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Case Number 52,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	No. 52, 2016
	)	
Appellant	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE IN
	)	ID No. 9904019329
LUIS REYES,	)	
	)	
	)	
Appellee	)	

ON APPEAL FROM THE SUPERIOR COURT OF

THE STATE OF DELAWARE

APPELLEE'S ANSWERING BRIEF

COLLINS & ASSOCIATES

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Dated: July 29, 2016

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NATURE AND STAGE OF THE PROCEEDINGS

Mr. Reyes adopts the State's recitation of the Nature and Stage of the Proceedings as set forth in the Opening Brief.[1]

[1] *State's Opening Brief (Op. Br.)* at 1-3.

SUMMARY OF ARGUMENT

CLAIM I: DENIED. ALL CLAIMS AND ISSUES SET FORTH IN THE OPINION VACATING MR. REYES' CONVICTIONS AND SENTENCE ARE PROPERLY BEFORE THIS COURT.

The postconviction judge thoroughly considered the entire record and the law and found that "the fundamental legality, reliability, integrity, and fairness of the proceedings leading to Reyes' convictions and sentencings are not sound." The court specifically rejected the notion that claims raised after the 2009 Second Amended Motion were barred; this assessment comports with the postconviction record establishing that claims could be stated in the post-hearing brief process. The court, noting that this is Mr. Reyes' *first* Motion for Postconviction Relief, properly considered the entire record. The postconviction court discharged its duty to prevent injustice.

CLAIM II: DENIED. THE COURT DID NOT ERR IN FINDING THAT MR. REYES' FIFTH AMENDMENT RIGHTS WERE VIOLATED; MOREOVER, TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER CHARACTER EVIDENCE PORTRAYING MR. REYES AS A LIAR.

Mr. Reyes wanted to testify, but elected not to do so based on his belief that if he remained silent, the jury would not hear about his prior Second Degree Murder conviction for the death of Fundador Otero. As such, his decision not to testify was not knowing, intelligent, and voluntary. Trial counsel should have settled the question by moving to exclude evidence of the prior conviction in the

guilt phase, but failed to do so. Compounding prejudice to Mr. Reyes, the only testimony the jury did hear from him was a read-in of inadmissible character evidence portraying him as a liar. The postconviction judge correctly found a miscarriage of justice and granted relief.

<u>CLAIM III:</u> DENIED. THE POSTCONVICTION JUDGE DID NOT ERR IN FINDING THAT MR. REYES WAS PREJUDICED BY THE DELAY IN THE CABRERA SENTENCING AND THAT CABRERA'S EXCULPATORY EVIDENCE SHOULD HAVE BEEN ADMITTED AT TRIAL.

The postconviction court correctly found that codefendant Luis Cabrera was unavailable at Mr. Reyes' trial due to a lengthy delay in Cabrera's sentencing. Moreover, even if Cabrera was an unavailable witness, trial counsel failed to present his prior statements as evidence exculpatory to Mr. Reyes. The portions of Cabrera's 1997 statement that were admissible would have built an argument for reasonable doubt of Mr. Reyes' involvement in the murders.

<u>CLAIM IV:</u> DENIED. THE POSTCONVICTION JUDGE CORRECTLY FOUND THAT RODERICK STERLING'S "HIGHLY SUSPECT" TESTIMONY VIOLATED MR. REYES' CONSTITUTIONAL RIGHTS AND THAT MR. REYES' WAS PREJUDICED BY HIS COUNSEL'S PERFORMANCE.

Roderick Sterling, a convicted rapist of a young child, was the State's star witness. He claimed to have overheard conversations between his cellmate, Ivan Galindez, and Mr. Reyes about the Rockford Park murders. Trial counsel's handling of Sterling was objectively unreasonable, especially since he was by far

the State's most important witness. Moreover, Sterling's testimony contained inadmissible hearsay which should have been excluded. The letter Sterling supposedly wrote to his lawyer that started it all was apparently lost—and was written by someone else. Trial counsel failed to seek a missing evidence instruction. The now-discredited testimony of Roderick Sterling, and trial counsel's ineffective handling of him, undermined the legality, reliability, integrity, and fairness of the trial. The State violated *Brady* with respect to Starling's drug addiction and treatment, and counsel failed to hold the State to its obligations. It was not error for the postconviction judge to vacate Mr. Reyes' convictions, predicated as they were on Sterling's testimony.

<u>CLAIM V:</u> DENIED. THE TRIAL COURT DID NOT ERR IN FINDING THERE WAS INADEQUATE CONSIDERATION OF MR. REYES' YOUTH AND BRAIN DEVELOPMENT AT SENTENCING; TRIAL COUNSEL WAS DEFICIENT FOR FAILING TO PRESENT THIS EVIDENCE TO THE JURY.

The Superior Court properly considered evolving standards of decency in finding that there was inadequate weight placed on Mr. Reyes' youth as it relates to neurological brain development. Trial counsel, thinking the issue would not get much traction, failed to take steps to present this crucial information to the jury by having a neuropsychological evaluation done and presenting an expert witness. As such, the jury and sentencing judge could not fully assess Mr. Reyes' moral culpability.

<u>CLAIM VI:</u> DENIED. THE POSTCONVICTION JUDGE CORRECTLY FOUND THAT COUNSEL WAS INEFFECTIVE IN THE PENALTY PHASE, CAUSING PREJUDICE TO MR. REYES.

Trial counsel were ineffective in multiple respects in the penalty phase. Their mitigation strategy—which deliberately focused only on negatives and risk factors for violence—was an unreasonable strategic decision. The strategy of introducing only negative aspects of Mr. Reyes deprived the jury of hearing significant mitigating evidence. Counsel failed to protect Mr. Reyes by objecting to multiple instances of prosecutorial misconduct. And counsel acquiesced to—and even joined in—the State's improper rebuttal of Mr. Reyes' allocution. For these reasons, Mr. Reyes suffered prejudice within the meaning of *Strickland*, undermining confidence in the outcome.

CUMULATIVE ERROR

The postconviction court correctly held that the cumulative effect of all constitutional errors in Mr. Reyes' case undermine the confidence in the fairness of the trial, and that without the errors, there is a reasonable probability of a different result.

STATEMENT OF FACTS

Mr. Reyes adopts the facts set forth in the Opening Brief, as they are a *verbatim* quote from this Court's direct appeal opinion.[2] Mr. Reyes presents the following supplemental facts:

A. Roderick Sterling's Testimony is Later Revealed to Be Untrue.

The facts set forth in the Opening Brief [3] establish that the Reyes trial featured a strong case against Luis Cabrera, Jr. The maroon bedsheet that covered the bodies matched a sheet in Cabrera's possession. The .38 caliber handgun found in Cabrera's residence fired the bullet recovered from Mr. Rowe's body. Cabrera sold Mr. Saunders' pager to Page One shortly after the murder. Other pieces of evidence also linked Cabrera to the murders.

As to Mr. Reyes, the trial established that he was involved in a fight in the basement of his and Cabrera's residence, 610 West 20th Street. It is no surprise then, that the sentencing judge considered the Sterling testimony to be the "most significant" evidence against Mr. Reyes.[4]

[2] *Reyes v. State*, 819 A.2d 305, 308-310 (Del. 2003).
[3] *Opening Brief (Op. Br.)* at 6-11.
[4] *State v. Reyes*, 2012 WL 8256131 at *1(Del. Super.); B2565, *citing State v. Cabrera and Reyes*, 2002 WL 484641 at *8 (Del. Super.)

1. Sterling testifies as part of a get-out-of-jail deal with the State.

On May 2, 1997, the police arrested Sterling and charged him with two counts of Unlawful Sexual Intercourse First Degree.[5] The victim was a 7 year-old child. On December 1, 1998, months after his interview with Detective Lemon about Rockford Park, Mr. Sterling pled guilty to one count of Unlawful Sexual Intercourse Second Degree and was sentenced to 10 years in prison.

On September 14, 2001, Sterling entered into an agreement with the State where he agreed to testify during Mr. Reyes' trial. Under the agreement, the State joined Sterling's motion to withdraw his plea, so he could immediately plead to a lesser charge, get sentenced to time served, and be deported to Jamaica.[6]

Detective Mark Lemon recorded Roderick Sterling's statement on January 20, 1998.[7] The State furnished Sterling's statement to trial counsel the night before his testimony.[8] The defense requested a recess before Sterling's testimony so he could review the statement with Mr. Reyes.[9] The recess lasted 25 minutes, and trial counsel said he was ready to proceed.[10]

It is obvious from the transcript of Sterling's 1998 statement that he is

[5] *State v. Sterling*, ID No. 9705000769.
[6] B2338-2339.
[7] B162-A163.
[8] B159.
[9] *Id.*
[10] B165.

reading from notes.[11] The notes were not provided to the defense. Sterling also disclosed that he and his cellmate Ivan Galindez had spoken "on several occasions" and "repeatedly" about the conversation between Mr. Reyes and Galindez that Sterling supposedly overheard, and that Galindez was aware he was taking notes.[12] Finally, the detective reads a portion of the letter received by Edward Pankowski, Esquire on July 22, 1998. This letter, which was never recovered or provided to the defense, is "from a Robert Sterling and a Ivan Galendez [sic]."[13]

Sterling testified that he overheard Mr. Reyes telling Galindez that two men shorted Mr. Reyes and Cabrera in a marijuana deal and were therefore killed.[14] He stated that he overheard Mr. Reyes saying one of the individuals was beaten with a belt, and that a neighbor came downstairs when she heard the commotion.[15] Sterling said he wrote a letter to his lawyer, Edward Pankowski, saying that he had information pertaining to the Rockford Park case.[16] Sterling admitted that Galindez wrote the letter, but both he and Galindez signed it.[17] The defense objected, stating the letter was hearsay because Galindez was its draftsman and Sterling only signed

[11] B2356, B2362, B2364, B2374.
[12] B2381-2382.
[13] B2383.
[14] B136.
[15] B137.
[16] B140. The letter was not provided to the defense, and postconviction counsel has been unable to obtain a copy. The date of the letter is unknown.
[17] *Id.*

the letter.[18] This Court, *sua sponte*, stated that the letter was not hearsay because Sterling signed it and adopted it as his own.[19] The defense continued to object that the letter was hearsay as to Galindez.[20] The defense did not further pursue the issue when the State explained it was only going to ask if Sterling signed the letter hoping he could get a deal.[21]

An issue arose regarding what language was spoken during the purported conversation between Mr. Reyes and Galindez. Sterling reported that he had seen Mr. Reyes having conversations with Spanish-speaking people.[22] He also reported that Galindez and Mr. Reyes had conversations together in Spanish.[23] Sterling said he did not speak Spanish.[24] He said he might understand "some" of a conversation in Spanish, but "not all of it."[25] Defense counsel tested him with the words murder, shooting, strangling, and belt—all words he claimed to have overheard—but Sterling did not know any of them.[26]

Trial counsel asked Sterling if the conversation that he purportedly overheard between Mr. Reyes and Galindez was in English.[27] Sterling asked for

[18] *Id*.
[19] B141.
[20] *Id*.
[21] *Id*.
[22] B150
[23] *Id.*
[24] B149.
[25] B150.
[26] *Id.*
[27] *Id.*

the defense to clarify the question: "…you want me to tell you that I heard it in English and they were speaking in Spanish?"[28] The defense stated that it wanted to know whether the conversation was in English or Spanish.[29] Mr. Sterling stated that he "heard" the conversation between them in English.[30] Sterling also testified that Galindez knew Cabrera and that Galindez had pointed out Cabrera to him.[31]

2. Sterling's story changes significantly in a 2008 interview.

Prior postconviction counsel sent an investigator to Jamaica to interview Sterling on September 17, 2008. In that interview, Sterling's account diverged significantly in important respects. He said he overheard two conversations. The first was "through the vent" and the other was out on the pod.[32] He believed the conversations were in Spanish, "or one of them possibly in English."[33] Sterling stated that it was Galindez who provided details of the conversations, as "I was not standing right there where the conversation. I was moving. So I was not getting the full detail of the conversation."[34]

Sterling also said, contrary to his trial testimony, that it was not Galindez who wrote the letter, but rather an inmate who wrote a lot of "lawyer letters" for

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[28] *Id.*
[29] *Id*.
[30] B149-150.
[31] *Id.*
[32] B2574-2575.
[33] B2574.
[34] B2575.

people.[35] He also confirmed that Galindez and Cabrera associated while in jail, particularly at Spanish chapel services.[36]

3. Galindez swears out an affidavit [37] confirming he and Mr. Reyes spoke in Spanish and Sterling did not speak Spanish.

On November 28, 2012, Ivan Galindez swore out an affidavit explaining that in 1997, he and Mr. Reyes were on the same pod and conversed in Spanish, because Galindez did not speak much English at the time. He further swore that Sterling did not speak Spanish.

B. Another Prison Informant Testifies, But is Discredited.

In its rebuttal case, the State called Waymond Wright, another prison informant. He testified that he was introduced to Mr. Reyes by an inmate named "Hawk," and that the three men conversed together.[38] Wright said Mr. Reyes told him that the "victims" came up short on a pound of marijuana.[39] According to Wright, Reyes said he went to school with the victims. When they died, some classmates were hugging him and, "inside himself he was like, if they only knew."[40] Then Wright went on to say that the murders were over being shorted on a marijuana deal, and that he scuffled in the basement with a victim, but was

[35] B2576.
[36] B2579.
[37] B2337.
[38] B405; *See also* B412.
[39] B407.
[40] B406.

interrupted by a woman.[41] Wright said Mr. Reyes told him that he dropped "them" off at Rockford Park.[42]

The defense in surrebuttal called Willie Snow, the aforementioned Hawk, to the witness stand. Snow testified that he knew Wright (as Quadire Mohammed) and also knew Mr. Reyes. But he never introduced Mr. Reyes to Wright.[43] Moreover, Snow testified that he was never with Wright and Mr. Reyes together at the same time.[44]

C. Luis Cabrera Gave Multiple Statements Exculpating Mr. Reyes

On March 22, 1997, Luis Reyes confessed to his role in the 1995 murder of Fundador Otero, implicating Cabrera.[45] He pled guilty on October 31, 1997.[46] Mr. Reyes testified for the State against Cabrera in the Otero trial.[47] At Mr. Reyes' sentencing for the Otero homicide, the judge remarked, "I think that assistance to the prosecution—because I also believe that without your testimony, the State's case would perhaps not even have been brought, so I do believe that is also a mitigating factor…"[48]

Despite the damage done to Cabrera by Mr. Reyes in the Otero case, Cabrera

[41] B407.
[42] *Id.*
[43] B446.
[44] B447.
[45] B2496-2459.
[46] B1855.
[47] B2386-2495.
[48] B1605.

on multiple occasions gave information exculpating Mr. Reyes as to Rockford Park. The statements occurred both before and after Mr. Reyes' testimony in Cabrera's Otero trial. In August of 1997, Cabrera spoke to an investigator about the murders and the investigator produced a report.[49] Cabrera explained that he and a person named Neil Walker planned to buy $500 worth of marijuana from Mr. Saunders. The package was not marijuana; Cabrera wanted his money back.[50] Mr. Saunders, Vaughn Rowe and others confronted Cabrera and Mr. Saunders rubbed Cabrera's face with a gun. Cabrera fled.[51] Cabrera told Walker about the incident, and went home and got his gun for protection.[52]

Later that night, Walker and Cabrera got into a confrontation with the Saunders/Rowe group, eventually badly beating Rowe.[53] Rowe was injured, and Cabrera wanted to get him seated on a bench, but Walker told Cabrera to go home and he would take care of it. Walker returned two hours later, saying everything was taken care of, and returned Cabrera's gun, which Cabrera had lost in the altercation.[54]

Two months later, angry with Walker because Cabrera was a suspect in the

[49] B1826-1854.
[50] B1829-1830.
[51] B1830.
[52] B1831.
[53] *Id.*
[54] B1832.

murders, Cabrera ran into Walker at Air Transport Command, a restaurant.[55] Cabrera beat up Walker. He was indicted on Assault Second Degree and other charges.[56] He pled guilty to Assault Third Degree.[57]

On August 9, 1999, Cabrera gave a rather rambling statement to the Wilmington Police about Rockford Park. He again described his dealings with Mr. Saunders and Mr. Rowe, but did not implicate Mr. Reyes in any way.[58]

Cabrera related to his attorney his willingness to testify at Mr. Reyes' trial. Cabrera's counsel allowed trial counsel to meet with Cabrera.[59] On March 9, 2001, Mr. Cabrera met with trial counsel Pedersen and an investigator, Robert Shannon. As described in counsel's notes[60] as well as the investigator's report,[61] Cabrera's account of the events remained consistent.

After Cabrera was found guilty of the Rockford Park murders, but before he was sentenced, Cabrera once again contacted Mr. Pedersen about testifying on Mr. Reyes' behalf, provided he did not have to "admit to my conviction."[62] But Cabrera's counsel advised trial counsel that Cabrera would not be testifying and

[55] B1833.
[56] B1976-1977.
[57] B1978-1985.
[58] B2031-2064.
[59] B1482.
[60] B1932-1934.
[61] B1940.
[62] B1480.

would invoke his 5th Amendment privilege if called as a witness.[63] As such, Mr. Cabrera was not called, even to plead the Fifth, nor was the investigator to whom he made the statement called as a witness.

[63] B1481.

<u>CLAIM I:</u> DENIED. ALL CLAIMS AND ISSUES SET FORTH IN THE OPINION VACATING MR. REYES' CONVICTIONS AND SENTENCE ARE PROPERLY BEFORE THIS COURT.

Question Presented

Whether the Court's application of the procedural bars, the miscarriage of justice exception, and the interest of justice exception was appropriate given all the facts and circumstances of this case.

Standard and Scope of Review

This Court reviews the Superior Court's decision on a motion for postconviction relief for abuse of discretion.[64] A *de novo* standard is applied to legal and constitutional questions.[65] Likewise, a *de novo* standard applies to colorable claims of miscarriage of justice.[66]

Merits

A. Facts and History Relevant to Consideration of Procedural Bars

The Superior Court's Order vacating Mr. Reyes' sentence and convictions on January 27, 2016 concluded a lengthy proceeding that began in March 2004. As noted by the postconviction judge, 10 combinations and permutations of counsel have represented Mr. Reyes in this proceeding.[67] The undersigned attorney has

[64] *Ploof v. State*, 75 A.3d 840, 851 (Del. 2013).
[65] *Id.*
[66] *Webster v. State*, 604 A.2d 1364, 1366 (Del. 2013).
[67] *State v. Reyes*, 2016 WL 358613 (Del. Super. Ct.) at *2, fn. 8.

been counsel of record since August 12, 2012, replacing Jennifer-Kate Aaronson, Esquire.[68] On December 5, 2012, the Court granted the State's motion to remove Natalie Woloshin, Esquire as counsel for Mr. Reyes.[69] Albert Roop, Esquire joined as cocounsel, but in December 2015, he joined the Department of Justice.

1. The Second Amended Motion Contains Claims Through October 2009.

Prior counsel filed a Second Amended Motion on October 13, 2009,[70] which included all claims raised in prior filings. Relevant to this proceeding are the following claims that were in place at that time:

- Ineffective assistance for failing to object to prejudicial comments made by the prosecutor in the penalty phase.[71]
- Counsel's failure to investigate and present mitigation evidence.[72] This claim asserted that trial counsel should have had Mr. Reyes undergo a neuropsychological evaluation.[73] It also asserted that trial counsel failed to present the significance of Mr. Reyes youth and brain development as a mitigating factor.[74] It identified numerous witnesses that should have been presented in the penalty phase.[75]

[68] B46.
[69] B49.
[70] B2632-2686.
[71] B2634-2644.
[72] B2651-2660.
[73] B2651-2653.
[74] B2653-2658.
[75] B2658-2659.

- Counsel's failure to prepare Mr. Reyes for allocution and failure to object to the State's admission of a letter regarding plea negotiations.[76]
- Appellate counsel's failure to raise the issue of the guilt phase read-in of testimony that characterized Mr. Reyes as a liar.[77]
- Counsel's failure to effectively rebut the nonstatutory aggravators, including the State's assertion that Mr. Reyes had made no efforts at rehabilitation.[78]
- Counsel's failure to present evidence that Mr. Reyes was fluent in Spanish, as a means of rebutting Roderick Sterling's testimony that he overheard Mr. Reyes speaking with Ivan Galindez about the Rockford Park Murders.[79]
- Mr. Reyes' constitutional rights were violated by the admission of Roderick Sterling's testimony.[80] This claim details Sterling's get-out-of-jail deal for testifying.[81] It describes Sterling's new version of events circa 2008 when he told an investigator that he did not actually hear Mr. Reyes make the statements but in fact Sterling heard it from his cellmate, Ivan Galindez, and that the statement was therefore inadmissible hearsay.[82] The claim went on to allege a *Brady* violation for the State's failure to disclose Sterling's

[76] B2660-2662.
[77] B2663-2664.
[78] B2666-2667.
[79] B2668.
[80] B2669-2675.
[81] B2671-2672.
[82] B2672-2673.

significant drug abuse history.[83] Finally, the claim alleges ineffective assistance of counsel for failure to investigate impeachment evidence.[84]

2. Despite new evidence, the trial judge twice denied motions to depose Sterling.

The sentencing judge found that Sterling's testimony was "the most significant evidence" against Mr. Reyes.[85] In 2008, new evidence came to light in the form of an investigator's interview[86] in which Sterling explained a number of things, including that he did not actually hear what Mr. Reyes said to Galindez. In October 2009, prior postconviction counsel filed a motion to depose Sterling.[87] The State opposed it.[88] Three years later, the trial court denied the motion.[89]

More new Sterling evidence arrived in the form of an affidavit from Ivan Galindez, stating that he and Mr. Reyes spoke in Spanish, and Sterling did not understand Spanish.[90] Postconviction counsel filed a motion to reargue the motion to depose Sterling.[91] Again, the State opposed.[92] The trial judge denied this motion as well.[93]

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[83] B2674-2675.
[84] B2675.
[85] *State v. Cabrera and Reyes*, 2002 WL 484641 at *8 (Del. Super.); B2179.
[86] The transcript of Sterling's 2008 interview, which was attached to the Second Amended Motion, is attached at B2578-B2591
[87] D.I. 256; B42.
[88] DI. 261; B42-43. Sterling is banned from the United States as part of his plea deal.
[89] *State v. Reyes*, 2012 WL 8256131 (Del. Super); B2565-2573.
[90] B2337.
[91] B2326-2336.
[92] D.I. 312; B50.
[93] B1280.

3. The trial judge expressed a preference to "sort out" the claims in the post-hearing process; the State did not oppose.

On the first day of the evidentiary hearing, the State inquired as to the scope of the evidentiary hearing.[94] The State requested that the Court limit counsel's presentation of witnesses and evidence to the claims for which the hearing was requested.[95] Ms. Aaronson responded:

> Your Honor, I understand that the motion for the evidentiary hearing narrowed specifically to penalty phase claims. In the continued investigation between 2009 and where we are here today, there have been some documents, which are part of the exhibit notebook produced to the State, that have raised some other potential issues.
>
> I'm suggesting that the Court at this point, since we're here, take testimony on the related matters; and then if the Court rules that those claims are time barred or not or does not grant leave to amend in the interest of justice, that can occur at a later date. But at this point, it is a very small, small section of any proposed questioning and is not the bulk of the reason why we're here with respect to the claims already raised.[96]

Ms. Aaronson explained that Cabrera was interviewed by an investigator in 1997, and there were statements made relevant to both guilt and sentencing phases. The trial judge responded:

> Well, my preference is to rule on that after the fact rather getting into whether I can rule on it and then – I just think, in the context of everything, I much prefer to have everything in front of me and then sort it out in the post-hearing process.[97]

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[94] B676.
[95] *Id*.
[96] *Id*.
[97] B676-677.

The State did not oppose, but rather, reserved the right to call rebuttal witnesses or recall prior witnesses.[98]

On February 4, 2013, at an office conference, a discussion of the conclusion of the evidentiary hearing was held. The undersigned attorney stated, "As far as the Reyes situation, it appears to me to get it in a posture that we can start getting ready to submit an amended motion combined with a post-hearing brief, a few things have to take place."[99] The State voiced no opposition.

The record establishes that Mr. Reyes filed a Second Amended Motion in 2009 that set forth most of the claims. Attempts to further develop the record with Sterling were opposed by the State and denied by the judge. The judge expressed a preference, unopposed by the State, that any remaining claims would be sorted out in the post-hearing process. The post-hearing briefing did in fact occur.[100] Then the postconviction judge sought supplemental briefings from the parties as to Mr. Reyes' 5th Amendment rights. Those submissions[101] completed the record.

B. The State's Assertions Ignore the Judge's Duty to Prevent Injustice.

Despite the foregoing, the State asserts that any claim raised after the 2009

[98] A677.
[99] B1280-1281.
[100] The post-hearing briefs are at B2687-B3068.
[101] B3069-3124.

Second Amended Motion is untimely,[102] and faults the postconviction judge for considering these claims.[103] The State claims further prejudice because the court raised claims *sua sponte.*[104] The State further argues that the postconviction judge applied the wrong "colorable claim of miscarriage of justice" exception under Rule 61(i)(5), noting that the constitutional violation must undermine the fundamental legality, reliability, integrity, or fairness of the proceedings.[105] Moreover, the State argues that the judge also misunderstood the interest of justice exception embedded in Rule 61(i)(4). The State urges that only subsequent legal developments in the case *sub judice* trigger the exception,[106] without mentioning that the equitable concern of preventing injustice may trump the "law of the case" doctrine.[107]

Despite these contentions, the State never filed a motion for reargument of the postconviction judge's order vacating Mr. Reyes' convictions and sentence. Such a motion would have been appropriate in that the State now asserts the court "has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[108]

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[102] *Op. Br.* at 13.
[103] *Id.* At 14.
[104] *Id.*
[105] *Id.* at 16.
[106] *Id.*
[107] *See Brittingham v. State*, 705 A.2d 577, 579 (Del.1998).
[108] *State Farm Fire and Cas. Co. v. Middleby Corp.*, 2011 WL 2462661, at *2 (Del. Super.) (citing *Kennedy v. Invacare Corp.*, 2006 WL 488590, at *1 (Del. Super.)).

C. The Court Properly Applied Legal Precepts in its Consideration of Procedural Bars.

1. The judge appropriately considered all claims in the record.

The postconviction thoroughly considered the entire record and the law and found that "the fundamental legality, reliability, integrity, and fairness of the proceedings leading to Reyes' convictions and sentencings are not sound."[109] The court specifically rejected the notion that claims raised after the 2009 Second Amended Motion were barred,[110] which is an accurate reading of the record. The court, noting that this is Mr. Reyes' *first* Motion for Postconviction Relief,[111] properly considered the entire record.

2. The judge properly considered other issues after a review of the record.

In a capital case on first-time postconviction review, the judge has the discretion to make findings based on the record without regard to whether it was specifically raised by the petitioner. Issues may be raised *sua sponte* in an exercise of discretion, to promote judicial efficiency and the ends of justice.[112] Moreover, our rules dictate that any claim not raised in a first motion for postconviction relief is thereafter barred, unless an exception applies.[113] The ends of justice would not

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[109] *State v. Reyes,* 2016 WL 358613 (Del. Super.) at *38.
[110] *Id.*at *3.
[111] *Id.*
[112] *Smith v. Horn,* 120 F.3d 400, 409 (3d Cir. 1997)(describing discretion to raise issues *sua sponte* but declining to raise a procedural default claim that the prosecution never made).
[113] *S.Ct. Crim. R.* 61(i)(2). The rule in place at the time of Mr. Reyes' first motion stated: Repetitive Motion—Any ground for relief that was not asserted in a prior postconviction

be served if the judge is not allowed to consider all issues, thereby creating a procedural default for the petitioner, both in State court and on federal habeas litigation.[114] This Court has long recognized the "important role of the courts in preventing injustice."[115]

This Court has recently considered *sua sponte* issues raised by the postconviction judge. In *State v. Wright,*[116] on a fourth postconviction motion, the judge *sua sponte* addressed the adequacy of *Miranda* warnings. This Court did not hold that the judge was precluded from doing so; it reached the merits even though the judge raised the claim and not the petitioner: "Wright did not ask for this relief, but if he had, there would be no basis on which to find that he overcame the procedural bar of Rule 61(i)(4)."[117]

Given the foregoing, it is clear that the *sua sponte* issues considered by the judge serve the interests of judicial economy, the ends of justice, and the inclusion of all relevant claims in a capital first motion for postconviction relief.

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proceeding ... is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

[114] *But see, Martinez v. Ryan,* 132 S.Ct. 1309, 1315 (2012)(holding that inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial).

[115] *See, e.g., Zebroski v. State,* 12 A.3d 1115, 1120 (Del. 2010)(remanding claim ruled barred under Rule 61(i)(2) for consideration of the "interest of justice" exception).

[116] 67 A.3d 319, 323 (Del. 2013).

[117] *Id.* at 323-324. *See also, Flowers v. State,* 2015 WL 7890623 at *2 (Del. Super.)(court *sua sponte* granting postconviction relief on right to confrontation grounds rather than ineffective assistance for failing to object to flawed foundations for statements admissible under 11 *Del. Code* §3507).

3. The judge properly applied the interest of justice exception of Rule 61(i)(4).

As will be discussed in detail in the few claims to which it applies, the postconviction judge properly found that the law of the case doctrine, embodied in Rule 61(i)(4), makes clear that "the equitable concern of preventing injustice may trump the 'law of the case' doctrine."[118] The postconviction judge recognized that when a prior decision arguably forms the law of the case, it still must be reviewed to determine if it produces an injustice.[119]

The State's heavy reliance on the recent litigation in *Wright v. State*[120] is misplaced. Wright was on his *fourth* motion for postconviction relief when this Court found that the validity of his *Miranda* warnings were the law of the case. This is Mr. Reyes' first postconviction motion. These claims have never been before this Court until now. This case could not be more different than *Wright.*

The postconviction judge did not commit error in applying the procedural bars to Rule 61 to Mr. Reyes' first postconviction motion. In this capital postconviction case, it was proper to consider all claims "in a manner consistent with Reyes' due process rights."[121]

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[118] *Zebroski v. State*, 12 A.3d 1115, 1120 (Del. 2010).
[119] *Brittingham v. State*, 705 A.2d 577, 579 (Del. 1998).
[120] 131 A.3d 310, 323 (Del. 2016); 67 A.3d 319, 323 (Del. 2013).
[121] *Reyes*, 2016 WL 358613 at *3.

<u>CLAIM II:</u> DENIED. THE COURT DID NOT ERR IN FINDING THAT MR. REYES' FIFTH AMENDMENT RIGHTS WERE VIOLATED; MOREOVER, TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER CHARACTER EVIDENCE PORTRAYING MR. REYES AS A LIAR.

Question Presented

Whether the postconviction judge erred in finding that Mr. Reyes' decision not to testify was not knowing, intelligent, and voluntary, and whether the admission of character evidence stating that Mr. Reyes was a liar caused prejudice to Mr. Reyes.

Standard and Scope of Review

This Court reviews the Superior Court's decision on a motion for postconviction relief for abuse of discretion.[122] A *de novo* standard is applied to legal and constitutional questions.[123]

Merits

Mr. Reyes wanted to testify, but elected not to do so based on his belief that if he remained silent, the jury would not hear about his prior Second Degree Murder conviction for the death of Fundador Otero. As such, his decision not to testify was not knowing, intelligent, and voluntary. Trial counsel should have settled the question by moving to exclude evidence of the prior conviction in the

[122] *Ploof v. State*, 75 A.3d 840, 851 (Del. 2013).
[123] *Id.*

guilt phase, but failed to do so. Compounding prejudice to Mr. Reyes, the only testimony the jury did hear from him was a read-in of inadmissible character evidence portraying him as a liar. The postconviction judge correctly found a miscarriage of justice and granted relief.

Although this claim was not raised in the Second Amended Motion or the post-hearing briefing, it is not barred. The postconviction judge properly found that this important constitutional issue was a colorable claim of a miscarriage of justice. The State is not prejudiced by the raising of this claim after the evidentiary hearings. Both sides were given an opportunity to submit supplemental briefing at the request of the court. Moreover, the State never sought reargument of this issue in the Superior Court.

This claim is not barred by the law of the case doctrine or Rule 61(i)(4). It is a *fact* in the case that the judge conducted a colloquy.[124] Whether Mr. Reyes' decision and answers to the judge's questions were predicated on a fateful misunderstanding that the jury would never hear about the Otero is a separate constitutional issue. It is an issue the postconviction judge properly reached in order to prevent an injustice.

[124] B392. It was thorough, but it came at the wrong time: after the defense rested.

A. Mr. Reyes' Decision Not to Testify Was Based on a Mistaken Belief That Evidence of the Otero Case Would Not Be Admissible.

Mr. Reyes' allocution revealed unequivocally his fundamental misunderstanding about his 5th Amendment rights:

> I didn't get on the stand during trial because I didn't want what I was presently incarcerated for to come up. I felt that by that coming out, you, the jury, would automatically think that I was guilty. Therefore, I chose not to take the stand. If I would have took the stand, you still might have came up to your ultimate decision; you might not have. I will never know. We all never know.[125]

The postconviction judge aptly observed that this statement "shows that Reyes' expectation was that such evidence would not be admitted."[126] Moreover, the judge correctly held that Mr. Reyes should have had the opportunity to consider that the Otero evidence in the penalty phase would be admissible.[127] As such, it was not error to find Mr. Reyes' decision was "premised on a misunderstanding."[128]

B. Mr. Reyes' Decision Not to Testify Was Not an Informed Choice Because Trial Counsel Were Ineffective in Not Filing a Motion to Exclude Mr. Reyes' Prior Conviction.

Mr. Reyes wanted to testify and profess his innocence as he did in his allocution: "…it is the truth, on everything I love and the Word of God, I did not kill Brandon and Vaughn. I did not take their life."[129] But, as his allocution

[125] A637. It is likely the last line should read "We will never know."
[126] *State v. Reyes*, 2016 WL 358613 at *6 (Del. Super.).
[127] *Id.*
[128] *Id.*
[129] B637.

statement confirms, he believed that if he testified, he would open the door to the Otero case in the guilt phase. As such, he could not possibly have made a knowing, intelligent, and voluntary decision, because trial counsel never filed a motion *in limine* to exclude his prior conviction from the Otero case.[130]

Trial counsel testified, "we had, I think, agreed pretty early on with Louie's consent that him testifying probably was not going to be a good idea."[131] But the record establishes no motion was filed which would have informed Mr. Reyes whether it *was* a good idea—a motion to exclude the Otero homicide. This failure constituted deficient performance which resulted in the abrogation of Mr. Reyes' right to due process.[132]

1. Trial counsel's deficient performance undermined Mr. Reyes' ability to make an informed decision about testifying.

In this context, the petitioner must establish that but for that deficient advice, the defendant would have chosen to testify, and that a reasonable probability exists that the outcome of the trial would have been different.[133] The standard for reasonable performance is that counsel must give the "reasonable advice of a

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[130] This claim was raised below in supplemental briefing. B3069-B3124. *See, e.g., Tickles v. PNC Bank,* 703 A.2d 633 (Del. 1997)(Appellee is entitled to argue any theory in support of judgment in his favor, even if that theory was not relied upon in decision on appeal).
[131] B714.
[132] *Strickland v. Washington,* 466 U.S. 668, 688 (1984)(to prevail on an ineffective assistance of counsel claim, a petitioner must show that counsel's performance fell below an objective standard of reasonableness, and that confidence in the proceeding is undermined due to counsel's deficiencies).
[133] *State v. Longeran,* 1992 WL 91128 at *1 (Del. Super).

conscientious advocate."[134]

Rule 609(a)(1) states, in relevant part, "for the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted but only if the crime (1) constituted a felony under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect."[135]

It is reasonably likely the Rule 609 motion would have been granted. In a capital murder case, it is hard to imagine something more prejudicial than the admission of a prior plea to Second Degree Murder. As to probative value, it is important to note that 609 evidence is only admissible for attacking the credibility of a witness, and not for establishing that the witness acted in character represented by his former crime.[136] Had Mr. Reyes testified, the State would have had ample opportunity to endeavor to impeach his credibility through cross-examination—without resorting to admission of the fact of the prior conviction.

In *State v. Flonnory,* the defendant was serving a sentence for murder, and was charged with assault in a detention facility.[137] Noting that the defense counsel properly moved *in limine* to exclude Flonnory's murder conviction, the trial court

[134] *Flamer v. State,* 585 A.2d 736, 755 (Del. 1990).
[135] D.R.E. 609(a)(1)
[136] *Williams v. State,* 796 A.2d 1281, 1291 (Del. 2002).
[137] *State v. Flonnory,* 2003 WL 22455188 at *2 (Del. Super.).

granted the motion and the jury did not hear about it, even during Flonnory's testimony.[138] That is what should have happened here.

The State's argument that had Mr. Reyes testified that the jury would have heard about his relationship with Cabrera and the beating in the basement and "Reyes' prior history as Cabrera's accomplice in the Otero murder" is a misstatement of the law and the record.[139] At trial, the State never moved to admit prior bad acts evidence pursuant to D.R.E. 404(b). Had the motion *in limine* been denied, and Mr. Reyes still chosen to testify, only the *fact* of the conviction would have been admissible.[140]

2. The negligent failure to file a Rule 609 motion prejudiced Mr. Reyes.

Counsel's failure to move to exclude the Otero conviction not only deprived Mr. Reyes of his 5th Amendment rights, it undermined confidence in the outcome of the trial. Had Mr. Reyes been able to testify, he would have professed his innocence, as he wanted to do and had a right to do. He could have demonstrated whether he spoke Spanish—maybe not as well as his grandmother—but spoke it. He could have testified whether he spoke to Ivan Galindez—in Spanish or English. He could have explained whether he lied to his girlfriend about the fight in the basement or whether he meant that he told her about the fight in the basement a

[138] *Id.*
[139] *Op. Br.* at 30.
[140] *See, e.g., Waller v. State*, 395 A.2d 365 (Del. 1994).

different time—not lied to her. He could have told the jury whether he ever spoke to Waymond Wright, the other prison informant witness.

Of course, he would have been cross-examined. The State would have used all means available to establish his relationship with Cabrera—certainly fair game for cross. He may have corroborated the testimony that one night he and Cabrera fought someone in a basement. Then what? There was no physical evidence connecting Mr. Reyes to the Rockford Park murders. No confession. No eyewitness.

Most importantly, the jury could have seen him, heard him, and evaluated his testimony and credibility in light of the other evidence. That was his right, and due to counsel's deficient performance, the jury never got to do so.

C. Trial Counsel Was Ineffective for Failing to Challenge a Read-In of Prior Testimony Characterizing Mr. Reyes as a Liar.

Mr. Reyes' girlfriend, Elaine Santos, gave a statement to the Burlington County, New Jersey Prosecutor's Office on March 22, 1997 regarding the Otero case.[141] During that interview, she explained that Mr. Reyes, around Christmas 1996, was upset and she went to his residence to speak with him.[142] Mr. Reyes was crying and shaking. He told her that he and Cabrera had beat someone up in the

[141] B2496-2549.
[142] B2556.

basement. He did not mention when it happened.[143]

Mr. Reyes testified as a State witness in Cabrera's Otero trial.[144] He was the main witness. At the Rockford Park trial, the State sought to admit a portion of his testimony, because it established that Mr. Reyes and Cabrera at some point were in a fight in their basement.[145] The relevant testimony, which was read to the jury, is:

CROSS EXAMINATION

> Q. Okay. And you don't recall telling your girlfriend that or do you recall telling your girlfriend that you were with Luis and somebody came over to the house and you went down the basement and beat them up?
>
> A. No, I don't recall telling her that. Not that moment. I told her that another time.
>
> Q. Another time?
>
> A. Yes.
>
> Q. When was that?
>
> A. When we was at our house.
>
> Q. So you lied to your girlfriend when you were at your house?
>
> A. Yes.
>
> Q. And when was that?

[143] B2557.
[144] B2386-2495.
[145] B62-63. The prosecutor characterized the testimony as a "red herring" in the Otero case, because there was no fight in the basement. But defense counsel brought it out on cross-examination, obviously having reviewed Elaine Santos' statement to police.

A. I couldn't give you an exact date.[146]

Trial counsel objected before the trial to this evidence,[147] because it portrayed Mr. Reyes as so distraught it evoked something more serious. Then counsel objected again, asking "what's the point" of the "lied to your girlfriend" testimony, apparently on relevance grounds.[148] The trial judge admitted all the evidence. He ruled that the jury could infer "lied to your girlfriend" comment to mean that "he did not tell her the whole thing."[149] On direct appeal, this Court upheld the admission of the testimony on grounds of relevance only.[150] Trial counsel never challenged the testimony on character evidence grounds, and appellate counsel never raised the claim.

What is sadly ironic is that the testimony makes clear that Mr. Reyes did not lie to his girlfriend. He is merely explaining to the cross-examiner that he told her about the fight in the basement, not at the police station, but at another time at his house. That is exactly what Elaine Santos said happened. Trial counsel seemed to never notice this; the only objection about the "lying" testimony is "what is the point of lines 13-17?"[151] The prosecutor's response—that he was lying to Elaine—makes no sense. If the State wanted to use the testimony to establish the fight in

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[146] *Id.*
[147] B64.
[148] B68.
[149] B67.
[150] *Reyes v. State,* 819 A.2d 305, 311 (Del. 2003).
[151] B66.

the basement, how does it help the State to present testimony that Mr. Reyes was lying about it? The only conceivable purpose of those lines of transcript is to tell the jury that Mr. Reyes was a liar without Mr. Reyes taking the stand.

Even more ironic is the fact that the State was able to use Mr. Reyes' testimony to convict Cabrera in the Otero case, then turn around and use it again on a specious claim that he was a liar. Due to trial counsel's lack of vigilance and failure to properly object, that is exactly what happened.

The postconviction judge appropriately found that the testimony disparaging Mr. Reyes' character for truthfulness was impermissible and undermined Mr. Reyes decision not to testify against himself.[152] This was impermissible character evidence.[153] And since Mr. Reyes was not a witness in the Rockford Park trial, the impeachment conditions in Rule 608 are inapplicable.[154]

For lack of a properly grounded objection by trial counsel, the jury heard Mr. Reyes' sworn testimony from a prior proceeding admitting he lied. Due to appellate counsel's ineffectiveness, this legal error was never cured. Combined with counsel's failure to file a Rule 609 motion, the result is that Mr. Reyes never got to testify, as he clearly wanted to, and the only testimony the jury heard from him characterized him as a liar. The court was right to grant relief.

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[152] *State v. Reyes*, 2016 WL 358613 at *6-7 (Del. Super.).
[153] D.R.E. 404(a), 404(a)(1).
[154] D.R.E. 608(a), 608(b).

<u>CLAIM III:</u> DENIED. THE POSTCONVICTION JUDGE DID NOT ERR IN FINDING THAT MR. REYES WAS PREJUDICED BY THE DELAY IN THE CABRERA SENTENCING AND THAT CABRERA'S EXCULPATORY EVIDENCE SHOULD HAVE BEEN ADMITTED AT TRIAL.

Question Presented

Whether the Superior Court properly found that Cabrera's unavailability due to the delay in his sentencing prejudiced Mr. Reyes, and that trial counsel was ineffective for failing to present Cabrera's admissible testimony.[155]

Standard and Scope of Review

This Court reviews the Superior Court's decision on a motion for postconviction relief for abuse of discretion.[156] A *de novo* standard is applied to legal and constitutional questions.[157]

Merits

The postconviction court correctly found that codefendant Luis Cabrera was unavailable at Mr. Reyes' trial due to a lengthy delay in Cabrera's sentencing. Moreover, even if Cabrera was an unavailable witness, trial counsel failed to present his prior statements as evidence exculpatory to Mr. Reyes.

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[155] *State v. Reyes*, 2016 WL 358613 at *8, 18-19 (Del. Super.).
[156] *Ploof v. State*, 75 A.3d 840, 851 (Del. 2013).
[157] *Id.*

A. Cabrera Should Have Been an Available Witness.

There was no reason to delay Mr. Cabrera's sentencing—it was apparently done so the codefendants could be sentenced together.

As explained in the Facts section, Cabrera told an investigator in August 1997—even though Mr. Reyes had implicated him in the Otero murder—that Mr. Reyes was not responsible for the Rockford Park murders. Cabrera explained the entire incident and blamed Neil Walker. There is some independent corroboration for Cabrera's claim, in that Cabrera was charged and indicted for beating up Neil Walker two months later in anger that Walker had exposed him to suspicion.[158]

The delay in Cabrera's sentencing ensured that he would be an unavailable witness for the Reyes trial, and could invoke his privilege. Despite twice expressing to trial counsel his interest in testifying as the trial approached, on the advice of his own counsel he declined to do so.

B. Trial Counsel Were Ineffective for Failing to Seek Admission of Cabrera's Out of Court Statements.

Trial counsel considered calling the investigator to admit Cabrera's statement against interest, but decided it was inadmissible hearsay and did not think it "would ever see the light of day."[159] However, portions of Cabrera's statement would have been admissible in the event he was unavailable, having

[158] B1833.
[159] B681.

invoked his privilege.

To admit a statement against interest, the statement must "so far tend[ ] to subject the declarant to civil or criminal liability … that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true."[160] In the event the statement exposes the declarant to criminal liability and exculpates the accused, the statement may only be admitted if corroborating circumstances clearly indicate the trustworthiness of the statement."[161]

The State correctly cites the law establishing that only the inculpatory statements are admissible in that those are the ones that provide reliability.[162] But parsing the statement, there was plenty of information that was reasonably likely to produce reasonable doubt. According to Cabrera's statement, the following would have been admissible:

Cabrera and Neil Walker knew each other. They teamed up to buy marijuana from Brandon Saunders. Bad blood ensued when Saunders sold them fake marijuana. Saunders pulled a gun on Cabrera. Vaughn Rowe was present at the time. Cabrera ran away. But later, Walker picked up Cabrera in his truck, and the two went looking for the assailants. Cabrera and Walker got involved in another

[160] D.R.E. 804(b)(3)
[161] *Id*.
[162] *Op. Br.* at 38, *citing Smith v. State*, 647 A.2d 1083, 1088 (Del. 1994).

fight with the group, this time assaulting Vaughn Rowe. Two hours later, Walker came back to Cabrera and returned Cabrera's gun to him. (Cabrera is a convicted felon and prohibited from possessing firearms.)[163] Two months later, Cabrera assaulted Walker and was arrested, and pled guilty.

Even removing the non-exculpatory parts of Cabrera's statement to Kent, the evidence is helpful to Reyes. It provides motive evidence for Cabrera and Walker to kill the victims—they were duped in a drug deal and Cabrera was threatened with a weapon by Mr. Saunders. It puts a weapon in both Cabrera's and Walker's hands. It involves both Cabrera and Walker in two separate assaults involving Mr. Saunders and Mr. Rowe. And none of it involves Mr. Reyes.

Moreover, this version of events is wholly different than the version testified to by Sterling. Unlike Sterling's get-out-of-jail testimony, Cabrera's statement to the investigator lacks the taint of testifying in exchange for a benefit.

Mr. Reyes was prejudiced by trial counsel's abandonment of the idea of putting the investigator on the stand to admit the portions of Cabrera's statement that were against his interest. Trial counsel knew that Sterling's testimony was coming, and should have left no stone unturned in disparaging his credibility. Cabrera's statement, given in 1997, close to the time of the homicides, and without the expectation of benefit, would have given the jury a different narrative to

[163] B2184.

consider besides Sterling's story that he supposedly overheard Mr. Reyes tell Galindez. In a capital murder case, it is deficient performance to fail to introduce any evidence that is reasonably likely to foster reasonable doubt, in furtherance of an objective to spare the client from the ultimate penalty. Trial counsel's performance here was deficient in a manner that prejudiced Mr. Reyes; the postconviction judge was correct in so finding.

<u>CLAIM IV:</u> DENIED. THE POSTCONVICTION JUDGE CORRECTLY FOUND THAT RODERICK STERLING'S "HIGHLY SUSPECT"[164] TESTIMONY VIOLATED MR. REYES' CONSTITUTIONAL RIGHTS AND THAT MR. REYES' WAS PREJUDICED BY HIS COUNSEL'S PERFORMANCE.

Question Presented

Whether the Superior Court abused its discretion in finding that Luis Reyes' constitutional rights were violated by Sterling's testimony, that the State committed a *Brady* violation, and that trial counsel was ineffective.

Standard and Scope of Review

This Court reviews the Superior Court's decision on a motion for postconviction relief for abuse of discretion.[165] A *de novo* standard is applied to legal and constitutional questions.[166]

Merits

As set forth in the Facts section, Roderick Sterling, a child rapist looking for a deal, was the State's star witness against Reyes. The sentencing judge called Sterling's testimony the "most significant"[167] evidence against Mr. Reyes; even that is an understatement. Trial counsel got the transcript of Sterling's 1998 statement the night before he testified, and it is evident from the trial transcript that

[164] *State v. Reyes,* 2016 WL 358613 at *8 (Del. Super).
[165] *Ploof v. State*, 75 A.3d 840, 851 (Del. 2013).
[166] *Id.*
[167] *State v. Cabrera and Reyes*, 2002 WL 484641 at *8 (Del. Super.); B2179.

counsel was ineffective in his cross-examination of Sterling. Moreover, counsel failed to make a proper hearsay objection, failed to request a missing evidence instruction, and failed to hold the State to its *Brady* obligations. The State violated *Brady* by not providing information in its possession regarding Sterling's drug use. Finally, Sterling's testimony has now been discredited by his own 2008 statement. For all these reasons, the postconviction judge properly found that Mr. Reyes' constitutional rights were violated and granted postconviction relief.

A. Sterling's 2008 Statement[168] Undermines Confidence in the Outcome of the Trial, and the Postconviction Judge Properly Granted Relief.

Sterling's statement to the investigator has been in this record since 2009, when it was an exhibit to the Second Amended Motion. On two occasions, postconviction counsel filed motions to depose Sterling. The State opposed both times, and the trial judge denied the motions. The State now asserts that those rulings are "law of the case," and that the postconviction judge somehow erred in considering the 2008 interview, which is in the record.

The 2008 interview is not law of the case under any stretch of the definition. Given Sterling's revelations, the motions were wrongly decided. The 2008 interview, among other things, establish that his testimony was inadmissible hearsay and violated Mr. Reyes' right to confront Galindez. Moreover, the trial

[168] B2578-2591.

judge knew that Sterling was deported and could not be brought to a court in Delaware. Sterling got a deal that sent him permanently home to Jamaica, to the detriment of Mr. Reyes' ability to develop the record of constitutional violations. The trial judge committed error in denying the motion. Moreover, the motion for reargument should have been granted when Galindez swore by affidavit that he and Reyes spoke in Spanish and that Sterling did not speak Spanish.

The fact that the State did not want to put Sterling under oath and cross-examine him is not the law of the case; it is the fact of the case. The State has no basis for faulting the judge for considering the 2008 interview, which is in the record and which the State made no attempt to strike from the record.

Sterling's statement makes clear that Galindez was the true declarant. Sterling overheard one or two conversations in Spanish and it was Galindez who provided the details. Mr. Reyes' right to confrontation was violated, undermining the fundamental legality, reliability, integrity, and fairness of this trial.

B. The court correctly found that the State committed a Brady violation; trial counsel was also ineffective for failing to request Brady material.

The State correctly sets forth the legal standard for a *Brady* violation: impeachment, willful or inadvertent suppression, and prejudice.[169] All three conditions are met here. Sterling's drug addiction at the time he perceived the

[169] *Op. Br.* at 44, *citing Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Atkinson v. State*, 778 A.2d 1058, 1062 (Del. 2001).

events, pled guilty to raping his 7 year-old niece, and at the time he testified, is clearly impeachment evidence.[170]

The State contends that the postconviction judge relied solely on the Sterling PSI, which the trial judge said he would not consider.[171] But the record contains multiple instances of the State being aware of potential *Brady* material related to Sterling's drug addiction. The State knew as early as January 1998, when he told the detective that he needed counseling and a drug rehab program.[172] The State knew that on January 29, 1999 Sterling was sentenced and blamed his behavior on his drug and alcohol addiction.[173] The State knew that the judge ordered Sterling to undergo a substance abuse and mental health evaluation.[174] And because the prosecutor assigned to the Sterling rape case reviewed the presentence report (PSI), the State was aware that he used marijuana, crack, heroin, and drank alcohol daily.[175] Under *Brady*, the prosecutor must disclose all relevant information obtained by the police or *others in the Attorney General's Office* to the defense. That entails a duty on the part of the individual prosecutor to *learn of any favorable evidence* known to the others acting on the government's behalf in the

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[170] *See, e.g., Capano v. State*, 781 A.2d 556, 649 (Del. 2001)(holding that evidence of witness' drug purchases and use were *Brady* material, but finding no violation as the evidence came in through other witnesses).
[171] *Op. Br.* at 45.
[172] B2383-2384.
[173] B2068.
[174] *Id.*
[175] B2021.

case, including the police.[176]

Although *Brady* obligations are self-executing and do not require a request from the defense, trial counsel was ineffective for failing to hold the State to its obligations. They were given Sterling's 1998 statement. They had easy access to Sterling's sentencing transcript and order. And Mr. Pedersen testified that he "would be real surprised if I did not go and look at the PSI."[177] All these documents indicated that the State had documents in its possession establishing that Sterling was undergoing and seeking treatment for his drug addiction.

Both the State's *Brady* violation and trial counsel's deficient performance prejudiced Mr. Reyes, because the information about Sterling's drug addiction was material and important for impeachment. Prejudice is established here because there exists "a *reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[178] As this Court has held, "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence."[179]

The postconviction judge's comparison to *Starling v. State*[180] is most apt. In

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[176] *Wright v. State,* 91 A.2d 972, 987-88 (Del. 2014)(emphasis added).
[177] B687. The PSI, which Ms. Aaronson obtained by a signed release from Sterling, authorizing her to obtain Sterling's attorney's file. B688. Appellee's Appendix includes all documents from the evidentiary hearing, including the PSI, which has been redacted. B2018-B2068.
[178] *Wright v. State,* 91 A.2d 972, 988 (Del. 2014)(emphasis in original).
[179] *Starling v. State,* 130 A.3d 316, 334 (Del. 2015), *citing Michael v. State,* 529 A.2d 752, 756 (Del. 1987).
[180] 130 A.3d 316 (2015).

Starling, as here, it was the State's "primary witness" who was the subject of the *Brady* violation.[181] In *Starling,* as here, the State failed to provide impeachment evidence: the State listed the witness Gaines' capias and VOP charge as "pending" when in fact they has been dismissed at the request of the prosecutor.[182] In *Starling,* as here, the subject of the *Brady* violation was the State's main witness and there was no physical evidence linking the defendant to the murders.[183]

The fact of Sterling's addiction to serious drugs and alcohol was crucial for the jury to know. The entire trial rode on Sterling's credibility. The State argued strenuously to the jury that Sterling was to be believed. (As will be noted later, the defense made it easier by failing to establish at trial that Galindez was an associate of Cabrera in prison.) The State's failure to disclose *Brady* information, and trial counsel's failure to request it, caused such prejudice to Mr. Reyes that there can be no confidence in the outcome of this trial; the postconviction judge properly vacated the convictions.

[181] *Id.* at 321.
[182] *Id.* at 330.
[183] *Id.* at 334.

C. Trial Counsel's Performance in Preparing For and Conducting the Cross-Examination of Sterling Was Deficient and Caused Prejudice to Mr. Reyes.

As this Court has held, the touchstone for prejudice under either *Strickland* or *Brady*, is the fairness of the trial.[184] To establish *Strickland* [185] prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[186] Moreover, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[187]

Trial counsel's failure to use readily available information about Strickland (interview transcript, sentencing transcript, PSI) seriously damaged counsel's ability to effectively impeach him. Counsel's failure to seek out *Brady* material regarding his drug addiction and treatment compounded the error. But there were other serious inadequacies in trial counsel's performance regarding Sterling.

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[184] *Id.*
[185] *Strickland v. Washington*, 466 U.S. 668 (1984).
[186] *Id.* at 694.
[187] *Cooke v. State*, 977 A.2d 803, 840 (Del. 2009)(quoting *Strickland*, 466 U.S. at 686).

1. The contents of the missing "Sterling letter" were inadmissible hearsay, and the jury should have been given a missing evidence instruction.

The letter from Sterling (or Sterling/Galindez) to Sterling's lawyer was crucial in that it formed the basis for his statement and Sterling's testimony. Having been given Sterling's 1998 statement the night prior to his testimony, trial counsel should have been on high alert, because the letter is from Sterling *and* Galindez.[188] Moreover, Sterling told the detective that he and Galindez discussed the "overheard" conversation "on several occasions" and "repeatedly."[189]

Trial counsel never got the letter. It has never been produced even up until this appeal. Given the contents of the 1998 statement, counsel should have moved *in limine* to exclude Sterling's testimony, based as it was on repeated conversations with Galindez. But when Sterling testified that Galindez wrote the letter, trial counsel's objection was inadequate. The trial judge, *sua sponte*, decided the letter was not hearsay as it had been adopted by Sterling, even though the prosecutor agreed the letter was hearsay if Galindez did not testify.[190]

The postconviction judge properly found that the contents of the letter should have been excluded as inadmissible hearsay.[191] Adoptive admissions are

[188] B2383.
[189] B2391-2382.
[190] B140-141.
[191] *Reyes*, 2016 WL 358613 at *17.

admissible as to parties only.[192] Trial counsel was ineffective for failing to make this objection, and appellate counsel was ineffective for failing to raise this claim. The specific contents and the authorship of the letter was of crucial importance to effective cross-examination of Sterling. (Sterling admitted in 2008 that the letter was written by another inmate,[193] which is not surprising because Galindez did not speak much English at the time.)[194] The letter was clearly a required disclosure under *Brady* and Rule 16, and the State had a duty to preserve it.[195]

Whether Mr. Reyes was entitled to a missing evidence instruction depends on "(1) the degree of negligence or bad faith involved, (2) the importance of the lost evidence, and (3) the sufficiency of other evidence adduced at trial to sustain the conviction."[196] The record is silent as to why the letter was never produced.[197] But the record is abundant as to the crucial importance of it, and the lack of any evidence to sustain the conviction. As such, Mr. Reyes was entitled to a missing evidence instruction.[198] The failure of counsel to seek one and appellate counsel to raise the claim undermine any confidence in the outcome of the trial.

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[192] *D.R.E.* 801(d)(2)(B).
[193] B2576.
[194] B2337.
[195] *State v. Deberry*, 457 A.2d 744, 750 (Del. 1983).
[196] *Id.*
[197] The State's partial quote from the letter as read by the detective does not shed any light on who wrote it or whether it is the entirety of the letter, or who signed the letter. *Op. Br.* at 47.
[198] *Reyes*, 2016 WL 358613 at *18.

2. The postconviction judge correctly held that trial counsel's failure to call Galindez as a witness was "objectively unreasonable."[199]

The State calls the judge's finding that trial counsel's performance in not calling Galindez "specious,"[200] but the record establishes otherwise. Challenging Sterling's testimony was critical and Galindez gave counsel the means to do it. Simply putting him on the stand and establishing he was not fluent in English would have undermined Sterling. Moreover, the questions counsel should have asked Galindez would have impeached Sterling no matter what the answers were. Did Galindez know and associate with Cabrera? If yes, it gives Galindez a source for the information he provided to Sterling. If no, it contradicts Sterling's testimony.[201] Did Galindez write the letter and if not, who did? If Galindez admits that he wrote the letter, it bolsters the hearsay argument and causes the jury to question the source of the information. If Galindez denies it, that contradicts Sterling[202] and further strengthens the hearsay argument because the drafter would be unknown. Could Galindez speak and write English? Did Galindez speak to Mr.

[199] *Id.* at *18.
[200] *Op. Br.* at 48.
[201] B150.
[202] B140.

Reyes in Spanish[203] or English?[204] These are basic questions that should have been asked. Juxtaposed against Sterling's testimony, Galindez would have helped either way. Trial counsel's failure to call Galindez creates a reasonable probability of a different outcome.

The now-discredited testimony of Roderick Sterling, and trial counsel's ineffective handling of him, undermined the legality, reliability, integrity, and fairness of the trial. It was not error for the postconviction judge to vacate Mr. Reyes' convictions, predicated as they were on Sterling's testimony.

[203] The State continues to assert that Mr. Reyes spoke little Spanish, *Op. Br.* at 49, but the record reflects otherwise. He spoke enough Spanish to understand what Cabrera was saying to Mr. Otero (B2402). Moreover, his cousin Rebecca Reyes testified at the evidentiary hearing that in the house, the family primarily spoke Spanish, and that they always spoke Spanish to their grandmother, who does not speak English. B729.

[204] Ironically, the State claims Galindez should have been called as a witness 15 years after the trial, despite arguing as to Sterling that "evidence from faded memories eleven years after an event does not constitute changed circumstances."[204] But his affidavit makes clear that he and Mr. Reyes spoke in Spanish and Sterling did not speak Spanish. B2337.

<u>CLAIM V:</u> DENIED. THE TRIAL COURT DID NOT ERR IN FINDING THERE WAS INADEQUATE CONSIDERATION OF MR. REYES' YOUTH AND BRAIN DEVELOPMENT AT SENTENCING; TRIAL COUNSEL WAS DEFICIENT FOR FAILING TO PRESENT THIS EVIDENCE TO THE JURY.

Question Presented

Whether the Superior Court erred in finding that Mr. Reyes' sentencing did not sufficiently consider his age and brain development, and whether trial counsel was ineffective for failing to present this evidence to the jury.[205]

Standard and Scope of Review

This Court reviews the Superior Court's decision on a motion for postconviction relief for abuse of discretion.[206] A *de novo* standard is applied to legal and constitutional questions.[207]

Merits

The Superior Court properly considered evolving standards of decency in finding that there was inadequate weight placed on Mr. Reyes' youth as it relates to brain development. Trial counsel, despite being aware of the science in 2001, inexplicably failed to take steps to present this crucial information to the jury.

[205] *State v. Reyes*, 2016 WL 358613 at *10-17 (Del. Super.).
[206] *Ploof v. State*, 75 A.3d 840, 851 (Del. 2013).
[207] *Id.*

A. The Judge Properly Raised This Claim to Prevent Injustice.

The State criticizes the postconviction judge for its purported legal standard of simply disagreeing with the trial judge,[208] an assertion not borne out by the record. The postconviction judge considered jurisprudence from before 2001, then considered evolving standards of decency since then. Recognizing that "youth is more than just a chronological fact,"[209] the postconviction judge appropriately found, in its exercise of discretion to prevent injustice, that the sentencing in this case was not constitutionally sound.

Ultimately, the postconviction judge found that the mitigation presentation failed to present evidence of youth and brain development as mitigators, rendering the sentence constitutionally deficient.[210] Whether expressed as a constitutionally infirm sentencing or as a failure of trial counsel to present this evidence, the result is the same: Mr. Reyes' right to due process was violated.

B. Trial Counsel's Strategic Decision that Evidence of Adolescent Brain Development Would Not Get Much "Traction" Was Unreasonable.

It is axiomatic that "investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."[211]

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[208] *Op. Br.* at 58-59.
[209] *Eddings v. Oklahoma,* 455 U.S. 104, 115-116 (1982).
[210] *State v. Reyes,* 2016 WL 358613 at *15.
[211] *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)(emphasis in original).

Abandoning potential mitigation avenues makes "a fully informed decision with respect to sentencing strategy impossible."[212] Yet when asked why he did not pursue mitigation establishing that the adolescent brain is not fully developed in judgment, reasoning, and impulse control, trial counsel responded, "I have no specific recollection, but I may have concluded that it was an issue that was not likely to get much traction."[213]

1. Counsel's failure to order a neuropsychological evaluation ultimately deprived the jury and sentencer of important mitigation evidence.

Given counsel's duty to discover all reasonably available mitigation, counsel should have had a neuropsychological examination performed. Had they done so, they would have had important mitigation evidence to present about the developing brain in general and about Mr. Reyes in particular.

Jonathan Mack, PsyD, is a board-certified neuropsychologist who has worked on many capital cases and testified in Delaware and elsewhere.[214] As he explained, a neuropsychological evaluation is "the gold standard for determining whether or not there might be some underlying neurocognitive or cerebrocortical problems that might have impacted the individual's behavior during the commission of a violent crime."[215] Dr. Mack's 2007 evaluation consisted of an

[212] *Wiggins*, 539 U.S. at 527-528.
[213] B742.
[214] B916.
[215] B917.

extensive records review, a clinical interview, and the administration of a battery of neuropsychological tests.[216]

Dr. Mack's postconviction neuropsychological assessment revealed several findings. The first is that Mr. Reyes was diagnosed with a mild neurocognitive disorder, colloquially known as brain damage.[217] Dr. Mack noted the possibility of the significant *in utero* marijuana exposure as a possible cause of the brain damage. He noted that the use of marijuana by the mother causes changes and damage to the prefrontal cortex and amygdala.[218] These two areas of the brain are the most involved with the "ability to normally and appropriately conduct oneself in light of rules and law and in terms of being able to anticipate consequences and inhibit an inappropriate action," according to the literature.[219] Dr. Mack also noted that the car accident at age 15 or 16 when Luis' head struck a car windshield and broke it may have been a contributing factor.[220]

Related to his brain damage diagnosis was Dr. Mack's findings with respect to executive function. The executive function occurs in the frontal lobe of the brain and pertains to the "ability to modulate and control emotions and behaviors, ability to anticipate consequences, and ability to stop oneself from making or doing

[216] *Id.* Dr. Mack's expert report is at B1506-1540.
[217] B921-922.
[218] B952.
[219] *Id.*
[220] B954.

an action that would be likely to get the individual in trouble."[221] In essence, executive function relates to impulse control.[222] Dr. Mack pointed out that the vast body of literature demonstrates that the executive functions of the brain are last to develop, and that the frontal lobes are not mature until age 25.[223] Dr. Mack explained that the synaptic connections in the executive frontal cortex are not fully online until about age 25, according to the research. He said that even though society recognizes 18 years old as adult, contemporary neuroscience does not.[224]

Although Dr. Mack did not have the opportunity to evaluate Mr. Reyes at an earlier age, even his testing at age 29 revealed moderately impaired executive function, scoring at the 6th percentile rank among the general population.[225] In Dr. Mack's opinion, due to the nature of brain development, Mr. Reyes' executive functions would have been worse in 1996, when Mr. Reyes was 18.[226] Also impacting brain function was the fact that Mr. Reyes' full scale IQ was in the 18th percentile among the general population.[227]

Mr. Reyes' traumatic upbringing impacted his brain development. Dr. Mack testified that when a child is exposed to fear, instability, violence, and lack of

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[221] B940.
[222] B941.
[223] B941. Mr. Mack testified that in 2001, the literature established 23 as the upper limit, but it had been revised upwards.
[224] B945.
[225] B942.
[226] B946.
[227] B928.

attachment figures, "this tends to bathe the developing brain in cortisol," and can "help set up maladaptive patterns of behavior and personality as one gets older."[228] Dr. Mack opined that the trauma in Mr. Reyes' life caused him anxiety and insecurity, and "a high tendency to attach to any figure that is likely to give him ongoing positive attention."[229] He characterized the phenomenon as "looking for love in all the wrong places."[230] Dr. Mack noted the numerous negative attachment figures, like Mr. Reyes' uncles, as well as the trauma arising out of abuse suffered at the hands of his mother.[231]

2. Mr. Reyes was prejudiced by the lack of this crucial mitigating evidence.

Due to counsel's deficient performance, the jury and sentencing judge never heard or considered the role brain development has on youthful behavior. It was absolutely essential to present this evidence, not just as a mitigator, but as a rebuttal to the aggravator of the Otero homicide.

Instead, trial counsel chose to portray Mr. Reyes as "hard wired for violence" and a "teenage murderer."[232] By latching on to this negative portrayal, by strategic choice, trial counsel failed Mr. Reyes. By never having him evaluated by a neuropsychologist, who could have provided some real insight into the

[228] A957.
[229] B957-958.
[230] B958.
[231] B958-959, 963.
[232] B644.

science of the developing brain, counsel failed Mr. Reyes. And they failed him also by not presenting specific evidence of Mr. Reyes' brain function.

The sentencing judge who imposed the death sentence and the nine jurors who voted for death did so without a complete picture of Mr. Reyes. They performed their duties without having enough information to assess Mr. Reyes' moral culpability. Confidence in the proceedings leading to the sentence of death is undermined, and the postconviction judge correctly found that constitutional standards were not met.

<u>CLAIM VI:</u> DENIED. THE POSTCONVICTION JUDGE CORRECTLY FOUND THAT COUNSEL WAS INEFFECTIVE IN THE PENALTY PHASE, CAUSING PREJUDICE TO MR. REYES.

Question Presented

Whether the postconviction court abused its discretion in finding that trial counsel's ineffective performance in multiple aspects of the penalty phase of Mr. Reyes' trial caused prejudice to Mr. Reyes to the extent that a reasonable probability that the outcome would have been different.[233]

Standard and Scope of Review

This Court reviews the Superior Court's decision on a motion for postconviction relief for abuse of discretion.[234] A *de novo* standard is applied to legal and constitutional questions.[235]

Merits

Trial counsel were ineffective in multiple respects in the penalty phase. Their mitigation strategy—which deliberately focused only on negatives and risk factors for violence—was an unreasonable strategic decision. The strategy of introducing only negative aspects of Mr. Reyes deprived the jury of hearing significant mitigating evidence. Counsel failed to protect Mr. Reyes by objecting to multiple instances of prosecutorial misconduct. And counsel acquiesced to—and even

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[233] *See, State v. Reyes,* 2016 WL 358613 at *21-37 (Del. Super.).
[234] *Ploof v. State,* 75 A.3d 840, 851 (Del. 2013).
[235] *Id.*

joined in—the State's improper rebuttal of Mr. Reyes' allocution. For these reasons, Mr. Reyes suffered prejudice within the meaning of *Strickland*, undermining confidence in the outcome.

A. Applicable Legal Standards.

1. Standards Governing Trial Counsel's Performance.

Under the Sixth Amendment, counsel's performance in a mitigation investigation is "measured against an 'objective standard of reasonableness,' 'under prevailing professional norms.'"[236]

2. Counsel's duty to conduct a thorough mitigation investigation.

In any capital case, a defendant has wide latitude to raise as a mitigating factor "any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[237] Mitigation humanizes the defendant and allows the jury to make a fair assessment of his moral culpability.[238] That broad mandate makes a thorough investigation of possible mitigation evidence absolutely essential to effective performance. The case law and the professional norms consistently recognize that

[236] *Rompilla v. Beard,* 545 U.S. 374, 380 (2005)(quoting *Strickland,* 466 U.S. at 688; *Wiggins,* 539 U.S. at 521).
[237] *Eddings v. Oklahoma,* 455 U.S. 104, 110-112 (1982).
[238] *See, Porter v. McCollum,* 130 S.Ct. 447, 449 (2009)(holding that counsel's failure to investigate and present evidence of capital defendant's military service; result: the jury "heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability.").

capital counsel have an "obligation to conduct a thorough investigation of the defendant's background" for mitigating evidence.[239] Of course, sound strategic decisions cannot be based on an inadequate or cursory investigation; these decisions are only "strategic choices made after less than complete investigations are [only] reasonable . . . to the extent that reasonable professional judgments support the limitations on investigations."[240]

"Thorough" in this context means that "investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."[241] The attorney must pursue all avenues of mitigation even in the face of recalcitrance by the client, nor may counsel fail to conduct an investigation because of the client's desire not to present mitigating evidence.[242]

A minimal, rudimentary mitigation investigation will simply not suffice to protect a capital defendant's rights.[243] Failing to "present possibly mitigating evidence cannot be justified when counsel have not 'fulfilled their obligation to

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[239] *Williams*, 529 U.S. at 396 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, at 4-55 (2d ed. 1980); *see also Wiggins*, 539 U.S. at 522.
[240] *Strickland*, 466 U.S. at 690-91.
[241] *Wiggins*, 539 U.S. at 524 (emphasis supplied in *Wiggins*); *see also Rompilla*, 545 U.S. at 387, n. 7.
[242] *See, e.g., Carter v. Bell*, 218 F.3d 581, 596 (6th Cir. 2000) ("The sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility.").
[243] *Wright*, 653 A.2d at 303.

conduct a thorough investigation of the defendant's background.'"[244] Further, the *Wiggins* court held, "In assessing the reasonableness of an attorney's investigation, [a] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."[245]

3. The legal standard for prejudice.

Prejudice occurs when the confidence in the penalty phase's outcome is undermined.[246] In other words, prejudice is established when the totality of the evidence "more likely than not" would have changed the outcome.[247] The Supreme Court has explained that "[t]o assess that probability [of a different outcome under *Strickland*]," we consider "the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the [post-conviction] proceeding" and "reweigh it against the evidence in aggravation."[248] This prejudice standard applies "regardless of how much or how little mitigation evidence was presented during the initial penalty phase."[249]

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[244] *Outten*, 464 F.3d at 419.
[245] *Wiggins*, 539 U.S. at 527.
[246] *Strickland*, 466 U.S. at 694.
[247] *Id*.
[248] *Williams*, 529 U.S. at 397-98.
[249] *Sears v. Upton*, 130 S.Ct. 3259, 3266-67 (2010).

B. Trial Counsel's Strategy to Focus Only on Negatives and Risk Factors for Violence Was Not Professionally Reasonable and Caused Prejudice.

Trial counsel explained the mitigation strategy in this way: "we were going to focus on, instead of the positive aspects of Luis Ryes, the negative things that happened to him in his life."[250] "I do recall the defense strategy at the penalty phase being we wanted to show how closely this defendant matched the criteria for future violence in the Department of Justice strategy."[251] And counsel followed through on that strategy. It affected their investigation, their choices of witnesses, and their arguments. Ultimately, counsel argued to the jury that Mr. Reyes was "hard wired for violence"[252] and that Cabrera was "the straw that broke the camel's back."[253]

1. The defense experts helped the State and hurt Mr. Reyes.

Caroline Burry, PhD is a social work expert who assisted trial counsel with the mitigating evidence in this case.[254] She was retained by the defense to conduct a family assessment and place Mr. Reyes' family history in context.[255] In preparation for her testimony, she interviewed family members, including Mr. Reyes' mother, Ruth Comeger, his grandmother, Candida Reyes, his aunt Luz

[250] B737.
[251] B734.
[252] B644
[253] *Id.*
[254] B572.
[255] B575.

Diaz, Demaris Reyes, and his girlfriend, Elaine Santos. She also interviewed Mr. Reyes as well as his daughter Deserie and stepson Raymond.[256] She noted that she needed criminal records on the entire family and medical records,[257] but they were never obtained.[258]

Dr. Burry presented a large genogram at trial to point out themes and consistencies within the Reyes family.[259] One such common theme was incarceration and criminal activity. She noted in orange the family members who had criminal records, such as Luis' uncle Michael.[260] She used another color to denote those family members with histories of substance abuse. Another color highlighted all the cousins who were raised by people other than their parents.[261]

Next, Dr. Burry went on to discuss a Department of Justice study called Predictors of Youth Violence, which promulgated a number of risk factors predictive of violent behavior.[262] She expressed the opinion that her study of Mr. Reyes' life revealed a "strikingly large" number of risk factors predictive of violence:[263]

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[256] B575.
[257] B1897.
[258] B735,
[259] B576.
[260] B577.
[261] *Id.*
[262] A578. Hawkins, Hennenbolil, Farrington, Brewer, Catalano, Harachi and Cotham, Juvenile Justice Bulletin (April 2000), *Predictors of Youth Violence,* Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice.
[263] *Id.*

- Individual Factors: hyperactivity, aggressiveness, early onset of violent behavior.[264]

- Family Factors: parent criminality, child maltreatment, low parental involvement, poor family bonding, parental attitude towards substance abuse.[265]

- School Factors: low bonding to school, truancy, frequent school transitions.[266]

- Peer Factors: delinquent peers.[267]

- Community Factors: community disorganization, availability of drugs and firearms, exposure to violence.[268]

- Health Factors: low birth weight, teenage mother, family violence.[269]

Dr. Burry testified that "Mr. Reyes' family history revealed a number, in fact, a strikingly large number, of risk factors predictive of violence."[270]

In sum, Dr. Burry's testimony expressed the opinion that Luis Reyes exhibited in his background the majority of the risk factors that predict violent behavior, while having few established protective factors in place. As she put it, "he was at a high risk and did in fact become a violent young person."[271]

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[264] B581.
[265] *Id.*
[266] B582.
[267] B583.
[268] *Id.*
[269] *Id.*
[270] B578.
[271] B585.

The State's cross-examination exposed the point Dr. Burry was unwittingly making to the jury: that the DOJ risk factors were pretty accurate in Mr. Reyes' case because he in fact became a violent adult.[272] The State also pointed out through cross-examination that any protective factors that might have assisted Mr. Reyes came too late to protect the victims of the homicides.[273] Dr. Burry's testimony opened the door for the State to argue in closing: "In case the defendant's three murders weren't enough to convince you of this fact [risk for future violent behavior], ladies and gentlemen, Dr. Burry's testimony should convince you that defendant is a very dangerous person and he will be for as long as he lives."[274]

Harris Finkelstein, PsyD. evaluated Mr. Reyes and testified. Like Dr. Burry before him, his evaluation was hampered by a lack of record gathering by trial counsel. He did not review any medical or educational records, because they were not provided.[275] He just spoke to Dr. Burry and trial counsel[276] and reviewed Mr. Reyes' PSI and some Family Court records.[277]

Dr. Finkelstein's diagnosis was that Mr. Reyes struggled with two opposing

[272] B588.
[273] B589.
[274] B630.
[275] B596.
[276] *Id.*
[277] B1596.

personalities: one confident and sure, the other doubtful about himself. [278] He also opined that emotions and connecting with other people are difficult for him[279] Dr. Finkelstein also testified that Mr. Reyes has ADHD and would do better in a structured environment with rules in place.[280]

Like Dr. Burry, he was skewered on cross-examination. He had to admit that he did not have full confidence he received all the factual history,[281] and further had to admit that his diagnosis was "based mostly on defendant data utilizing just a few selected points from history."[282]

More importantly, Dr. Finkelstein had to admit on cross what was not brought out on direct: his diagnosis of personality disorder not otherwise specified with narcissistic and antisocial features.[283] Moreover, Dr. Finkelstein's opinion that despite Mr. Reyes' mostly minor prison violations, he would be "chronically vulnerable" to committing impulsive and antisocial acts.[284] Finally, the doctor admitted that he doubted Mr. Reyes' credibility: "I didn't necessarily accept that [Mr. Reyes' self-assessment] as the truth."[285] When asked if a person who has committed three murders is not typically aggressive in a way that would lead to

[278] B593-594.
[279] B593.
[280] B594.
[281] B596.
[282] B600.
[283] B59-600.
[284] B603.
[285] B604.

murder, Dr. Finkelstein replied, "I think that's what he was trying to present to me."[286]

In closing, as with Dr. Burry, the State used his testimony to appeal for a death sentence: "What Dr. Finkelstein said, boiled down to its essence, is that this man who committed three murders has a personality disorder." "Dr. Finkelstein paints the picture of a dangerous man who can't control his impulses." "He is a danger to the prison community. And if you choose, you may use Dr. Finkelstein's testimony on that point as an aggravating circumstance."[287]

The State's only experts were hamstrung by lack of record gathering, minimal to no interviewing of historians, and lack of preparation. Dr. Burry's testimony portrayed, in cold, statistical fashion, her theory that Mr. Reyes was person predisposed to commit violence. Dr. Finkelstein was worse. He forsook his opinions when cross-examined, agreeing that Mr. Reyes had antisocial proclivities, rather than rebutting the assertion that Mr. Reyes had antisocial personality disorder. Finally, he characterized Mr. Reyes as a faulty or disingenuous historian. Both experts provided the State with a bonanza for making their case that Mr. Reyes should be put to death for killing three people.

The postconviction judge correctly found that trial counsel's deficient

[286] *Id.*
[287] B630.

performance was constitutionally prejudicial to Mr. Reyes. Our constitution does not call for perfect or exemplary performance, but it does require reasonably competent performance. Trial counsel fell short of that standard.

2. The three nonexpert penalty phase witnesses were insufficient to give the jury a complete picture of Mr. Reyes' life.

Only three nonexperts testified for Mr. Reyes in the penalty phase. Through an interpreter, Candida Reyes, Luis' grandmother, related information about Luis' life. Luis did not know his father. She raised Luis because his mother, Ruth, was always out partying. Luis' aunt Luz assisted with the care of Mr. Reyes.[288] Eventually, Ruth married Keith Comeger, and for a time, Luis lived with them. But the Comegers used drugs and Comeger beat Ruth.[289] Eventually, Ruth left Comeger and brought Luis back to live with his grandmother.[290]

Luis had no good male role models. He did not know his father, and his uncles, Michael and Israel, abused drugs.[291] Eventually, Ruth Comeger ended up in a relationship with Luis Cabrera, although they did not marry. She left Luis with his grandmother and took up with Cabrera. The relationship did not last.[292] At some point in his teens, Luis eventually went to live with Cabrera, even though

[288] B607.
[289] B608.
[290] *Id.*
[291] *Id.*
[292] B609.

Cabrera and Luis' mother were no longer together.[293]

Ms. Reyes testified she visits Mr. Reyes, during which they communicate in Spanish.[294] She discussed her close relationship with his children and the significant impact an execution would have not only on her but on Luis' children.[295]

Elaine Santos, Mr. Reyes' girlfriend, testified about her relationship with Mr. Reyes and the impact his execution would have on her and the children.[296] Finally, her 12 year-old son, referring to Mr. Reyes as "dad," described their good relationship he "would not feel good" if he could no longer see Mr. Reyes.[297]

3. Trial counsel's negative-only strategy deprived the jury of hearing important mitigation witnesses.

The State asserts that the many mitigation witnesses from the evidentiary hearing would not have assisted Mr. Reyes at trial, because their testimony "would have been inconsistent with the defense strategy."[298] Actually, the witnesses proved that the defense strategy was unreasonable. No witness exemplified this more than Mr. Reyes' mother, Ruth Comeger. Trial counsel testified that he believed, "we're better off saying his own mother didn't show up."[299] Ruth Reyes

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[293] B609.
[294] *Id.*
[295] B610.
[296] B621.
[297] B623.
[298] *Op. Br.* at 75.
[299] B740.

testified she was told by Mr. Capone not to attend the trial, because "he wanted to…disgrace me as a bad mother, you know, and that would make him look good."[300] She followed trial counsel's advice and did not attend.

Ruth recalls being raised in a very strict household. If something occurred, the children would be lined up, and the guilty party would be beaten with a belt.[301] She carried this on in her discipline of young Luis. One form of punishment was making Luis kneel for long periods of time with his palms outstretched. She also beat him with a belt at times.[302]

Ruth smoked marijuana daily while pregnant with Luis. She testified that her doctor told her it was okay so long as she did not do so excessively.[303] She also tried to abort the pregnancy twice with a solution known as Goya Malt, which included castor oil.[304] Ruth's mother Candida was very upset with the teen pregnancy, and when Luis was born, Candida took Luis and Aunt Luz and moved to Delaware from Brooklyn.[305] She was bothered that she was not considered fit to parent Luis, but ultimately agreed that she was not able to care for him.[306]

Shortly after catching up with her son in Delaware, Ruth moved with Luis to

[300] B815.
[301] B816.
[302] *Id.*
[303] B817.
[304] *Id.*
[305] B818.
[306] *Id.*

Amsterdam, New York for about a year and lived with her brother Mike. Ruth at that time was using cocaine socially. It became a habit shortly thereafter.[307]

When she got back to Delaware, Ruth met and married Keith Comeger. The relationship was "a mess." Comeger, according to Ruth, was an alcoholic who also used crank. Comeger used Ruth as "a punching bag," and once threw Luis across the room. Ruth ended the marriage and moved back in with her mother.[308]

She next took up with Keith Powell for a short time, in a relationship that "was based on drugs."[309] She noted that she was looking for a "father replacement" for Luis, but the relationship only lasted a year and a half.[310]

Next, she met Luis Cabrera. She was with him for four years, beginning in about 1988.[311] Ruth knew Cabrera to be an enforcer for his father's numbers business. She did not know at the time, but she later learned, "I was living with a hit man."[312] Cabrera and Luis began doing everything together: played ball, went to movies, and went bowling, for example.[313] She felt she lost a little control of Luis as he spent more time with Cabrera. Eventually, Ruth found out that Cabrera was cheating on her, and the relationship ended. But Mr. Reyes and Cabrera

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[307] *Id.*
[308] B819.
[309] *Id.*
[310] *Id.*
[311] B820.
[312] B821.
[313] *Id.*

continued their relationship and ended up living together.[314]

Overall, Ruth testified that throughout Luis' childhood she was making bad choices and "got into drugs heavily and couldn't attend to him like a mother should."[315] She stated, "he was searching and reaching out to me. And I was so into myself that I couldn't even see that."[316] Ruth believes that if she was there as a mother, then Luis "would not be where he is right now."[317]

Other family members testified about Mr. Reyes' dysfunctional and chaotic upbringing and his exposure to negative role models. Cousin Rebecca Reyes testified that Luis worked at cousin Michael's restaurant, which was in reality a place for drug dealing and prostitution.[318] She also recounted an incident at a pool where Luis saved her from drowning.[319] Like everyone else in the family, she initially liked Cabrera and was happy Luis found a father figure.[320]

Aunt Luz Diaz helped raise Mr. Reyes because his mother was partying and using drugs.[321] Luz provided some insight into her family's strict upbringing; their father (Mr. Reyes' grandfather) was a religious missionary who was harsh and

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[314] B820.
[315] B822.
[316] *Id.*
[317] *Id.*
[318] B727.
[319] B728-729.
[320] B728. *See also*, Deborah Diaz, B744.
[321] B787.

strict with the children.[322] Having helped raise Mr. Reyes, Luz was an effective historian; she testified at length about the many places Mr. Reyes lived as a child, from his mother's various residences, to her mother's paramours, and at times being placed with other families altogether.[323]

Michael Reyes, Luis' uncle, was another significant figure in Mr. Reyes' life. In 1990, he opened his restaurant, El Caribe. Virtually all the family worked there at one time or another. Michael used the first floor as a restaurant and the second floor to cook crack cocaine for his flourishing drug business.[324]

During this timeframe, Michael remained close to Luis, whose mother Ruth was in the throes of her own addiction.[325] Michael, in addition to the drug trafficking, was also running 6 or 7 prostitutes and engaged in an extensive check forging criminal enterprise.[326]

Michael eventually became a full time drug dealer.[327] Luis' uncle Israel, was himself a heroin addict and a "kingpin" in Chester, Pennsylvania.[328] Virtually the whole Reyes family in the mid-90s was either using or selling drugs.

Michael has cleaned up and works for Connections trying to find jobs for

[322] B783.
[323] B791-792.
[324] B1061.
[325] B1062.
[326] B1063.
[327] B1065.
[328] B1066.

clients being treated there. He is a minister in the Salvation Army Church.[329] He will not blame Cabrera for his negative influence on Luis Reyes; rather, he blames himself: "God gave me a beautiful opportunity to provide a direction for Luis Reyes and I failed."[330] "I wish I could exchange the seat right now with him."[331]

Many other figures from Mr. Reyes' life came forward and testified as they would have at trial. These were witnesses who would have established Mr. Reyes' positive and redeemable characteristics. Most of them gave letters of support when Mr. Reyes was being sentenced for Mr. Otero's murder.[332] Trial counsel did not contact any of them, believing it was "strategically legitimate not to call somebody who wrote a letter at the first murder case for the second case."[333] He believed the cross examinations would go badly, and he specifically did not contact these witnesses because he wanted to "focus on, instead of the positive aspects of Luis Reyes, the negative things that happened to him in his life."[334]

Mr. Reyes' wrestling coach, George Lacsny, testified that Mr. Reyes was an excellent wrestler and a natural leader; he was the rare junior who was named captain of the team.[335] He suspected Cabrera's negative influence is what led him

[329] B1028-1029.
[330] B1076.
[331] *Id.*
[332] *See*, B1867-1880.
[333] B737.
[334] *Id.*
[335] B1136.

astray. Luis introduced Cabrera as his "father."[336] Victor Reyes (no relation), another coach and youth mentor, suspected Mr. Reyes' mother was on drugs and knew that Luis was in foster placements.[337] He helped get Mr. Reyes enrolled at A.I. DuPont,[338] where he flourished as a wrestler and student,[339] until his senior year, when things went downhill.[340] He testified, "If I would have got a little bit more involved, I don't think we would be here now.[341]

Paul Parets, a teacher at A.I. Dupont High School, saw Mr. Reyes as "an incredible, outgoing young man," who "was liked by everybody."[342] He lamented the "almost infinite possibilities for this young man" which are now gone.[343]Mr. Parets wrote in support of Mr. Reyes for the Otero case,[344] and probably would have testified on his behalf in the Rockford Park case. But he was never contacted by trial counsel.[345]

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[336] B1151.
[337] B759-760.
[338] B759.
[339] B761.
[340] B761-762.
[341] B762. The State argues in a footnote (fn. 149) that Victor Reyes would not have been helpful because he had a sex offense. But trial counsel, having not interviewed any of these witnesses, was in no position to make that call. Perhaps if trial counsel had interviewed potential witnesses, Victor Reyes would not have made the cut. But due to trial counsel's limited investigation, trial counsel could not make legitimate strategic choices.
[342] B916.
[343] B1104.
[344] B1867.
[345] B1109.

4. Postconviction experts provided crucial information that should have been presented at trial.

Jonathan Mack, PsyD, is a board-certified neuropsychologist.[346] As he explained, a neuropsychological evaluation is "the gold standard for determining whether or not there might be some underlying neurocognitive or cerebrocorical problems that might have impacted the individual's behavior during the commission of a violent crime."[347] Dr. Mack's evaluation consisted of an extensive records review, a clinical interview, and the administration of a battery of neuropsychological tests.[348] The interview and testing was conducted over a three-day period in January and February of 2007.[349]

Dr. Mack made several key findings. Mr. Reyes was diagnosed with a mild neurocognitive disorder, colloquially known as brain damage.[350] He opined this could be the result of Ruth Comeger's marijuana use while pregnant, causing changes and damage to the prefrontal cortex and amygdala.[351] These two areas of the brain are the most involved with the "ability to normally and appropriately conduct oneself in light of rules and law an in terms of being able to anticipate consequences and inhibit an inappropriate action," according to the literature.[352]

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[346] B916.
[347] B917.
[348] *Id.* Dr. Mack's full report is at B1506-1540.
[349] B922.
[350] B921-922.
[351] B952.
[352] *Id.*

Dr. Mack also opined about Mr. Reyes' executive functioning. The executive function occurs in the frontal lobe of the brain and pertains to the "ability to modulate and control emotions and behaviors, ability to anticipate consequences, and ability to stop oneself from making or doing an action that would be likely to get the individual in trouble."[353] In essence, executive function relates to impulse control.[354] Dr. Mack pointed out that the vast body of literature demonstrates that the executive functions of the brain are last to develop, and that the frontal lobes are not mature until age 25.[355]

Dr. Mack found moderately impaired executive function, scoring Mr. Reyes at the 6th percentile rank among the general population.[356] In Dr. Mack's opinion, due to the nature of brain development, Mr. Reyes' executive functions would have been worse in 1996, when Mr. Reyes was 18.[357] Also impacting brain function was the fact that Mr. Reyes' full scale IQ was in the 18th percentile among the general population.[358]

Dr. Mack next discussed the effect of Mr. Reyes' traumatic upbringing on his brain development. He testified that when a child is exposed to fear, instability, violence, and lack of attachment figures, "this tends to bathe the developing brain

[353] B940.
[354] B941.
[355] B941.
[356] B942.
[357] B946.
[358] B928.

in cortisol," and can "help set up maladaptive patterns of behavior and personality as one gets older."[359] Dr. Mack opined that the trauma in Luis' life caused him anxiety and insecurity, and "a high tendency to attach to any figure that is likely to give him ongoing positive attention."[360] Dr. Mack noted the numerous negative attachment figures, like Mr. Reyes' uncles, as well as the trauma arising out of abuse suffered at the hands his mother.[361]

Unsurprisingly, the judge gave no weight to Samuel Elliott, PhD, whom the State brought in to rebut Dr. Mack. Dr. Elliot interviewed Mr. Reyes for 75 minutes and conducted no testing.[362] He criticized the number of tests given by Dr. Mack: "the more tests you administer to even a normal person, the more impairments you'll find."[363]

Dewey Cornell, PhD is a forensic psychologist and faculty member at the University of Virginia.[364] He has done such work since 1983, and currently teaches at the Institute of Law Psychiatry and Public Policy.[365]

In addition to a six-hour clinical interview of Mr. Reyes, Dr. Cornell interviewed Luis' mother Ruth, his aunt Luz Diaz, his cousin Debbie Diaz, and

[359] B957.
[360] B957-958.
[361] B958-959, 963.
[362] B1397.
[363] B1386.
[364] B1560-1594.
[365] B843.

Elaine Santos, the mother of his daughter.[366] He interviewed the Skinners and Kathy Covelli-Reyes. He also reviewed all of the records gathered, the transcripts of court proceedings, and the reports of Delores Andrews, Dr. Mack, and Dr. Finkelstein.[367]

Dr. Cornell testified that the mild brain damage diagnosed by Dr. Mack, coupled with the fact of incomplete prefrontal cortex development in young adult was significant.[368] He stated, "the young man who does not have even the normal 18 year-old capacity to reflect on consequences of his actions, to separate himself from what other people are telling him to do, sort of use ordinary judgment that would lead you to act more independently rather than dependently on an authority figure or a person you depend on."[369]

Dr. Cornell thought a neuropsychological evaluation should have been done pretrial, as there were several indicators of possible brain dysfunction.[370] He also opined that trial counsel failed to present crucial evidence about the scientific understanding of the immaturity of the 18 year-old brain: "it is not sufficient simply to note his youth and immaturity at the time of the offense."[371]

The lack of evidence presented to the jury on brain development and Luis'

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[366] B845.
[367] B847.
[368] Dr. Cornell's expert report is at B2117-B2137.
[369] B847.
[370] *Id.*
[371] B846.

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 him, to feel loyalty and obligation to do what Mr. Cabrera asked him to do."[372] Dr. Cornell also noted the significant effect that the childhood abuse and neglect suffered by Mr. Reyes further exacerbated the effects of brain impairment and decision making.[373]

Delores Andrews is a clinical social worker who works as mitigation specialist, particularly in capital cases.[374] In her work on the Reyes case, she conducted thorough interviews of Mr. Reyes, his mother, his Aunts Demaris and Luz, and his cousin Deborah. She also interviewed many of the non-family members, particularly from A.I duPont High School.[375] She authored a report of her findings and testified in the evidentiary hearing.

Ms. Andrews' findings made clear that Ruth Reyes was incapable, due to immaturity and drug addiction, to parent Luis. But she also chafed against her mother Candida taking over that role. This tension left Luis caught in the middle and unable to form healthy attachments. None of the other family members were able to fill the parent role, although all of them were close to Luis in some way.[376]

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[372] B849.
[373] B848.
[374] Ms. Andrews' *curriculum vitae* and report are at B2077-2116.
[375] B864.
[376] B866.

As noted, Mr. Reyes sought a father figure throughout his childhood. His uncle Michael was unable to properly take on that role, due to his criminal activities and drug addiction issues.[377] The various unsuitable paramours Ruth Reyes brought around were all inadequate, and every time Ruth formed a new romantic relationship, it would mean upheaval for Luis, as he would be brought to live with his mother for a time. Luis attended six different elementary schools, and according to family members, lived in 16 different houses before the age of 16.[378]

Ms. Andrews testified that due to Dr. Burry's incomplete investigation, the mitigators that were mentioned were not fully developed, and others were missed altogether.[379] For example, the exposure to child endangerment by his drug dealing uncles Michael and Israel, and his grandmother's ill health and inability to properly care for Mr. Reyes were touched upon but not explored.[380] Ms. Andrews also stated that the jury was not fully informed that, despite the odds against him, he was able to graduate from school, hold down a job, and take care of himself at an early age.[381]

James Aiken is a prisons consultant who has had a lengthy career in corrections. He did consulting work within the federal prison system, and was also

[377] B867.
[378] B868.
[379] B870.
[380] B872.
[381] *Id.*

a consultant to the Delaware Department of Corrections.[382] He has testified many times regarding corrections issues, including the Delaware Superior Court.[383]

Mr. Aiken found that Luis Reyes does not present as an individual who could not be safely managed within the prison system.[384] He shows no signs of predatorial or violent behavior.[385] He further found that of the 22 disciplinary infractions during Mr. Reyes' four years of pretrial incarceration, the vast majority were early in his confinement and "miniscule to say the least."[386] He examined the one infraction for fighting, and noted that the incident lacked any indicia of predatory behavior.[387]

Mr. Aiken pointed to other factors predictive of Mr. Reyes' lack of future dangerousness. He noted that the prison system is well-equipped through protocols, security measures, and facilities to safely manage the vast majority of prisoners.[388] Finally, he testified that the risks presented by Dr. Burry as to Luis Reyes are not predictive of violent prison behavior as inmates are controlled and appropriately managed within the prison population.[389]

Mr. Aiken also noted that the prison records reflect that Mr. Reyes did in

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[382] *Id*.
[383] *Id.*
[384] Mr. Aiken's *curriculum vitae* is at B1541-1549; his report is at B1595-1601.
[385] B807.
[386] *Id.*
[387] *Id.*
[388] B808.
[389] B809.

fact participate in vocational rehabilitation programs when eligible, contrary to the State's assertions at trial. However, when the new charges were presented, he was removed from the programs due to lack of eligibility.[390]

The postconviction judge's finding regarding Mr. Reyes' mitigation case aptly captures the prejudicial effect of counsel's deficient performance:

> At best, Reyes Trial Counsel's performance left the jury with an incomplete profile and understanding of Reyes, his background, and his mental functioning. At worst, Reyes Trial Counsel's deficient performance actually served to dehumanize Reyes and to portray him as violent.[391]

Trial counsel's strategic decision to present only negative information had a snowball effect: it led to a limited investigation, an ill-advised presentation of witnesses, and a deliberate choice to leave the jury in ignorance of significant mitigation. Confidence in the outcome is therefore undermined.

C. Trial and Appellate Counsel Were Ineffective for Failing to Challenge Multiple Instances of Improper Prosecutorial Argument.

Many of the State's arguments in closing were improper, but trial counsel did not protect their client by objecting. Then appellate counsel failed to raise the claim on appeal. As such, this claim appears as an ineffective assistance of counsel claim under the *Strickland* rubric. The postconviction court accurately found that Mr. Reyes was prejudiced by the improper comments.

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[390] B810.
[391] *State v. Reyes*, 2016 WL 358613 at *29 (Del. Super.).

It is of course axiomatic that prosecutors have a special role in our criminal justice system and are duty bound to "avoid improper suggestions, insinuations, and assertions of personal knowledge"[392] in making argument. Over the years, the Delaware Supreme Court has continued to express "considerable concern" regarding prosecutorial misconduct.[393]

While the prosecutor has a special role in ensuring fair trials, so too does the defense attorney. This Court has repeatedly admonished defense counsel to make timely objections to improper comments,[394] and expressly held that effective assistance requires timely objections in order to avoid plain error review.[395] In Mr. Reyes' trial, not only did trial counsel fail to heed that admonition, but appellate counsel did not even raise a plain error claim, causing prejudice to Mr. Reyes.

1. The State's improper "whose murder will go unpunished" argument violated due process, misstated the law, misled the jury.

The prosecutor stated:

> It is a significant statutory aggravating circumstance. Because if he should be sentenced to life imprisonment for the murder of one of the two victim in this case, either Vaughn Rowe or Brandon Saunders, he [Reyes] has only one life to serve. And for the murder of the other he will receive no punishment.
>
> Oh, the judge would sentence him to life without parole, just as he

[392] *Kirkley v. State,* 41 A.3d 372, 377 (Del. 2012).
[393] *Hunter v. State,* 815 A.2d 730, 734 (Del. 2002).
[394] *See, Mason v. State,* 658 A.2d 994, 999 (Del. 1995)(admonishing the defense bar to be vigilant in asserting objections to perceived prosecutorial misconduct).
[395] *Trump v. State,* 753 A.2d 963, 969-70 (Del. 2000).

would have for the other, but the practical effect of that would be would receive no punishment for the second murder he committed in this case.[396]

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And as you know, as was true with Brandon and with Vaughn, the defendant only has one life to give. So that second life sentence for the second murder of the two murders he committed on January 21, 1996, is essentially a *meaningless punishment*.[397]

***

If you do not recommend the death penalty in this case; Your Honor, if you do not impose the death penalty in this case, one of those two murders will go unpunished.[398]

***

When you convict someone of two murders, if you impose a life sentence for the first murder because we each have but one life to give, *there is no real punishment for that second murder*.[399]

I ask you this, ladies and gentlemen, Judge Herlihy, who murder will go unpunished? Will it be Brandon's? Or Vaughn's?

And what have you heard throughout the course of this trial, particularly over the last two days, which suggests, for a minute, that the defendant deserves the gift, the grace of being able to go practically and essentially unpunished for one of those two murders? What has he done to deserve that?

Ladies and gentleman, Judge Herlihy, only a death sentence will ensure that the murders of both Brandon Saunders and Vaughn Rowe are justly and fairly punished.[400]

***

We're talking about what the General Assembly says, your general assembly, your legislature says what constitutes appropriate procedure to prove a death penalty when one of them is where two people are killed in a particular case…it's easy to understand why *because a life sentence for one murder means no punishment for the other*. It's as

[396] B531.
[397] B624.
[398] *Id*.
[399] B631 (emphasis added).
[400] *Id*.

> simple as that. We're not talking about an eye for an eye. We're talking about accountability. *We're talking about no free murders*. No opportunities to kill somebody *and not be punished*.[401]
>
> ***
>
> If you return a life sentence for these – if you recommend a life sentence for these murders, he will serve a one life sentence and that life sentence will begin at sometime between 2007 and 2009. It won't even be his entire life because a portion of that life up until that time will be spent serving a sentence for the murder of Fundador Otero.
>
> What does it say, ladies and gentleman? What does it say as the conscience of the community? What does it say about justice of Luis Reyes can kill and kill and kill yet again, and for the last murder, *never be punished*?[402]

Repeatedly and forcefully, the State argued that if they did not vote for death, they would leave a murder unpunished, or "free." This argument, in addition to being logically flawed, misstates the law, and implies that the General Assembly wrote the law such that there would be no "free" murders. More to the point, this argument was way outside the bounds of proper argument about the aggravating and mitigating evidence. It egregiously inflamed the jury's passion and sympathy, implying that Mr. Reyes would get away with one of the murders.

The judge had to sentence Mr. Reyes to death, or life without parole as to each murder. The argument that Mr. Reyes would get off scot-free on one of the murders is not only ridiculous, it is misconduct. Trial and appellate counsel did

[401] B649-650 (emphasis added).
[402] B652 (emphasis added).

nothing about it and for that they were ineffective.

Similarly prejudicial is another out-of-bounds argument: that if the jury recommended life, it would not really be a full life because he was serving time for the Otero case. It is a life sentence: imprisoned for the rest of his natural life. The reference to the Otero sentence was improper and objectionable.

2. The State's argument that Mr. Reyes should be punished for three murders was improper and a misstatement of the law.

Embedded in the excerpts above is another improper argument: that the jury should punish Mr. Reyes for the Otero murder too. In addition to the "kill and kill and kill again" comment, the prosecutor also rhetorically asked what the punishment should be "for each of the three lives that he snuffed out."[403] In fact, the prosecutor began his closing arguments with: "Fundador Otero. Brandon Saunders. Vaughn Rowe…three men murdered intentionally with premeditation, coldly, coolly, callously. Three men murdered by the defendant."[404] And it went on and on; as just one more example of many: "Do you think when he conceived Desiree, the fact that he was a three-time murderer meant anything to him?"[405]

Mr. Reyes' conviction for the Otero case was fair game for evidence and argument as an aggravator. The prosecutor's conflation of it into a plea to punish

[403] B624.
[404] *Id.* Of course, when making this comment, the prosecutor knew that Mr. Reyes pled guilty to Second Degree Murder of Mr. Otero, because he is the same prosecutor who handled that case.
[405] B651.

three murders was most certainly not—it was a violation of due process.

3. The prosecutor's remark characterizing mitigation as "an attempt to excuse what he has done" was improper.

The prosecutor noted the defense attorney argued that the mitigation case was not to excuse the murders. But then he asked the jury to consider the testimony of Dr. Burry: "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."[406]

This Court has consistently held that mitigating circumstances are not excuses and that mitigation is much broader and allows the sentencer to assess the moral culpability of the defendant.[407] The State's reliance on *Taylor v. State*[408] is misplaced. *Taylor* featured one isolated excuse comment that drew a proper objection. This Court has held that prosecutorial remarks must be analyzed in the whole context of the case to determine whether they prejudiced the defendant's right to a fair trial.[409] And in this case, they did. The "excuse" comment here was one more improper comment in a closing argument full of them. Taken in the context of this case, the "excuse" comment was prejudicial.

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[406] B629.
[407] *Whalen v. State*, 492 A2d 552, 569 (Del. 1993); *Small v. State*, 51 A.3d 452, 460 (Del. 2012).
[408] 32 A.3d 374, 386-87 (Del. 2011).
[409] *Hooks v. State*, 416 A.2d 189, 205 (Del. 1980).

4. The prosecutor engaged in misconduct by calling Mr. Reyes "monstrous."

Another comment, which the State argues was proper when taken in context,[410] is the prosecutor's characterization of Mr. Reyes as "monstrous:"

> When you kill, and you kill, and you kill again, you are a murderer. That is what you are. You need go no further in defining him. **He is so monstrous.** It is so monumental that any definition of Luis Reyes pales into insignificance.[411]

While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones."[412] Given the legion of cases in the past 30 years regarding improper conduct by prosecutors, any prosecutor in Delaware should know that he or she "should not use arguments calculated to inflame the passions or prejudices of the jury.[413] To call a defendant essentially a monster in summation is the quintessence of inflaming the passions of the jury. The State's assertion that the comment was proper because Mr. Reyes committed monstrous crimes[414] is inaccurate and misses the point. It is inaccurate because the prosecutor called Mr. Reyes monstrous, not his crimes. It misses the point because a prosecutor can argue vociferously all evidence and inferences to support aggravating factors—but may not engage in common name-calling. To argue that Mr. Reyes committed heinous crimes is a

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[410] *Op. Br.* at 91-92.
[411] B650 (Emphasis added).
[412] *Berger v. United States,* 295 U.S. 78,85 (1935).
[413] *Brokenbrough v. State,* 522 A.2d 851, 855 (Del. 1987)
[414] *Op. Br.* at 91-92.

hard blow. To call him a monster is a foul one.

5. The prosecutor's improper reference to "the conscience of the community" was contrary to well-settled law and prejudicial to Mr. Reyes.

The prosecutor also improperly appealed to the jury's sense of community by asking the following:

> What does it say, ladies and gentlemen? What does it say as the conscience of the community? What does it say about justice if Luis Reyes can kill and kill yet again, and for the last murder, never be punished?[415]

These statements were a call to the jury to consider what the community might think if the jury voted in favor of life. "Message to the community" arguments are impermissible. Courts have held that appealing to a jury's sense of personal risk and "direct[ing] the jury's attention to the societal goal of maintaining a safe community" is improper.[416] This type of argument appeals to the emotions and fears of the jurors, which are outside the proper scope of deliberations.[417]

The prosecutor's "conscience of the community" argument creates a reasonable probability that the jury was improperly influenced to impose the death penalty, so as not to make a decision that could be interpreted as the wrong message to send to the community.

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[415] B652.
[416] *Williamson v. State*, 1998 WL 138697, at *3 (Del.) (other citation omitted).
[417] *Black v. State*, 616 A.2d 320, 324 (Del. 1992).

6. The prosecutor misled the jury by arguing that Mr. Reyes had made no effort to improve himself while in prison. He was not eligible for programming while a pretrial detainee.

In discussing Mr. Reyes' prison record in closing arguments, the prosecutor stated:

> He was convinced you all would exonerate him and he would be released from prison one day. But he didn't do anything of significance to make himself a better person in anticipation of his eventual release. No anger counseling, no psychological counseling, no Key program, no Crest program, no certificates of achievement, nothing. Nothing.[418]

Anyone practicing criminal law knows that pretrial detainees are not eligible for rehabilitative or educational programming. Mr. Reyes was a pretrial detainee for the Otero case from March 3, 1997 to September 25, 1998, when he was sentenced. Then he again became a pretrial detainee on November 30, 1999 when he was charged with the Rockford Park murders. He was a pretrial detainee for 13 out of 36 months leading up to trial and ineligible for programming.

As Mr. Aiken explained, "before he was charged with this offense, he was involved with vocational programs…my reading of the record indicates that, once these new charges came about, he was no longer eligible and was separated."[419]

The prosecutor's comment, like all the others, did not draw an objection. Moreover, trial counsel had no expert on prison adjustment or the corrective setting

[418] B628.
[419] B810.

at all, which constituted deficient performance. As such, the jury was left to believe that Mr. Reyes was so sanguine about his release from prison, and so unmotivated to improve himself, that he simply took a pass on rehabilitation. Trial counsel was ineffective for failing to object, resulting in prejudice to Mr. Reyes.

7. The totality of prosecutorial misconduct, the failure of trial counsel to object and appellate counsel to raise the claim was deficient performance of a magnitude that violated Mr. Reyes' right to due process.

While our guidepost for ineffectiveness is *Strickland*, the prosecutorial misconduct analysis is set forth in *Hughes v. State*: the court must assess "the closeness of the case, he centrality of the issue affected, and the steps taken to mitigate the error."[420] This case was life or death—nothing is more central than that. No steps were taken to mitigate, because trial counsel sat and did nothing while the misconduct occurred over and over. Even with the deficient performance of trial counsel, three jurors voted for life.[421] Had counsel protected Mr. Reyes' due process rights, it is reasonably likely that more jurors would have done so.

[420] *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).
[421] Trial counsel testified, "you can't count it as a win but…you know, that was a pretty good vote all things considered." B721.

D. Trial Counsel Was Ineffective for Acquiescing to the State's Solution to Mr. Reyes' Supposedly Erroneous Statement in Allocution; Appellate Counsel Was Ineffective for Failing to Raise This Claim.

Back on April 5, 2000, the State sent a letter responding to the defense request for discovery.[422] At the end of the letter is the following offer:

> The State would consider accepting a plea to first degree murder in exchange for not pursuing the death penalty. The state would not require your client to testify against the co-defendant, but would require a full and truthful statement from him prior to the co-defendant's trial.[423]

In the wake of September 11, 2001, trial counsel wrote to the State, seeking consideration of taking death off the table for Mr. Reyes.[424] The State's responded by letter:

> We also want to comment on your arguments concerning a prior plea offer. To be precise, no plea was ever offered. We did ask whether your client would be willing to discuss a possible plea to a life sentence coupled with a proffer to the victims' families in some undetermined form as to the specifics of what happened and why. Your client expressed no interest in opening those lines of communication so no plea was ever offered. While we might be willing to talk about waiving the death penalty for someone who accepts responsibility for his actions and helps grieving families cope with their losses, we are not willing to do so for a person we believe to be a triple murderer who does not accept that responsibility. **Without an acceptance of responsibility, we believe that the death penalty for your client is absolutely required.** It seems to us that we will be able to seat an unbiased jury. If your client wants to avoid the possibility of a death penalty, we believe he should rethink his earlier position rather than seek unilateral

[422] B1460-1463.
[423] B1463.
[424] B1464.

concessions from the State.[425]

Before Mr. Reyes allocuted, the trial judge explained:

> There's virtually, Mr. Reyes, nothing you cannot say in allocution. You have a pretty broad range of things to say. You can talk about anything in the evidence showed in the guilt phase of the trial, anything that has come up during this penalty phase, and any inference from that evidence in any way you want or any of the other – - anything from that evidence that you wish to address. Do you understand?[426]

The judge told Mr. Reyes that if he strayed too far, he would be sworn and subjected to cross-examination.[427] He referred to controlling case law in making this admonition.[428] Mr. Reyes did allocute. In relevant part, he said:

> Before this trial started, Mr. Woods [sic] and Mr. Ferris [sic]—Mr. Woods and Mr. Wharton came to me with a plea of life in prison, to spend the rest of my life in jail, but I turned that plea down. My lawyers advised me of the evidence that they had and that it didn't look good, but regardless of that, I would not take that plea. I told them I would not take a plea for something that I did not do. So we came to trial.[429]

No timely objection was made. But before the defense closing, the prosecutors objected to the reference of a plea offer, arguing no offer had been made. The April 2000 offer was never mentioned—just the September 2001 letter—so the trial judge had no way of knowing about it. [430] The remedy

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[425] B639.
[426] B634.
[427] *Id.*
[428] *Capano v. State*, 781 A.2d 556, 655 (Del. 2001); *Shelton v. State*, 744 A.2d 465, 496, (Del. 2000)(holding that if the defendant makes a 'statement of new evidence' he shall be sworn and subject to cross-examination).
[429] B637.
[430] B639.

suggested by the State was that that they be allowed to read the portion of the letter in their rebuttal.[431] Defense counsel immediately acquiesced.[432] No thought was ever given to redacting anything out of the letter. And so it was that the State read the letter into the record. Defense counsel mentioned that the jury would be hearing about a "misstatement" and "inaccurate" statement made by their client.[433]

1. Trial counsel's acquiescence deprived Mr. Reyes of the opportunity to be cross-examined and explain his comments.

The State asserts that the trial judge faced a "Hobson's choice" whether to allow the read-in or subject Mr. Reyes to cross-examination.[434] But actually there was only one choice under the law—and it was not taken. It is easy to see that from Mr. Reyes' perspective, a plea *was* offered. He had the right to answer the prosecutor's questions. He would have explained, as he did in allocution, although he had made bad choices in the past, he always came forward and took responsibility for his actions.[435] The deprivation of this opportunity is the result of an improper procedure endorsed by trial counsel.

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[431] *Id.*
[432] *Id.*
[433] B642.
[434] *Op. Br.* at 96.
[435] B637. "I've made many bad choices in my life and I'm guilty of many things, and out of all of those bad choices that I've made, I admitted to my wrong. Whether it was exactly at that time or a little later down the line, I admitted to what I did. I came forward."

2. Mr. Reyes also suffered prejudice because the read-in contained a statement of prosecutorial vouching.

Expression of belief by a prosecutor implying superior knowledge or belief is forbidden, as our jurisprudence clearly demonstrates.[436] Yet trial counsel's failure to at least make sure the letter was redacted, ensured a statement of belief would be read to the jury—a statement of belief that the death penalty was absolutely required, no less. Mr. Reyes' right to due process was violated.

For all the foregoing reasons, trial counsel's performance was deficient in the penalty phase. The postconviction judge correctly found that the cumulative effect of all these errors caused prejudice to Mr. Reyes in a manner that undermined the fundamental legality, reliability, integrity, and fairness of the proceedings. As such, it was not error to grant relief.

[436] *See, e.g., Whittle v. State*, 77 A.3d 239 (Del. 2013).

CUMULATIVE ERROR

As this Court held last year in *Starling v. State*, "where there are multiple material errors in a trial, the Court must weigh their cumulative effect and determine if, combined, they are "prejudicial to substantial rights [so] as to jeopardize the fairness and integrity of the trial process." The relevant inquiry is, after considering the errors, "whether we can be confident that the jury's verdict would have been the same."[437]

The postconviction judge properly applied that rubric and found multiple errors in both phases of the Reyes Rockford Park trial. The errors are each of a constitutional dimension that require relief. Cumulatively, the errors undermine the fairness, legality, integrity, and reliability of the proceeding, and confidence is undermined. The judgment of the Superior Court should be affirmed.

[437] *Starling v. State,* 130 A.3d 316, 336 (Del. 2015).

CONCLUSION

For the reasons stated herein, Appellant Luis Reyes respectfully requests that the judgment of the Superior Court be affirmed.

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