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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| **STATE OF DELAWARE**, | ) | |
| | ) | |
| Defendant-Below, | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. 692, 2015 |
| | ) | |
| **DAMONE FLOWERS**, | ) | |
| | ) | |
| Plaintiff-Below, | ) | |
| Appellee. | ) | |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

# STATE'S REPLY BRIEF

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DATE: April 20, 2016

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**STATUTES AND RULES**

## I. SUPERIOR COURT ABUSED ITS DISCRETION BY GRANTING FLOWERS POSTCONVICTION RELIEF.

### A. Flowers' claims are untimely and procedurally defaulted.

Superior Court correctly recognized that Flowers' postconviction motion was untimely under Criminal Rule 61(i)(1), and the claims in the motion were barred as repetitive under Rule 61(i)(2).[1] Superior Court then erroneously found that Flowers had made a colorable claim of a mistaken waiver of important constitutional rights under the Sixth Amendment regarding the proper foundation for admitting a statement under 11 *Del. C.* § 3507, and thus *all* of his claims satisfied the Rule 61(i)(5) exception to the procedural bars.[2]

Although Flowers asserts that he raised a freestanding claim of a Confrontation Clause violation, his argument in his Amended and Superseding Rule 61 Motion specifically lists Ground 1 as:

> FLOWER'S [sic] FORMER ATTORNEY WAS INEFFECTIVE UNDER *STRICKLAND V. WASHINGTON* IN FAILING TO OBJECT TO THE ADMISSION OF TAPED STATEMENTS OF FIVE STATE'S WITNESSES BASED UPON THE FAILURE TO MEET THE REQUIREMENTS FOR ADMISSION OF THE STATEMENTS UNDER 11 DELAWARE CODE SECTION 3507 RESULTING IN A VIOLATION OF HIS SIXTH AMENDMENT DUE PROCESS CONFRONTATION RIGHT.[3]

Although Flowers' argument asserts a deprivation of his Sixth Amendment right

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[1] *State v. Flowers*, 2015 WL 7890623, at *2 (Del. Super. Ct. Nov. 20, 2015) (Ex. A to Op. Br.).

[2] *Flowers*, 2015 WL 7890623, at *2.

[3] *Amended and Superseding Rule 61 Motion for Postconviction Relief* (DI 130) at 4. AR4.

to counsel and his Sixth Amendment due process confrontation protections, he fails to provide legal support for that position. The only law presented in support of the claim relates to the legal standards for reviewing claims of ineffective assistance of counsel.[4] Further, Flowers' argued this claim exclusively as an ineffective assistance of trial counsel claim. He repeats this same claim when assessing the performance of appellate counsel in Ground 5 of his Amended and Superseding Rule 61 Motion.[5] Having failed to brief the issue below, Flowers waived the freestanding Confrontation Clause claim.

Flowers relies on *Webster v. State*[6] for the proposition that Rule 61(i)(5) includes an exception to the procedural bars in cases where there has been a "mistaken waiver of fundamental constitutional rights." Ans. Br. at 9. Webster sought to withdraw his guilty plea, claiming that he "mistakenly waived his entitlement to all the processes by which guilt is determined, a right all criminal defendants enjoy."[7] Under the facts of that case, Webster was asked at his plea colloquy only if he had heard his codefendant's colloquy and, after Webster simply nodded his head, the trial court accepted his guilty plea to first degree

[4] *See* AR6-10.

[5] *See* AR33 (repeating the same opening paragraph from Ground 1, pp 5-6 (AR5-6), and including an assertion of ineffective assistance of unspecified counsel for failure to raise the ineffectiveness claim (apparently of appellate counsel) in direct appeal).

[6] 604 A.2d 1364 (Del. 1992).

[7] *Id.* at 1366.

kidnapping, first degree robbery and second degree burglary.[8] Finding an inadequate plea colloquy to be a concern of "constitutional implication," this Court reversed and remanded for a determination whether Webster had knowingly and voluntarily waived his rights.[9] The Court noted that Webster's other grounds for relief failed "to make a colorable claim of manifest injustice because of those contentions" and "Superior Court was therefore correct in ruling them to be time barred."[10] This Court has limited the application of *Webster* to cases where a defendant affirmatively waives trial or appellate rights and later alleges that he had done so unknowingly.[11] Here, Flowers did not affirmatively waive any trial or appellate rights and thus *Webster* is inapplicable.

To determine whether Rule 61(i)(5) provides an exception to the procedural bars in this case, the Court must assess whether a miscarriage of justice occurred based on a constitutional violation that impacted "fundamental fairness." "The fundamental fairness exception (as set forth in Superior Court

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[8] *Id.* at 1365-66.

[9] *Id.* at 1366. After conducting the hearing on remand, Superior Court found Webster had knowingly and voluntarily waived his rights and denied postconviction relief. *See Webster v. State*, 1993 WL 227340, at *1 (Del. June 7, 1993).

[10] *Id.* at 1366 n.2.

[11] *See, e.g.*, *Hackett v. State*, 2006 WL 1640135, at *1 (Del. June 12, 2006) ("*Webster* holds that the trial court must personally address the defendant before accepting a defendant's waiver of his fundamental constitutional trial rights. In this case, counsel's withdrawal of Hackett's motion is not equivalent to the waiver of a fundamental constitutional right."); *Wall v. State*, 2005 WL 76950, at *1 (Del. Jan. 15, 2005) (denying relief where defendant knowingly and voluntarily waived various trial and appellate rights pursuant to entry into a First Offenders Controlled Substance Diversion Program).

Criminal Rule 61(i)(5)) is a narrow one and has been applied only in limited circumstances, such as when the right relied upon has been recognized for the first time after the direct appeal."[12] "A defendant must prove that his or her claim shows either that the Court lacked jurisdiction or that the petition raises 'a colorable claim that there was a miscarriage of justice *because of a constitutional violation* that undermined the fundamental legality, reliability, integrity, or fairness leading to the judgment of conviction.'"[13] "The defendant bears the burden of proving the existence of a constitutional violation under the Rule."[14] "A postconviction relief court need apply only the constitutional standards that prevailed at the time the original proceedings took place."[15] Flowers did not meet this high burden, because he failed to establish a constitutional violation, and thus the claims in his successive, untimely motion for postconviction relief do not merit review under Rule 61(i)(5).

**B. Section 3507 and the Sixth Amendment Confrontation Clause**

"[T]he Confrontation Clause of the Sixth Amendment reaches no further than to require the prosecution to *produce* any *available* witness whose

[12] *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

[13] *Bailey v. State*, 588 A.2d 1121, 1129-30 (Del. 1991) (citing Del. Super. Ct. Crim. R. 61(i)(5) and adding emphasis).

[14] *Id.*

[15] *Flamer v. State*, 585 A.2d 736, 749 (Del. 1990).

declarations it seeks to use in a criminal trial."[16] This Court has also found that "Sixth Amendment Confrontation Clause rights are not offended so long as there are indicia of reliability sufficient to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement."[17] The Confrontation Clause may be satisfied where, as here, the 3507 declarant has limited or no recollection of the events surrounding the incident or subsequent statements offered about the incident.[18] The Court explained that "[t]he genuineness of [the declarant's] limited recall was open to cross-examination and her demeanor on the stand was subject to the jury's scrutiny in weighing the truthfulness of her statements."[19]

Neither Flowers nor Superior Court addressed the United States Supreme Court's clear explanation of the parameters of the Confrontation Clause or this Court's adoption of those holdings. The only case decided at the time of Flowers' trial cited by the court for the proposition that failure to ask a witness if her prior out-of-court statement was true violated the Confrontation Clause, is *Johnson v. State*.[20] This Court in *Tucker v. State*[21] noted that:

In *Johnson,* this Court rejected a Sixth Amendment contention that

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[16] *California v. Green*, 399 U.S. 149, 174 (1970) (Harlan, J., concurring).

[17] *Burke v. State*, 484 A.2d 490, 495 (Del. 1984) (citations and internal quotations omitted).

[18] *Id.* at 493-94.

[19] *Id.* at 496.

[20] 338 A.2d 124 (Del. 1975).

[21] 564 A.2d 1110 (Del. 1989).

> defendant's right of cross-examination was constitutionally impinged by declarant's inability to testify concerning her out-of-court statement. We premised our decision on the rationale of *United States v. Payne*, 4th Cir., 492 F.2d 449 (1974), *cert. denied*, 419 U.S. 876, 95 S.Ct. 138, 42 L.Ed.2d 115 (1974); and *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).[22]

*Tucker* adopted the holding of *United States v. Owens*[23] that "the availability of declarant for cross-examination, notwithstanding his memory loss, dispensed with the need for reliability" and that the "'traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness's demeanor satisfy the constitutional requirements.'"[24]

In *Ray v. State*, this Court introduced the foundational requirement that, for admission under section 3507, the prosecution ask a witness whether his or her prior statement and testimony are true, explaining that: "[I]n order to conform to the Sixth Amendment's guarantee of an accused's right to confront witnesses against him, the [declarant] must also be subject to cross-examination on the content of the statement as well as its truthfulness."[25] *Ray*, to the extent it is read to require the prosecutor to ask the witness about truthfulness as a foundational requirement, cannot be reconciled with prior decisions of this

[22] *Id.* at 1122.

[23] 484 U.S. 554 (1988).

[24] *Tucker*, 564 A.2d at 1123 (quoting *Owens*, 484 U.S. at 560).

[25] 587 A.2d 439, 443 (Del. 1991).

Court,[26] where a statement of a declarant who at the time of trial simply had limited or no memory of the prior statement was found to be properly admitted at trial.[27] And, in *Hall v. State*, this Court noted that *Johnson* held "that the issue [of whether limited recall implicated the Confrontation Clause] was a matter of weight for the jury, not a constitutional violation." [28] Thus, at the time of Flowers' trial in October 2002, the state of the law regarding *the parameters of the Confrontation Clause* was clear – the State need only present the witness for cross-examination without restriction. *Ray*'s requirement that the witness be about the veracity of the out-of-court statement is not grounded in Confrontation Clause jurisprudence. Rather, this inquiry is a State court imposed evidentiary foundation.

As Flowers could, at most, only establish that the State failed to comply with a foundational requirement for admission of evidence, not a constitutional violation, Rule 61's procedural bars cannot be overcome here.

**C. Flowers' postconviction claims**

**Claim 1 – Ineffective assistance of trial counsel for failure to object to the State's failure to lay a proper foundation for admission of the prior out-of-court statements of five witnesses pursuant to 11 *Del. C.* § 3507.**

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[26] *See, e.g., Burke v. State*, 484 A.2d 490 (Del. 1984); *Johnson v. State*, 338 A.2d 124 (Del. 1975).

[27] *See also Feleke v. State*, 620 A.2d 222, 228 (Del. 1993).

[28] 788 A.2d 118, 124, 125 (Del. 2001) (citing *Johnson*, 338 A.2d at 127; *Owens*, 484 U.S. at 560).

Superior Court granted relief on Flowers' ineffective assistance of trial counsel claim by creating a separate freestanding claim for relief based on the prejudice alleged in Flowers' *Strickland* claim. This was legal error.

**a. Trial counsel's performance did not fall outside the wide range of professionally reasonable representation.**

Superior Court properly found no deficient performance of trial counsel, but then inexplicably concluded that counsel's failure to object resulted in a constitutional violation.

Counsel's explanation for not objecting was professionally reasonable. Had he objected, the trial judge would have required the prosecutor to ask the question, at least one witness would have incongruously responded with a lack of memory, and the taped statement would have been admitted. The answer would have had no effect on trial counsel's ability to effectively cross-examine the witness. Whether or not trial counsel knew that *Ray* required the prosecutor to ask a witness about the veracity of the out-of-court statement, trial counsel was permitted to, and did, effectively and thoroughly cross-examine each witness. Flowers, without further explanation asserts that "Counsel may have been able to prevent the admission of the most damaging portion of the State's case (5 taped statements) if objections made [*sic*]." Ans. Brf. at 22. But Flowers does not explain why the five statements would have been inadmissible and why

the prosecutor would not have, after the first objection, simply asked the question. He has not offered any reason why the trial judge would have suppressed the out-of-court statements rather than allow the prosecutor to complete an evidentiary foundation if one was found to exist. There is none.

**b. Flowers suffered no prejudice from trial counsel's failure to object to the admission of the witnesses' prior statements for lack of foundation.**

Even if trial counsel should have objected to the admission of the section 3507 statements based on an inadequate foundation, Flowers cannot establish prejudice. Trial counsel's ability to cross-examine each of the declarants was not limited in any way. Counsel used the inconsistencies and memory problems to cast doubt on the witnesses' credibility and the accuracy of their prior statements. Given trial counsel's effective use of the prior statements, any error in establishing a proper foundation was harmless.

This Court recently rejected a similar claim of ineffective assistance of counsel, finding no prejudice where counsel failed to object to a technical foundational requirement:

> ... Hoskins has not shown that trial counsel's failure to object constituted a *Strickland* violation at all, and, in any event, has not demonstrated prejudice. And absent any prejudice to the defendant, we will not reverse as an abuse of discretion a trial court's decision to admit evidence based upon the technical requirements of § 3507. In sum, there are insufficient grounds in the record to overcome the

presumption of trial counsel's reasonableness.[29]

Moreover, Flowers has not addressed the State's argument that the prior statements in this case were also admissible under Delaware Uniform Rule of Evidence ("DRE") 613. Thus, any failure to adhere to the section 3507 foundational requirement that a witness be directly asked if his or her prior statement is true, could not have prejudiced Flowers because the statements were admissible pursuant to the DRE 613 without that technical foundational prerequisite.

**Claim 5 – Ineffective assistance of appellate counsel for failure to raise claims of plain error regarding error in the admission of the prior out-of-court statements of five witnesses pursuant to 11 *Del. C.* § 3507 and the provision of those statements to the jury for deliberations.**

This claim was untimely under Rule 61(i)(1) and repetitive under Rule 61(i)(2) for failure to present the claim in his first motion for postconviction relief. Flowers did not demonstrate that the court was required to consider his claim in the interest of justice; nor did he establish manifest injustice under Rule 61(i)(5) to avoid the procedural bars to his claim. Superior Court, after announcing the claim to be barred under the incorrect rule, proceeded to consider the claim on the merits and granted relief. Superior Court was wrong in applying the law and abused its discretion in granting relief. By finding that counsel acted reasonably in failing to object at trial, but was objectively

[29] *Hoskins v. State*, 102 A.3d 724, 734-35 (Del. 2014).

unreasonable for the same behavior on appeal, Superior Court has set the stage for defense counsel to withhold trial objections, hope for an acquittal, and save claims for potential success on appeal if needed.

Superior Court's legal rationale is wrong. The court found

> When evaluating Trial Counsel's conduct, this Court "should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Therefore, at the trial level, the Court will not criticize Trial Counsel's decision to not object to the improper foundation for the five section 3507 statements. However, the same rationale cannot be applied at the appellate level.[30]

Appellate counsel, just like trial counsel, is expected to use reasonable professional judgment. Moreover, appellate counsel, just like trial counsel, is presumed to have acted reasonably.[31] Flowers did not, and cannot, overcome that presumption. Superior Court found that trial counsel made a reasonable strategic decision not to object to the prosecutors' failure to explicitly ask each witness whether his or her out-of-court statement was truthful.[32] Appellate counsel, having failed to object when serving as trial counsel below, could not expect, much less presume that the Court would consider that claim on appeal. Superior Court's postconviction decision, twelve years after Flowers' conviction,

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[30] *Flowers*, 2015 WL 7890623, at *5 (citations omitted).

[31] *See Strickland v. Washington*, 466 U.S. 668, 690 (1984).

[32] *Flowers*, 2015 WL 7890623, at *5. *But cf. id.* ("Trial Counsel's failure to object to the improper foundation for admission of the five section 3507 statements resulted in a violation of Defendant's Sixth Amendment right to confrontation.").

erroneously applied inconsistent standards to assess the reasonableness of counsel's performance.

This Court's "analysis of a claim of ineffective assistance of appellate counsel follows the standard *Strickland* framework."[33] Appellate counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal."[34] "A strategy, which structures appellate arguments on 'those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.'"[35] "Nevertheless, '[i]t is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent.'"[36] Selecting a claim that could only be reviewed, if reviewed at all, under plain error is unlikely to be clearly stronger than other claims the Court could consider under a more favorable standard of review.[37]

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[33] *Purnell v. State*, 106 A.3d 337, 351 (Del. 2014). *Accord Smith v. Robbins*, 528 U.S. 259, 285 (2000) ("the proper standard for evaluating [a] claim that appellate counsel was ineffective ... is that enunciated in *Strickland v. Washington*" (citing *Smith v. Murray*, 477 U.S. 527, 535–536, (1986) (applying *Strickland* to claim of attorney error on appeal))).

[34] *Robbins*, 528 U.S. at 288 (discussing the holding in *Jones v. Barnes*, 463 U.S. 745 (1983)).

[35] *Zebroski v. State*, 822 A.2d 1038, 1051 (Del. 2003) (quoting *Flamer*, 585 A.2d at 758).

[36] *Purnell*, 106 A.3d at 351 (quoting *Neal v. State*, 80 A.3d 935, 946 (Del. 2013) (quoting *Robbins*, 528 U.S. at 288)).

[37] *See Robbins*, 528 U.S. at 288 (citing with approval to *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.").

On direct appeal, counsel raised four claims for relief which had all been raised in Superior Court, including a claim concerning the voluntariness of Ronetta Sudler's section 3507 statement. The appellate issues were not clearly weaker than a plain error claim that the prosecutors had failed to explicitly ask the witnesses about the veracity of their prior statements.[38] Moreover, Flowers failed to establish that the outcome of the appeal would likely have been different had appellate counsel raised his plain error claims.

Trial counsel used the section 3507 statements to Flowers' advantage. The witnesses at Flowers' trial were called to testify four years after the homicide and were generally uncooperative. They provided ample testimony both about the events perceived and their prior statements to satisfy the foundational requirements of 11 *Del. C.* § 3507 and the requirements of the Confrontation Clause. Consequently, appellate counsel acted well within the bounds of objectively reasonable representation in deciding not to raise a challenge to the admission of the statements based on a failure of the prosecutors to ask a single question where the answer did not affect the admissibility of the witness's prior statement or the ability of counsel to effectively cross-examine the witness on both her trial testimony and her out-of-court statement. Flowers suffered no

[38] *See Woodlin v. State*, 3 A.3d 1084, 1089 (Del. 2010) (no plain error where truthfulness addressed "implicitly").

prejudice from his counsel's professional representation both at trial and on appeal. Superior Court abused its discretion in granting relief.

## CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be reversed and remanded with directions to summarily deny Flowers' Amended and Superseding Second Motion for Postconviction Relief.

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## CERTIFICATE OF SERVICE

The undersigned certifies that on April 20, 2016 she caused the attached *State's Reply Brief* to be electronically delivered through File and Serve Xpress, to the following:

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