.) The

⁷ See *Howard v. State*, 2009 WL 3019629 *3 n. 2 (Del. 2009)

Superior Court's reliance on *Pierce* is erroneous as *Pierce* concerned the request for a unanimity instruction in relation to acts that were alleged in the indictment, unlike this case in which no alternative acts were alleged in the indictment and each count of the indictment was worded identically. *Pierce*, 911 A.2d at 798; (A23) As described below, the conceptually different acts alleged against Mr. Howard were not included in the indictment (A23-28) which is the opposite of what occurred in *Pierce*.

As argued in the Amended Petition (A123-127), each of the "bets"⁸ and other behavior⁹ that the alleged victims testified to are independent acts that if believed by the jury would constitute a crime for the respected counts. Since the indictment was silent on which factual allegation corresponded with each count, each juror was allowed to find different acts to satisfy each count. As such, it is apparent that the lack of an adequate instruction permitted the jury to convict Mr. Howard on a count without unanimously agreeing as to which specific act constituted the offense. Thus,

⁸ JK testified to being offered money on separate occasions to expose his buttocks while riding his bike and to swim nude in the Brandywine Creek. (T1:27-29; A35) He also testified to being offered money to go sit on Mr. Howard's deck naked for one minute and on a separate occasion, perform 10 naked pushups on the same deck. (T1:29; 35) He also testified that Mr. Howard dared him to sit on a rock in the Brandywine creek, nude, for one minute. (T1:29; A35) BK testified to being offered money to swim nude. (T1:105; A54)

⁹ JK testified that Mr. Howard sat naked on a rock in a river while on a biking trip. (T1:31; A36) Mr. Howard offered to measure JK's penis. (T1:27; A35) Mr. Howard pulled JK's pants down and looked at his private areas. (T1:61; 43) JK testified to nude massages and inappropriate touching with Mr. Howard squirting lotion on JK's buttocks and scooped it up with his knuckle. (T1:71-4; A46-47) JK testified that Mr. Howard walked around in the apartment nude over twenty five times while JK was there. (T1:26; A35) BK also testified that Mr. Howard gave him massages down the front of BKs' shorts. (T1:100-101; A53)

Mr. Howard was deprived his due process rights under the Fourteenth Amendment of the United States Constitution and Article 1 §§ 4 and 7 of the Delaware Constitution.

The Superior Court's opinion also failed to account for the fact that Mr. Howard was charged with five counts of sexual solicitation of a child while the State presented evidence well over that amount to the jury. (T5:22-26; A68-69) The State also presented evidence of more than one conceptually different acts for the one count of unlawful contact in the second degree, (T5:26-28; A69) one count of attempted sexual contact in the third degree, (T5:28-30; A69-70) and the nine counts of indecent exposure in the first degree. (T5:19-20; A67) As the State contested that multiple separate acts would satisfy a single charge (A66-70), the Court was required, under *Probst*, to issue a unanimity instruction advising the jury that they must be unanimous as to which specific act gave rise to Mr. Howard's liability for each count.

C. Trial Counsel was ineffective for failing to request a single theory unanimity instruction.

The right to counsel is a fundamental right under the Sixth Amendment and applied to the States through the Fourteenth Amendment of the United States Constitution. *Gideon v Wainwright*, 372 U.S. 335, 342-343 (1963); *Strickland*, 466 U.S. at 685. To prevail on an ineffective assistance of counsel claim, a defendant

must show that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687. The Superior Court denied this claim concluding that "[b]ecause [the unanimity instruction] was not necessary, Trial Counsel's failure to request such an instruction did not constitute ineffective assistance of counsel." (Denial pg. 15)

While Trial Counsel did not request a unanimity instruction for any of the charges, he admitted in his affidavit that he should have requested such an instruction. (A97-98) Trial Counsel also asserted on appeal that a unanimity instruction was needed in relation to the sexual solicitation of a child counts. (A86-87) By Trial Counsel's own admission and the reasons described in Section B *supra*, Trial Counsel's failure to request a unanimity instruction fell below the objective standard of reasonableness and thus constitutes ineffectiveness under *Strickland*.

As outlined in section B *supra* and the Amended petition, (A128-140) Mr. Howard suffered prejudice as a result of Trial Counsel's failure to request a unanimity instruction. Even if Trial Counsel had request the instruction and was denied, Mr. Howard would have had a more favorable standard of review on appeal. Additionally, Trial Counsel's argument on appeal did not cure any prejudice suffered as Trial Counsel's argument was limited to only the counts alleging sexual solicitation of a child. However, case law makes clear that the unanimity instruction

should have been applied to all counts. Therefore, it is apparent that Trial Counsel's ineffectiveness directly prejudiced Mr. Howard.

D. Trial Counsel was ineffective for failing to file a motion for reargument in the Delaware Supreme Court concerning the single theory unanimity claim.

Delaware Supreme Court Rule 18 permits Motions for Reargument. *See Probst*, 547 A.2d at 121. The rule only requires a statement of the grounds for the motion and an attestation that the motion is made in good faith. *Id.* A motion for reargument may be made when the Court misconstrues the facts of a cited case. *Taylor v. State*, 822 A.2d 1052, 1059 (Del. 2003)

On direct appeal, Trial Counsel raised five issues including the Trial Court's failure to issue a unanimity instruction. *Howard v. State*, 981 A.2d 1172 *1 (Del. 2009) During oral argument before this Court, Trial Counsel orally withdrew his sufficiency of the evidence argument as he stated that he looked at the statute too narrowly. (A86) A large portion of Trial Counsel's argument was concerning the Trial court's failure to provide a single theory unanimity instruction. (A86-89) At no point during the oral argument did Trial Counsel withdraw his unanimity argument.

This Court incorrectly concluded on Mr. Howard's direct appeal that "[i]n his briefs Howard claims that it was plain error for the Superior Court to fail to give, *sua sponte*, a single theory unanimity jury instruction on the Sexual Solicitation charges.

At oral argument, Howard’s counsel withdrew that argument, and we do not consider it.”¹⁰ Relying on this error, this Court considered the other four issues raised in Mr. Howard’s briefs, including the sufficiency of the evidence argument that was orally withdrawn, and affirmed Mr. Howard’s conviction. *Id.* at 4-5.

Trial Counsel was ineffective as he failed to move for reargument on the unanimity instruction argument which was the strongest argument raised on appeal and as outlined in this motion in Section B *supra*. See *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (applying *Strickland* standard to appellate counsel’s ineffectiveness). Once Trial Counsel received a copy of the Delaware Supreme Court’s opinion it should have been apparent that this Court erroneously mistook Trial Counsel’s waiver of his sufficiency of the evidence argument as a waiver of his unanimity argument. Trial Counsel was therefore ineffective as a motion for reargument would have allowed this Court to correct the error by withdrawing the opinion. Had Trial Counsel moved for reargument, there is a reasonable probability that the outcome of Mr. Howard’s appeal would have been different as this Court would then have made a ruling on the merits of the unanimity issue.

¹⁰ *Howard v. State*, 981 A.2d 1172, 2009 WL 3019629 *3 n. 2 (Del. 2009)

E. The Superior Court erred by not holding an evidentiary hearing.

While Mr. Howard submits that reversal of all convictions is warranted due to the Trial Court's failure to provide a unanimity instruction, in the alternative, Mr. Howard asserts that the Superior Court erred by not holding an evidentiary hearing or requesting a new affidavit from Trial Counsel. Trial Counsel's affidavit only addressed claims raised in Mr. Howard's *pro se* Rule 61 petition. (A97-104) As the ineffective for failing to file a motion for reargument was added in the amended petition, Trial Counsel's response is needed to have a complete record for review. *See Home v. State*, 887 A.2d 973, 975 (Del. 2005) A remand for an evidentiary hearing would permit Trial Counsel to respond to the ineffectiveness arguments and allow the Court to judge his reasonableness. As such, an evidentiary hearing is needed.

For the reasons stated above, Mr. Howard's conviction should be reversed and remanded for a new trial or remanded for an evidentiary hearing.

II. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A BILL OF PARTICULARS IN VIOLATION OF MR. HOWARD’S SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER ARTICLE 1, §§ 4 AND 7 OF THE DELAWARE CONSTITUTION.

QUESTION PRESENTED

Did the Superior Court err in denying Mr. Howard’s claim that the Trial Counsel was ineffective for failing to file a bill of particulars? Mr. Howard preserved this issue as he raised it in his Amended Petition for Post Conviction Relief. (A133)

SCOPE OF REVIEW

Ineffective assistance of counsel claims are reviewed *de novo*. *Swan* , 28 A.3d at 391. Questions of law are reviewed *de novo*. *Dawson*, 673 A.2d at 1190. Claims of a constitutional violation are reviewed *de novo*. *Hall*, 788 A.2d at 123.

MERITS OF THE ARGUMENT

The Superior Court erred in denying Mr. Howard’s claim of ineffective assistance of counsel for failing to move a bill of particulars by noting that because this Court had previously determined on direct appeal that the indictment was not fatally defective, Trial Counsel was not ineffective for failing to request a bill of particulars. (Denial pg 17-18) The Superior Court’s opinion incorrectly assumed that the indictment gave Mr. Howard proper notice, and thus a bill of particulars was not needed. As this Court noted in *Lovett*, a bill of particulars is intended to supplement

the information set forth in the indictment to protect the defendant against surprise during the trial, and precludes subsequent prosecution for an inadequately described offense. *Lovett v. State*, 516 A.2d 455, 467 (Del. Supr. 1986) Thus in the present case, a bill of particulars was necessary to allow Mr. Howard to identify which acts the State intended to introduce in its case-in-chief.

A. Law Applicable.

Mr. Howard hereby incorporates by reference the law cited in Section C of Argument I regarding ineffective assistance of counsel. Pg. 12 *supra*.

“[A] bill of particulars is intended to provide notice supplemental to information contained in the indictment. It also serves to protect the defendant against surprise during the trial, and to preclude a second prosecution for an inadequately described offense.” *Lovett*, 516 A.2d at 467 (citations omitted); *see also United States v. Addonizio*, 451 F.2d 49, 63-64 (3d Cir. 1971) Additionally, “A bill of particulars generally confines the prosecution’s proof to the particulars supplied.” *Dobson v. State*, 2013 WL 5918409, at *6 (Del. 2013) (Citation omitted). In *Dobson*, this Court held that an attorney was ineffective for failing to file for a bill of particulars when multiple counts of the indictment were worded identically, covered the same time period, and uncharged crimes were presented to the jury without any limiting instruction being provided. 2013 WL 5918409, at * 2. This Court concluded

that “[b]y failing to request a bill of particulars or otherwise becoming informed through discovery, defense counsel proceeded to trial with inadequate knowledge of the case to be tried.” *Id.* at 2. Additionally in *Luttrell*, this Court reversed a defendant’s conviction due to the trial court’s failure to grant a request for a bill of particulars when “neither the indictment, nor any of the underlying materials Luttrell received provided sufficient information for him to understand for what particular conduct he was being prosecuted....” *Luttrell v. State*, 97 A.3d 70, 77-78 (Del. 2014). In support of this holding, this Court cited *Dobson* with approval. *Id.* at 76.

B. The Superior Court erred in denying Mr. Howard’s claim that Trial Counsel was ineffective.

Mr. Howard’s conviction should be reversed and remanded for a new trial due to Trial Counsel’s failure to move for a bill of particulars. The indictment failed to provide any details as to which allegations corresponded with each individual count and failed to identify who the alleged victim was for each count. (A23-28) The Sexual Solicitation of a Child counts were worded identically, and each covered the same period of time. (A23-24) The indecent exposure counts were also worded identically, covering the same time period. (A25-28)

At trial, the need for a bill of particulars became even more apparent as both alleged victims testified to multiple “bets,” (*See* ft. note 8 on pg. 10 *supra*) and other

bizarre behavior. (*See* ft. note 9 on pg. 10 *supra.*) During a sidebar discussion on the second day of trial, the State addressed the need to assign names and facts to each count of the indictment. (T2:98-100; A56-57) The trial judge expressed her concerns as she stated it was hard to tell which counts applied to each witness. (T2:98; A56) It was at this point that Trial Counsel brought to the parties' attention a pre-indictment letter that he received from a prosecutor previously assigned to the case. (T2:99-100; A56) The letter outlined which alleged acts and victims corresponded with each count of the indictment. (A21-22) After being shown the letter, the State responded by disagreeing with the letter. (T2:99; A56) Additionally, the language of the proposed charges in the pre-indictment letter did not match the indictment that was ultimately returned.

Trial Counsel's representation fell below the objective standard of reasonableness under *Strickland* as he failed to move for a bill of particulars. In his affidavit, it was Trial Counsel's position that he could only be ineffective for the unanimity instruction claim or the bill of particulars claim but not both as he wrote that "[i]f this particular claim is simply an appendage to the first claim; i.e. 'A request for a Bill of particulars should have been made, and since it wasn't, an unanimity instruction was required, then the affiant agrees.'" (A102) This position is buttressed by the fact that Trial Counsel admitted to this Court that he should have moved for

a bill of particulars (A59) and exhibited a mistaken belief that Mr. Howard was charged in relation to requesting or suggesting a child commit the act of masturbation. (A86-96) As such, Trial Counsel's representation fell below the objective standard for reasonableness under *Strickland*.

Similar to *Dobson* and *Luttrell*, Mr. Howard suffered prejudice under *Strickland* as a result of Trial Counsel's failure to move for a bill of particulars and proceeding to trial with inadequate knowledge of the case to be tried. In all three cases, Trial Counsels were not aware of which factual allegation was related to which charge of the indictment. *Dobson*, 2013 WL 5918409, at *1; *Luttrell*, 72 A.3d at 77. Additionally, like *Dobson*, uncharged crimes were presented to the jury without any limiting instruction explaining the purpose of doing so. *Dobson*, 2013 WL 5918409, at *6. Mr. Howard was charged with five counts of sexual solicitation of a child, one count of unlawful sexual contact second degree, one count of attempted unlawful sexual contact second degree and nine counts of indecent exposure. (A23-28) However, both JK and BK testified to multiple bets, massages, and indecent exposures which far exceeded the number of counts in the indictment.¹¹ Another similarity to *Dobson* is that half way through the trial, the State had to clarify for the court which factual allegation was allocated to which charge. (T2: 98-100; A56-57);

¹¹ See footnotes 8 and 9 on pg. 10 *supra*.

Dobson, 2013 WL 5918409, at *3. This event highlighted the amount of confusion in the case as even the trial judge was unaware of which count applied to each witness. (A56)

Mr. Howard's case is also similar to *Dobson* and *Luttrell* in that the indictment did not contain any details as to the factual allegations as the individual counts contained the exact same statutory language. (A23-28); *Dobson*, 2013 WL 5918409, at *2; *Luttrell*, 72 A.3d at 73. The above facts reveal that Trial Counsel was under the mistaken belief that Mr. Howard was indicted on offenses relating to masturbation. This belief caused Trial Counsel to challenge and argue claims dealing with masturbation and not focus on the "bets," and massages that were what the State was ultimately charging Mr. Howard with. Following this Court's decisions in *Dobson* and *Luttrell*, the Trial Court erred by holding that Mr. Howard suffered no prejudice for Trial Counsel's failure to file a bill of particulars.

For the reasons described above, Mr. Howard's conviction should be reversed and remanded for a new trial.

III. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY ADVISE MR. HOWARD OF HIS RIGHT TO TESTIFY IN VIOLATION OF MR. HOWARD’S SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND HIS RIGHTS UNDER ARTICLE 1, §§ 4 AND 7 OF THE DELAWARE CONSTITUTION.

QUESTION PRESENTED

Did the Superior Court err in denying Mr. Howard’s claim that the Trial Counsel was ineffective for failing to properly advise Mr. Howard of his right to testify? Mr. Howard preserved this issue as he raised it in his Amended Petition for Post Conviction Relief. (A139)

SCOPE OF REVIEW

Ineffective assistance of counsel claims are reviewed *de novo*. *Swan*, 28 A.3d at 391. Questions of law are reviewed *de novo*. *Dawson*, 673 A.2d at 1190. Claims of a constitutional violation are reviewed *de novo*. *Hall*, 788 A.2d at 123.

MERITS OF THE ARGUMENT

The Superior Court erred in denying this ineffective assistance of counsel claim as Mr. Howard unwittingly admitted to multiple crimes when he testified. The Superior Court incorrectly rationalized that because this Court on appeal held that there sufficient evidence to convict due to the testimony of JK and BK, that the jury could have reasonably found Mr. Howard guilty even without testimony. (Denial pg. 19) Due to Trial Counsel’s failure to properly advise Mr. Howard, Mr. Howard

admitted to two counts of sexual solicitation of a minor and numerous indecent exposures in his testimony. As Mr. Howard was only convicted of two of the five sexual solicitation of a child charges, all of the attempted solicitation and all the indecent exposure charges, it is reasonable to believe that but for Mr. Howard's testimony, he would not have been convicted.

A. Applicable Law.

The right to counsel is a fundamental right under the Sixth Amendment and applied to the States through the Fourteenth Amendment of the United States Constitution. *Gideon v Wainwright*, 372 U.S. 335, 342-343 (1963) "The right to counsel is the right to effective assistance of counsel." *Strickland*, 466 U.S. at 685. To prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Id.* at 687.

In *U.S. v Moskovits*, the U.S. District Court for the Eastern District of Pennsylvania held that reversal of Moskovits' conviction was warranted as Moskovits' trial attorney was ineffective for failing to research the law and facts pertaining to a Mexican conviction and erroneously advising Moskovits that this conviction was admissible which caused Moskovits not to testify. *U.S. v. Moskovits* 844 F.Supp. 202, 210 (E.D.Pa. 1993). The District Court stated that "it is the duty of

counsel to present to the accused the relevant information on which to make an intelligent decision as to whether or not to take the stand.” *Id.* at 206.

B. The Superior Court erred in denying Mr. Howard’s claim that Trial Counsel was ineffective.

In denying this claim, the Superior Court found that Mr. Howard had failed to establish actual prejudice. (Denial pg. 19) In support, the Superior Court noted that because this Court found the evidence sufficient to convict Mr. Howard, “the jury could have reasonably found Mr. Howard guilty on these charges whether he testified or not, because the testimony of JK and BK was sufficient to convict.” (Denial pg. 19) The Superior Court’s analysis incorrectly correlates sufficiency of evidence with an ineffective assistance of counsel claim. The Superior Court failed to consider that the jury only found Mr. Howard guilty of two of the five counts of sexual solicitation of a child charges. As such, it is reasonable to conclude that the jury found Mr. Howard guilty based solely on his admissions of a bet with each boy.¹² Without Mr. Howard’s admission, there is a reasonable probability that the jury would have returned a verdict of not guilty on those two counts. The jury may have also returned

¹² Mr. Howard admitted to offering the “moon bet” with JK (T4:138; A59) and admitted to offering BK \$20 to swim across the creek naked. (T4:139-144; A59-60)

verdicts of not guilty as to the other counts without Mr. Howard confirming that he gave the boys massages and walked around in the nude.¹³

C. Trial Counsel was ineffective for failing to properly advise Mr. Howard.

Trial Counsel's representation fell below the objective standard of reasonableness under *Strickland* for failing to properly advise Mr. Howard. Like *Moskovits*, Trial Counsel's mistaken belief directly affected Mr. Howard's constitutional right to testify. *Moskovits*, 844 F.Supp., at 210. In *Moskovits*, trial counsel's mistaken belief was that Maskovits' Mexican conviction was admissible against him, resulting in Moskowitz not testifying. *Id.* In the present case, Trial Counsel's mistaken belief was that Mr. Howard was being charged for encouraging two young boys to masturbate and not for the "bets" and massages¹⁴ which resulted in Trial Counsel failing to advise Mr. Howard of the danger of admitting to two "bets" and to walking around his condo naked with a child in sight as well as engaging in massages.¹⁵ In fact, Trial Counsel admitted in his affidavit that he never

¹³ Mr. Howard testified that he engaged in massages with the two boys but denied they were sexual in nature. (T4:135; A58) He also admitted to walking from his bedroom to the bathroom naked while the boys were watching tv in the living room. (T4:187; A65)

¹⁴ See (DE 14; A3) (Motion to dismiss counts 1 through 5). See also Mr. Howard's opening brief on appeal arguments. *Howard v. State*, 981 A.2d 1172 *1 (Del. Supr. 2009)

¹⁵ Mr. Howard admitted offering JK the "moon bet" (T4:138; A59) and to offering BK \$20 to swim across the creek naked. Mr. Howard also testified that he engaged in massages with the two boys. (T4:135; A58) (T4:139-144; A59-60). Mr. Howard also admitted to walking from his bedroom to the bathroom naked while the boys were watching tv in the living room.

advised Mr. Howard that offering a financial benefit to a child to exhibit himself with partial or complete nudity would constitute a prohibited sexual act nor discussed the pros and cons of testifying with Mr. Howard. (A101) As such, Trial Counsel was ineffective under *Strickland*.

Mr. Howard submits that if he were properly advised of the risks of testifying that he would have exercised his right not to testify. Of the five counts of sexual solicitation of a child charged against Mr. Howard, the jury returned a verdict of guilty on only two of the counts. It is a reasonable inference that the jury found Mr. Howard guilty based on his admission of a bet with each boy. Without Mr. Howard's admission, there is a reasonable probability that the jury may have returned a verdict of not guilty on those two counts. The jury may have also returned verdicts of not guilty as to the other counts of the indictment without Mr. Howard confirming that he gave the boys massages and walked around in the nude. As such, Mr. Howard suffered prejudice as result of Trial Counsel's failure to advise Mr. Howard.

For the reasons stated, Mr. Howard's conviction should be reversed and remanded for a new trial.

(T4:187; A65) Mr. Howard denied they were sexual in nature.

IV. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE IN LIMINE TO PROHIBIT THE ADMISSION OF MR. HOWARD’S PRIOR BAD ACTS IN VIOLATION OF MR. HOWARD’S SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE U. S. CONSTITUTION AND HIS RIGHTS UNDER ARTICLE 1, §§ 4 AND 7 OF THE DELAWARE CONSTITUTION.

QUESTION PRESENTED

Did the Superior Court err in denying Mr. Howard’s claim that the Trial Counsel was ineffective for failing to file a motion in limine concerning Mr. Howard’ prior bad acts? Mr. Howard preserved this issue as he raised it in his Amended Petition for Post Conviction Relief. (A145)

SCOPE OF REVIEW

Ineffective assistance of counsel claims are reviewed *de novo*. *Swan* , 28 A.3d at 391. Questions of law are reviewed *de novo*. *Dawson*, 673 A.2d at 1190. Claims of a constitutional violation are reviewed *de novo*. *Hall*, 788 A.2d at 123.

MERITS OF THE ARGUMENT

The Superior Court erred in denying Mr. Howard’s ineffective assistance of counsel claim as it incorrectly held that Mr. Howard suffered no prejudice from Trial Counsel’s failure to move to preclude the admission of prior bad acts. (Denial pg. 20) Due to Trial Counsel’s failure to move to preclude Mr. Howard’s prior bad acts from

use at trial, uncharged conduct occurring in Delaware and outside the state were admitted against Mr. Howard without any limiting instruction.

A. Applicable Law.

Mr. Howard hereby incorporates by reference the law cited in Section C of Argument I regarding ineffective assistance of counsel. Pg. 12 *supra*.

Evidence of a defendant's prior bad acts is not to be admitted unless both the proponent and the Court plainly identify a proper, non-propensity purpose for its admission. *U.S. v. Sampson*, 980 F.2d 883, 887 (3d Cir. 1992) This Court established a series of guidelines for the admission of prior bad acts under Superior Court Criminal Rule 404(b) in *Getz v. State*:

(1) The evidence of other crimes must be material to an issue or ultimate fact in dispute in the case. If the State elects to present such evidence in its case-in-chief it must demonstrate the existence, or reasonable anticipation, of such a material issue. (2) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basis prohibition against evidence of bad character or criminal disposition. (3) The other crimes must be proved by evidence which is “plain, clear, and conclusive. (4) The other crimes must not be too remote in time for the charged offense. (5) The Court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by D.R.E. 403. (6) Because such evidence is admitted for a limited purpose, the jury should be instructed concerning the purpose for its admission as required by D.R.E. 105.

Getz v. State, 538 A.2d 726, 734 (Del. 1988). “[I]f the uncharged misconduct offered by the State is not admissible pursuant to D.R.E. 404(b), or for any other consistent

purpose, a trial judge may consider the admissibility of such evidence pursuant to the carefully circumscribed inextricably intertwined doctrine” so long as an appropriate limiting instruction is provided. *Pope v. State*, 632 A.2d 73, 76 (Del. 1993).

B. The Superior Court erred in denying Mr. Howard’s claim that Trial Counsel was ineffective for failing to file move in limine to preclude prior bad acts.

In denying this claim, the Superior Court stated “although a limiting instruction should have been given, there is no evidence that the failure by counsel to request such an instruction affected the outcome of the proceedings.” (Denial pg. 20) The Superior Court’s holding is incorrect as the State introduced uncharged prior bad acts which occurred both inside the state of Delaware¹⁶ and the surrounding states¹⁷ without a limiting instruction as to how the jury should use this evidence. The Superior Court’s holding also failed to consider Trial Counsel’s affidavit in which he admitted that a limiting instruction should have been request. (A98)

¹⁶ See footnotes 8 and 9 on pg. 10 *supra*.

¹⁷JK testified to a number of incidents that occurred outside the state of Delaware. JK testified that during a trip to Greenbrier, Maryland, he and Mr. Howard shared a tent together and that Mr. Howard told JK that he was going to masturbate. (T1:53-55; A42-43) JK also testified that during a trip with Mr. Howard in Danville, Pennsylvania, Mr. Howard began to masturbate while in the same tent as JK. (T1:55-6; A52) JK also testified that during a trip to North Carolina, Mr. Howard masturbated while in the same hotel room as JK. (T1:58-60; A43) On the same trip, JK testified that he saw Mr. Howard masturbating outside of a pavilion wearing only a shirt. (T1:59-61; A43) JK further testified that while at his mother’s home in Pennsylvania, that after getting out of the shower and wearing only a towel, Mr. Howard lifted up JK’s towel and laughed at him. (T1:86-88; A50)

As outlined in the Amended petition, none of the uncharged acts introduced at trial passed the *Getz* analysis and were thus inadmissible. (A149-154) Additionally, even if the uncharged acts were admissible under the inextricably intertwined doctrine, a limiting instruction was still required. *Id.* at 76-77.

As noted previously, Mr. Howard's case is significantly similar to *Dobson* which held that an attorney was ineffective for failing to move for a bill of particulars when multiple counts of the indictment were worded identically, covered the same time period, and uncharged crimes were presented to the jury without any limiting instruction. *Dobson*, 2013 WL 5918409, at *2. Thus, due to the similar nature of these two cases, *Dobson* should be controlling in this manner and Mr. Howard's conviction should be reversed and remanded for a new trial. Trial Counsel's failure to request a limiting instruction resulted in the jury being free to decide how to use the uncharged prior bad acts. *See Mulligan v State*, 761 A.2d 6, 10 (Del. 2000).

Alternatively, an evidentiary hearing is needed as Trial Counsel did not file an affidavit in response to Mr. Howard's amended petition which argued that the in State and out of state prior bad acts should have been suppressed. (*See* A151-153) If reversal is not warranted, then an evidentiary hearing is needed.

For the foregoing reasons, Mr. Howard's convictions should be reversed and remanded for a new trial or an evidentiary hearing.

V. MR. HOWARD’S RIGHT TO A FAIR TRIAL WAS DENIED DUE TO CUMULATIVE DUE PROCESS ERROR IN VIOLATION OF MR. HOWARD’S SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER ARTICLE 1, §§ 4 AND 7 OF THE DELAWARE CONSTITUTION.

QUESTION PRESENTED

Did the Superior Court err in denying Mr. Howard’s claim that his right to a fair trial was denied due to cumulative due process error? Mr. Howard preserved this issue as he raised it in his Amended Petition for Post Conviction Relief. (A155)

SCOPE OF REVIEW

Ineffective assistance of counsel claims are reviewed *de novo*. *Swan*, 28 A.3d at 391. Questions of law are reviewed *de novo*. *Dawson*, 673 A.2d at 1190. Claims of a constitutional violation are reviewed *de novo*. *Hall*, 788 A.2d at 123.

MERITS OF THE ARGUMENT

The Delaware Supreme Court erred by denying Mr. Howard’s claim of cumulative due process violation. (Denial pg. 21) As outlined in Claims I-IV *supra*, Mr. Howard submits that he has presented multiple claims that on their own warrant reversal. However, in the event that this Court finds otherwise, the cumulative effect of all these errors violates due process.

Where there are several errors in a trial, a reviewing court must weigh the cumulative impact to determine whether the defendant was deprived of his right to

a fair trial. *Wright v State*, 405 A.2d 685, 690 (Del. 1979) Cumulative impact of errors at trial may be the basis for reversing a conviction even when one error, standing alone, would not be the basis for reversal. *Id.* The cumulative effect of the alleged errors may violate due process. *U.S. ex rel. Sullivan v Cuyler*, 631 F.2d 14,17 (3d Cir. 1980).

The Superior Court erred when it held that “[t]his Court has determined that Mr. Howard’s preceding six claims are without merit, and therefore, a cumulative error analysis is not necessary.” (Denial pg. 21) As outlined in Arguments I through IV, Mr. Howard has alleged multiple constitutional violations under both the United States and Delaware Constitution.

Mr. Howard submits that the cumulative effect of the above errors “operated to deprive the defendant of a fair trial.” *Wright*, 405 A.2d at 690. The cumulative effect of these errors resulted in Trial Counsel being ill prepared to defend the charges and properly advise Mr. Howard of the impact of his testimony. Furthermore, the Trial Court’s failure to provide a unanimity instruction allowed the jury to convict Mr. Howard on different facts that the jury may not have agreed on.

For the foregoing reasons, Mr. Howard’s convictions should be reversed and remanded for a new trial.

VI. THE SUPERIOR COURT ERRED BY NOT HOLDING AN EVIDENTIARY HEARING OR REQUIRING A NEW AFFIDAVIT FROM TRIAL COUNSEL IN VIOLATION OF MR. HOWARD’S FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER ARTICLE 1, §§ 4 AND 7 OF THE DELAWARE CONSTITUTION.

QUESTION PRESENTED

Did the Superior Court err in denying Mr. Howard’s request for an evidentiary hearing? Mr. Howard preserved this issue as he raised it in his Amended Petition for Post Conviction Relief. (A111)

SCOPE OF REVIEW

The Delaware Supreme Court reviews the Superior Court's denial of a request for an evidentiary hearing for abuse of discretion. *Outten*, 720 A.2d at 551.

MERITS OF THE ARGUMENT

While Mr. Howard submits that reversal of all counts of conviction and a remand for a new trial is warranted due to the arguments raised in Claims I through V, Mr. Howard alternatively asserts that the Superior Court erred by refusing to grant an evidentiary hearing¹⁸ or ordering Trial Counsel to file a new affidavit in response to Mr. Howard’s claims of ineffectiveness which requires a remand to the Superior Court for additional actions. A remand to the Superior Court would be required as

¹⁸Mr. Howard requested an evidentiary hearing in the Amended petition. Pg 3.

Trial Counsel submitted an affidavit only in relation to claims raised in Mr. Howard's *pro se* Rule 61 petition. (A97-104) However, this Court reversed and remanded the denial of Mr. Howard's *pro se* Rule 61 petition to allow for appointment of counsel and an amended filing. Exhibit B; (DE 93, A13) With counsel appointed, Mr. Howard filed an amended petition which raised a number of new claims including ineffective assistance of counsel for failing to file a motion for reargument and failure to file a motion to suppress prior bad acts. (Denial pg. 5) However, the Superior Court denied these new claims without an evidentiary hearing or even requesting an affidavit from Trial Counsel to respond to the new claims.

This Court has opined that the production of Trial Counsel affidavits is the preferred practice in response to Rule 61 ineffective assistance of counsel claims. This court noted in *State v. Home* that “[w]ithout either an affidavit from Trial Counsel or an evidentiary hearing on the allegations, Trial Counsel would have neither an opportunity to be heard, nor the chance to defend himself against such charge of incompetency.” *Home*, 887 A.2d at 975. As Mr. Howard has asserted multiple claims of ineffectiveness in his Amended Petition that were not in the *pro se* Rule 61 petition, nor addressed in Trial Counsel's responsive affidavit, the Superior Court erred by not holding an evidentiary hearing or ordering Trial Counsel to file a new affidavit addressing the new ineffective claims.

Lastly, a remand to the Superior Court to hold an evidentiary hearing is appropriate as it promotes judicial efficiency as it could prevent the need for a potential United States District Court evidentiary hearing if Mr. Howard seeks federal habeas review pursuant to Title 21 U.S.C. § 2254.¹⁹

For the foregoing reasons, this Court should remand to the Superior Court.

CONCLUSION

WHEREFORE, based on the foregoing, Mr. Howard respectfully requests that this Court reverse and remand Mr. Howard's conviction and grant all appropriate relief.

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¹⁹ See *Jackson v. Denno*, 378 U.S. 368, 393-6 (1964) (Reversing the denial of defendant's writ of habeas corpus and remanding the case to allow the State a reasonable time afford the defendant a hearing on whether his confession was voluntary.); *U.S. v. Driber*, 546 F.2d 18, 21 (3d Cir. 1976) (Reversing the judgment of the district court with instructions to grant defendant's writ of habeas corpus unless the State affords the defendant a hearing on the issue of improper pretrial identification.); *Townsend v Sain*, 372 U.S. 293, 313 (1963) (requiring federal courts to grant evidentiary hearings when, *inter alia*, "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing" or there is a substantial allegation of newly discovered evidence"), overruled in part on other grounds by *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5 (1992).