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Case Number 344,2014D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL MANLEY,	)	
	)	
Defendant Below,	)	No. 344, 2014
Appellant,	)	
	)	On Appeal from the
	)	Superior Court of the State
	)	of Delaware in and for
v.	)	New Castle County
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

APPELLANT'S SECOND CORRECTED OPENING BRIEF

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Dated: March 6, 2017

PRELIMINARY STATEMENT CONCERNING CITATIONS AND FORM

Citations preceded by "A" refer to the Appendix. Citations preceded by "O" refer to the Opinion denying Rule 61 relief, attached to this brief.

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NATURE OF PROCEEDINGS

On November 13, 1996, Appellant was found guilty of first degree murder in New Castle County Superior Court (Barron, J.), A799-802, and on January 10, 1997, Judge Barron sentenced Appellant to death. A924. After affirmance on direct appeal, A978-1025, Judge Barron denied Appellant's Rule 61 Motion on April 27, 2000. A1026-47. This Court reversed and remanded for a new penalty hearing. A1084-1100.

After reassignment to the Hon. Jerome Herlihy, a hearing was held on January 11, 2002 on certain guilt-phase claims. Relief was denied on October 2, 2003. A1127-82. This Court affirmed on April 7, 2004. A1392.

At Appellant's 2005 resentencing, a non-unanimous jury recommended death. After making additional findings regarding aggravating factors and mitigating circumstances, Judge Herlihy issued his opinion and judgment on February 3, 2006, sentencing Appellant to death. A1830-73. This Court affirmed on January 3, 2007. A2000-2026. Certiorari was denied on May 29, 2007. A2027.

On January 25, 2008, Appellant filed a Rule 61 Motion in the Superior Court. Amendments/supplements were filed on June 25, 2008; April 20, 2009; August 6, 2012; and December 12, 2012. The Court conducted an evidentiary hearing in December 2011 and April, June and July 2012, limited to claims about the 2005

resentencing and barring claims about the 1996 trial. After Judge Herlihy retired, the Hon. James Vaughn was assigned and issued an order denying relief on May 29, 2014. O1. Appellant timely appealed on February 27, 2015. On May 11, 2015, this Court stayed the proceedings pending the outcome of Hurst v. Florida, 136 S. Ct. 616 (2016). A3188. On January 12, 2016, the Supreme Court held Florida's capital sentencing scheme vesting sentencing authority in the trial judge alone violated the Sixth Amendment. Hurst, 136 S. Ct. at 622. On January 28, 2016, this Court stayed these proceedings pending its decision in Rauf v. State, 145 A.3d 430 (Del. 2016). A3190. On August 2, 2016, this Court held Delaware's capital sentencing statute unconstitutional. Rauf, 145 A.3d at 434. On August 24, 2016, this Court stayed these proceedings pending the outcome of Powell v. State, __A.3d__, 2016 WL 7243546 (Del. Dec. 15, 2016). A3191. On December 15, 2016, this Court held Rauf constituted a new watershed procedural rule of criminal procedure to be applied retroactively. Powell, 2016 WL 7243546, at *5. On December 20, 2016, this Court issued a new briefing schedule to eliminate or refine issues in light of Powell. A3192.

SUMMARY OF ARGUMENT

1. Rauf v. State and Powell v. State require Appellant be resentenced to life without parole.

2. Because of counsel's ineffectiveness, the jury did not hear evidence directly disputing Appellant's guilt.

3. The state's unconstitutional failure to disclose material exculpatory and/or impeachment evidence compromised the verdict.

4. Improper joinder violated the state and federal constitutions.

5. Unconstitutional accomplice instructions prejudiced Appellant.

6. The failure to request voir dire on racial bias violated the state and federal constitutions.

7. The state's discriminatory peremptory strikes prejudiced Appellant.

8. Prosecutorial misconduct violated the state and federal constitutions.

9. Judicial bias deprived Appellant of his right to a fair trial.

10. The admission of Stevenson's statements and bad acts and the court's improper instructions regarding the consideration of that evidence against Appellant violated the state and federal constitutions.

11. The denial of a fair and impartial jury violated the state and federal constitutions.

12. The cumulative effect of the prejudicial errors violated the state and federal constitutions.

STATEMENT OF FACTS

This Court's opinion setting forth the facts related to the 1996 trial is appended. A989-95. The victim was shot the morning he was scheduled to testify against codefendant David Stevenson in theft charges pending before the Honorable Norman Barron. Judge Barron sought, and was granted, assignment to the murder case and failed to disclose his efforts to preside over those proceedings.

Although Defendant was not involved in the theft charges, the state claimed that Defendant shot the decedent on Stevenson's behalf, relying on: witnesses to both an incident the night before the shooting and the actual shooting; the discovery of a military jacket with a gun clip in the pocket in Stevenson's car; expert testimony purporting to explain the absence of gunshot residue on Defendant despite a wealth of GSR on the victim and his clothing; and Defendant's military record. A515-16; A776. The defense argued Defendant knew nothing about the charges against Stevenson, had no motive to commit the murder, did not possess a gun and, at best, was merely present. A779.

Defendant's trial was joined with Stevenson, permitting the state to admit extensive evidence regarding Stevenson's theft charges and other bad acts (A622-23; A726) that the Court instructed the jury to consider against Defendant (A793). The court also provided accomplice instructions that further skewed and diminished the

state's burden of proof (A790-93). Although this case involved a white victim, African American defendants and cross-racial identifications, the court failed to conduct racial bias voir dire and permitted the state to exclude an African American juror despite questions of pretext (A361). The court also permitted jurors to remain despite biases arising from exposure to Defendant in prison garb (A235; A310-22); exposure to pretrial publicity (A318; A449; A453) and external factors (A366-67; A449); and personal biases (A317-22; A342-45; A446-47).

Evidence at the Rule 61 hearing directly disputed critical aspects of the state's case, including that: the state's explanation for the absence of GSR was scientifically unreliable (A2503-2510); the purported identification testimony of eyewitnesses was inherently unreliable (A3042-45; A3058-3118); the state's claims of a connection between Defendant's military service and evidence found in Stevenson's car were demonstrably false (A2620-26); and there was another person with closer ties to Stevenson, a military background, and clearer motives to assist Stevenson (A113-27; A2965-82). Defendant also discovered previously undisclosed taped statements of prosecution witnesses that disputed their reliability and provided evidence supporting the theory that another, not Defendant had been involved in the murder (A113-27; A2342-51; A2861-68).

JURISDICTIONAL STATEMENT

The Superior Court applied Rule 61 (i)(2) and (i)(4) to either limit or preclude consideration of claims arising from the trial.[1] O14-15. The court also limited its consideration of arguments 7 (involving the State's discriminatory use of a peremptory challenge) and 10 (involving the improper admission of Stevenson's bad acts against Appellant) to whether counsel's ineffectiveness demonstrated cause and prejudice under (i)(3).

This Court has jurisdiction to rule on the merits of Appellant's claims pursuant to Rule 61, authorizing relief from any ground presenting a "sufficient factual and legal basis for a collateral attack upon a criminal conviction." Super. Ct. Crim. R. 61(a)(1).

Rule 61(i)(5) precludes application of the (i)(1)-(3) bars where "a colorable

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[1] Those claims are: (1) counsel's ineffectiveness and prosecutorial misconduct prevented the jury from hearing available evidence demonstrating Appellant's innocence, A2048-67; (2) the State failed to disclose material exculpatory evidence, A2089-95; (3) inadequate voir dire on racial bias, A2167-74; (4) the State's discriminatory use of a peremptory strike, A2186-93; (5) denial of an impartial jury, A2210-25; (6) prosecutorial misconduct, A2236-47; (7) the unconstitutional accomplice liability instructions, A2157-67; (8) unconstitutional display of Appellant in prison garb, A2282-87; (9) unconstitutional instructions on the jury's consideration of Stevenson's bad acts evidence against Appellant, A2287-96; (10) unconstitutional admission of Stevenson's hearsay statements, A2301-07; (11) unconstitutional joinder at trial, A2308-16; and (12) counsel's failure to request a change of venue/venire, A2317-23.

claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction" is demonstrated. Bailey v. State, 588 A.2d 1121, 1128-29 (Del. 1991); Younger v. State, 580 A.2d 552, 555 (Del. 1990). Section (i)(5) applies to all cases of fundamental unfairness, not just innocence claims. Webster v. State, 604 A.2d 1364, 1366 (Del. 1992).[2]

Where merits review is required in the "interests of justice," the (i)(2) and (i)(4) bars do not apply. Two exceptions to the "law of the case" doctrine apply to the "interests of justice" exception of Rule 61(i)(4): where the prior "ruling was clearly in error or there has been an important change in circumstances, in particular, the factual basis for issues previously posed," Weedon v. State, 750 A.2d 521, 527-28 (Del. 2000) (citing Kenton v. Kenton, 571 A.2d 778, 784 (Del. 1990)); or "the equitable concern of preventing injustice may trump the 'law of the case' doctrine."

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[2] See Wright v. State, 91 A.3d 972 (Del. 2014) (Brady v. Maryland, 373 U.S. 83, 87 (1963), claim satisfied Rule 61(i)(5)); Younger, 580 A.2d at 555 (newly recognized right qualifies under section (i)(5)); State v. Crawford, 2005 WL 2841652, 1 (Del. Super. 2005) (destruction of potentially exculpatory evidence warranted merits review); State v. Hackett, 2005 WL 3060976 *1 n.10 (Del. Super. 2005) (counsel's ineffective assistance "by its very nature," qualifies under section (i)(5)); State v. Wilson, 2005 WL 3006781, 1 (Del. Super. 2005) (same); State v. Briggs, 1998 WL 1029256 *2 (Del. Super.1998) (newly discovered); State v. Rosa, 1992 WL 302295 (Del. Super. 1992)(instruction reducing state's burden demonstrates colorable claim of miscarriage of justice).

Id. at 528 (citing Brittingham v. State, 705 A.2d 577, 579 (Del. 1998)); see also Zebroski v. State, 12 A.3d 1115, 1120 (Del. 2010).

Appellant presents colorable claims of constitutional error undermining the reliability of the verdict. Merits review is required under section (i)(5) and the "interests of justice" exceptions to (i)(2) and (i)(4).

Merits review is also warranted because the prior resentencing order invalidated the original judgment of conviction and Appellant's judgment was not final until May 29, 2007. See Flamer v. State, 585 A.2d 736, 745 (Del. 1990) ("Postconviction relief is a collateral remedy which provides an avenue for upsetting judgments that otherwise have become final"). As the timing and filing requirements of Rule 61, including those in (b)(2), did not apply before May 29, 2007, Rule 61(i)(2) does not apply. When a state establishes the right to particular review, a Fourteenth Amendment life and liberty interest is created. Evitts v. Lucey, 469 U.S. 387, 393 (1985).[3] Delaware provides two avenues of relief from an invalid conviction: direct appeal and post-conviction. As a capital post-conviction litigant, Appellant was entitled to appointment of counsel. See Super. Ct. Crim. R. 61(l)(3). Having created these rights, Delaware was obliged to provide Appellant effective counsel and

[3] See also Ford v. Wainwright, 447 U.S. 399, 427-31 (1986) (O'Connor, J., concurring); Hicks v. Oklahoma, 447 U.S. 343, 346 (1980).

counsel's failure to raise the multiple state and federal constitutional claims directly impacting the reliability of the verdict violated federal Due Process and Equal Protection and rendered the Rule 61(i)(2) bar inapplicable. See also Martinez v. Ryan,132 S. Ct. 1309, 1317 (2012).

STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL

Several of Appellant's claims involve counsel's ineffectiveness, U.S. Const. Amend. V, VI, XIV; Del. Const. Art. I, §§ 4,7, which are evaluated under the two-prong test of Strickland v. Washington, 466 U.S. 668 (1984): (a) deficient performance, i.e., that counsel's performance fell below "an objective standard of reasonableness," Id. at 688; and (b) prejudice, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000). Any strategic decision must be informed and reasonably designed to effectuate the client's interests. Decisions can be informed only if counsel has investigated the facts and law and knows the options. Porter v. McCollum, 558 U.S. 30, 40 (2009); Wiggins, 539 U.S. at 523-4; Marshall v. Cathel, 428 F.3d 452, 471 (3d Cir. 2005); Neal v. State, 80 A.3d 935, 944 (Del. 2013). Prejudice does "not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' ... but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" Porter, 558 U.S. at 44 (quoting Strickland, 466 U.S. at 693-94); see also Hinton v. Alabama, 134 S. Ct. 1081, 1089 (2014). This prejudice standard "is less demanding than the preponderance standard." Hull v. Kyler, 190

F.3d 88, 110 (3d Cir. 1999) (quotation marks and citations omitted).

Strickland's substantive standard also applies to claims of ineffective assistance of appellate counsel. Smith v. Robbins, 528 U.S. 259, 285 (2000); Smith v. Murray, 477 U.S. 527, 535-36 (1986); Ploof v. State, 75 A.3d 811, 831 (Del. 2013). Counsel's failure to raise obvious and potentially successful issues constitutes deficient performance. United States v. Mannino, 212 F.3d 835, 842-43 (3d Cir. 2000). The ABA Guidelines in effect "at the time of [Appellant's direct appeal] describe[ ] the obligation in terms no one could misunderstand in the circumstances of a case like this one," Rompilla, 545 U.S. at 387: "[a]ppellate counsel should seek, when perfecting the appeal, to present all arguably meritorious issues." ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN CAPITAL CASES, Guideline 11.9.2.(D), Duties of Appellate Counsel (1989 ed.). Where "there is a reasonable probability" that the result of the appellate proceedings would have been different, prejudice is demonstrated. Smith, 528 U.S. at 285; Showers v. Beard, 635 F.3d 625, 634 (3d Cir. 2011); Mannino, 212 F.3d at 845.

ARGUMENT

1. RAUF AND POWELL REQUIRE APPELLANT BE RESENTENCED TO LIFE WITHOUT PAROLE.

Question Presented: Whether, pursuant to Powell v. State, this Court's decision in Rauf v. State should be applied retroactively requiring that Appellant be resentenced? (Preserved A2323-35).

Scope and Standard of Review: Pursuant to Powell, Rauf must be retroactively applied.

Merits of Argument: On August 2, 2016, this Court held Delaware's capital sentencing statute, Del. Code. Ann. Tit. 11, § 4209, violates the Sixth Amendment requirement that a jury, not a judge, make the necessary findings for imposition of a death sentence. Rauf, 145 A.3d at 434. On December 15, 2016, this Court held Rauf must be applied retroactively to capital cases on collateral review. Powell, 2016 WL 7243546, at *5. As Powell invalidates Appellant's death sentence, counsel have eliminated the penalty claims from this revised brief.

2. COUNSEL'S INEFFECTIVENESS PREVENTED THE JURY FROM HEARING READILY AVAILABLE EVIDENCE DIRECTLY DISPUTING APPELLANT'S GUILT.

Question Presented: Whether, because of counsel's ineffectiveness, the jury did not hear readily available evidence directly disputing Appellant's guilt in violation of the 6th, 8th, and 14th Amendments and Delaware Constitution Article I, §§ 4, 7, 9, 11, 12 and 13? (Preserved A2048-67).

Scope and Standard of Review: The standard of review of the denial of relief under Rule 61 is abuse of discretion. Swan v. State, 28 A.3d 362, 382 (Del. 2011). Questions of law, claims of constitutional violation, and mixed questions of law and fact are reviewed de novo, Zebroski, 12 A.3d at 1119, as are issues arising from the Superior Court's application of Rule 61(i) bars, Id. at 1120; Webster, 604 A.2d at 1366.

Appellant presents colorable constitutional claims of error undermining the reliability of the verdict. Merits review is required under (i)(5) and the "interests of justice" exceptions to (i)(2) and (i)(4).

Merits of Argument: Counsel's failure to investigate, develop and present evidence directly disputing Appellant's guilt constituted prejudicially deficient performance. This Court should reach the merits because the lower court misapplied the Rule 61(i)(2) bar.

In support of its trial theory, the State relied on: three eyewitnesses it claimed connected Appellant to the shooting (Susan Butler, Phillip Hudson, Debra Dorsey-Crowell); forensic testimony purporting to explain the absence of any gunshot residue ("GSR") on Appellant despite the presence of GSR on the victim's clothing; the State's contention Appellant's military service connected him to a military jacket containing a clip with bullets matching those used in the murder and found in Stevenson's car; and its theory Appellant's military weapons training indicated Appellant was the shooter. The post-conviction hearing evidence directly disputes the reliability of each of these factors. Had the jury heard the readily available evidence directly disputing each of these factors presented at the post-conviction hearing, there is a reasonable probability that it would have acquitted Appellant.

Ms. Butler admittedly did not get a good look at the suspect's face, A3011-12, and described the individual as not "overly" tall,[4] stocky, wearing a blue shirt. A569. Mr. Hudson told the police the man was six feet tall, 225-250 pounds wearing a blue shirt with writing on it. A575. He gave varying descriptions of the suspect's car to the police and in his testimony. While he picked Appellant's photo from the array, Hudson did not identify Appellant at trial. A571-75.

[4] Ms. Butler testified that the individual was much taller than the maintenance worker (who was shorter than 5 feet 6 inches). A571.

Debra Dorsey, the victim's girlfriend, testified about observing a black man through her apartment door the night before the murder (A527-28) and how she saw a black man running from the murder scene the next day (A531). It was the prosecution's theory that the two men were one in the same and that the description matched Appellant. Ms. Dorsey told the police the person was a black male, six feet tall, with no facial hair, wearing a thick insulated type black coat and carrying gloves. A693.[5] She did not identify Appellant from a police photo array. A2959. By the time of trial, her description evolved to more closely match Appellant, including changing her description from six feet tall to "a little shorter than" the victim, who was 5'10". A64; see A528.

There existed significant evidence disputing the reliability of this witness testimony. The jury never heard that Ms. Butler failed to identify Appellant in a photo array conducted a week after the murder or that the best she could say was that of those in the array, Appellant's photograph had the "closest profile" (the same "shape of head") and on a scale of one to ten, his photo was a "four." See A2340; A2961. It also never heard that Hudson told a defense investigator that he was only "pretty sure" that Appellant was the individual. A2996-97. Nor did the jury hear that Ms.

[5] Appellant was 5 feet 6 inches tall with a mustache and goatee. See A609; A2945.

Dorsey had made statements to the police reflecting both racial bias and an inability to make an accurate cross-racial identification. A2350 ("they all look the same"); A2349 (describing the man wearing a "shoplifting coat"); A2347 ("You know how they do that with their hands sometimes"). Nor did the jury learn that the 911 calls by these witnesses demonstrated that they were highly emotional, provided disparities in the descriptions, and discussed and compared their observations following the shooting. A3067-73.

Dr. Davis, an identification expert, explained how the emotional stress and trauma of witnessing a frightening, violent event, such as the shooting of a neighbor or loved one, directly impacts and impairs the ability to accurately recall, relate and describe the circumstances of the incident and perpetrator. A3070-74. Dr. Davis also described how accounts change over time, especially when, as in this case, witnesses discuss the event or perpetrator with each other, A3075, and how the impact of trauma and stress affects memory and dramatically decreases a witness's accuracy rate, even just a week after the event. A3117. See Dennis v. Sec'y Pa. Dep't of Corr., 834 F.3d 263, 321-341 (3d Cir. 2016) (McKee, J., concurring)(discussing inherent unreliability of eyewitness identifications due to law enforcement influence, stress, weapon focus, memory decay, distance, and duration of view; addressing crucial role of expert testimony and need for "robust jury instructions" to "minimize [] dangers associated

with inaccurate eyewitness identifications"). Dr. Davis specifically addressed how these principles explain the changes in Ms. Dorsey's descriptions from her initial police contact (describing someone far different from Appellant and failing to identify Appellant), to the trial (adding characteristics similar to how Appellant appeared in court). A3086-87; A3103-04. Dr. Davis also described the inherent risk of misidentification in photo arrays and how the array in this case was flawed in its composition and administration. A3089-92; A3099-3101. Although it was counsel's strategy to challenge evidence purporting to connect Appellant to the shooting, A1102-03, counsel ineffectively failed to marshal this evidence directly disputing the reliability of these witnesses. Counsel's failure to develop evidence supporting their chosen defense was deficient. Jacobs v. Horn, 395 F.3d 92, 104 (3d Cir. 2005)

While there was GSR inside the pocket and on the sleeves of the victim's jacket (found inside his jeep trunk), none was found on Appellant. A589-90. Through Agent Kinard's testimony, the State elicited various speculative and unrelated reasons why GSR may not be on a person who had fired a weapon. A587-89. As Dr. Harper, a forensic expert, testified during the Rule 61 hearing, the only acceptable scientific explanation for the absence of GSR on Appellant was that he was not in the area of the murder weapon at the time it was fired, i.e., he was not the shooter. A2506. Dr. Harper systematically explained how Agent Kinard's speculative "reasons" for the

absence of GSR were either not present or inapplicable in light of the record, the witness testimony, and the physical evidence, especially given the presence of GSR on the victim's jacket sleeves and pocket. A2503-06.[6] Counsel's failure to develop this evidence directly disputing the State's inherently unreliable forensic testimony constitutes prejudicially deficient performance.

There also existed evidence directly disputing the State's claim that Appellant's military service connected him to the murder. Contrary to the State's at-trial claim, the military jacket issued to Appellant was not remotely similar to the one found in Stevenson's car[7] and was in the possession of Jermaine Turner at the time of the incident, in a completely different state.[8] While Appellant was required to participate in weapons training even though he was assigned to a medical unit, that training was limited to an M-16 rifle as opposed to any, let alone extensive, training in automatic or semi-automatic hand-guns.[9] Counsel ineffectively failed to investigate Appellant's service clothing, weapons training or any other evidence disputing the State's theory

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[6] After reviewing limited record excerpts and the State's 'summary' of the incident, the State's expert initially offered various reasons for the absence of GSR but ultimately conceded that those reasons were speculative and not supported in the record. A3138-42; A3146-56.

[7] A2488; A2490.

[8] A2620-26.

[9] A2476; A2483-85; A2493-95.

based on Appellant's military service.

There also existed another more likely suspect, Stevenson's cousin, George Stevenson ("George"). They grew up together and were close. George had served as Stevenson's protector; knew about the Macy's charges; was in the vicinity at the time of the murder; was in the Army and had the same access to camouflage and weapons training the State attributed to Appellant; was employed at Champs at Christiana Mall and wore a uniform that matched eyewitness descriptions of the shooter's clothes; and provided contradictory details to the police. See A113-127; A2971-73; A2975-79; A2992-93; A3008-09.

Counsel also failed to present Susan Brown who saw the suspect approach the decedent, fire multiple times, then leave on foot behind an apartment building, in the direction of Christiana Mall. A2394. Presented with this evidence, the jury reasonably could have found that the individual Ms. Brown saw was George Stevenson, fleeing in the direction of his workplace.

Counsel also failed to challenge prosecution evidence that was either irrelevant or materially misleading. Melissa Magalong, who lived in the apartment formerly occupied by the decedent, described an incident the night before the murder in which she heard two male voices and then a knock at her door. A664. Although Magalong did not see the individuals and there was nothing to connect Appellant to this incident,

the State argued that the individuals were Appellant and Stevenson. The jury's consideration of this irrelevant, speculative testimony and argument violated Appellant's state and federal due process rights to a verdict based on competent evidence.

The State also called Kevin Powlette who spoke with Stevenson shortly before the murder about obtaining a gun. A669-71. Although Appellant was not present, the jury was instructed to consider this evidence against Appellant. See Argument 10. Had counsel merely asked, Mr. Powlette would have told the jury that Appellant was not present and did not participate. A2432-33. Counsel's failure to present this evidence, particularly where the court instructed the jury to consider evidence of Stevenson's bad acts against Appellant (see Argument 10), constitutes deficient performance.

Individually and cumulatively, these errors demonstrate prejudice. Had the jury learned: the identification testimony purporting to connect Appellant to the shooting was inherently unreliable; the only scientific basis for the absence of GSR on Appellant was that he was not the shooter; the jacket in Stevenson's car was not Appellant's and his military service did not include the weapons training the State contended; there was no connection between Appellant and Stevenson's search for a gun; and that George Stevenson had a stronger motive, closer connection with

Stevenson, was in the military, and worked nearby, there is more than a reasonable probability of a different verdict. Indeed, Appellant has demonstrated "more likely than not that no reasonable juror would have convicted." Schlup v. Delo, 513 U.S. 298, 327 (1995). Relief is required.

The court's bar determination fails. See Jurisdictional Statement. As the evidence counsel ineffectively failed to develop and present goes to the core of the reliability of the jury's guilt determination, Appellant has demonstrated that consideration of his claims is in the interests of justice and presented colorable constitutional claims of error undermining the reliability of the verdict. Appellant has also demonstrated that prior counsel's failure to develop this evidence constituted prejudicially deficient performance and violated federal due process. Relief or, at a minimum, remand for a full hearing[10] is required.

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[10] The lower court denied discovery and precluded Appellant from presenting evidence supporting this claim (A2407), including testimony from Tiarra Koston who had told the police she saw Stevenson driving, alone, near his home in Wilmington shortly after the murder and before the police arrived at Stevenson's home (see A2355). Presented with this evidence, particularly in combination with the other evidence described above, a factfinder could have concluded that, contrary to the prosecution's theory, David Stevenson was accompanied by George Stevenson at the time of the murder and once the murder was completed, David Stevenson then returned home where the police found him and Appellant. At a minimum, remand to permit Appellant to fully develop and present the evidence the court excluded is warranted.

3. THE FAILURE TO DISCLOSE MATERIAL EXCULPATORY AND/OR IMPEACHMENT EVIDENCE COMPROMISED THE VERDICT.

Question Presented: Whether the State's failure to disclose material exculpatory evidence violated the 6th, 8th and 14th Amendments and Delaware Constitution Article I, §§ 4, 7, 9, 11, 12 and 13? (Preserved A2089-95).

Scope and Standard of Review: See Standard, Argument 2. Appellant presents colorable constitutional claims of error undermining the reliability of the verdicts. Merits review is required under (i)(5) and the "interests of justice" exceptions to (i)(2) and (i)(4).

Merits of Argument: The State failed to disclose material exculpatory evidence. The Court held those aspects of this claim arising from trial were barred and further limited Appellant's evidentiary presentation to the tapes of three witnesses (Susan Butler, Debra Dorsey-Crowell, George Stevenson) and the 911 tapes. A2407-08. Appellant also raised constitutional claims based on the State's failure to disclose material exculpatory and/or impeachment evidence about: Phillip Hudson, Dorothy Hackett, Marlene Farmer, Jessica Wing, Carol Schweda, and Tiarra Koston. A2091-95. Due Process requires a prosecutor to disclose material exculpatory evidence, including impeachment evidence. Kyles v. Whitley, 514 U.S. 419, 437 (1995); United States v. Bagley, 473 U.S. 667, 676 (1985); Giglio v. United States, 405 U.S. 150,

153-56 (1972); Brady, 373 U.S. at 87; Napue v. Illinois, 360 U.S. 264, 269 (1959); Wright v. State, 91 A.3d 972, 987-88 (Del. Supr. 2014). The duty continues beyond sentencing. Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976). Materiality/prejudice exists when there is a reasonable probability that, had the evidence been disclosed, the result of the proceedings would have been different. Kyles, 514 U.S. at 434.

The undisclosed evidence included taped interviews and 911 calls. While the State turned over transcripts for Susan Butler, Phillip Hudson and George Stevenson, those transcripts contained blanks and omissions. The State also failed to turn over a transcript for Ms. Koston. The contents of the taped statements provided further support for the unreliability of the identification testimony. The 911 calls provided myriad bases to challenge the reliability of the witnesses, including evidence that Ms. Dorsey harbored racial biases (compromising the reliability of her identification testimony); that Ms. Butler and Ms. Dorsey were clearly traumatized by the shooting (impacting their ability to accurately relate details) and that in the chaos after the shooting, witnesses discussed what they had seen, further diminishing their reliability. The contents of George Stevenson's taped statement included further support for a defense theory that it was George, not Appellant, who committed the shooting.

There is also a reasonable likelihood that the contents of tapes still not disclosed are material and exculpatory. Ms. Koston's taped statement likely substantiates her

police statement that she saw David Stevenson, alone, driving near his home shortly after the shooting, supporting the defense that Appellant was not involved. The tapes of Ms. Hackett, Ms. Farmer, Ms. Wing, and Ms. Schweda likely include further exculpatory evidence consistent with the police reports of those interviews containing descriptions of those involved that do not match Appellant.[11]

Individually and cumulatively, the undisclosed evidence would have presented the jury with strong evidence that Appellant was not the shooter. Had the jury learned of this additional evidence demonstrating that the State's eyewitness testimony was inherently unreliable and the strong likelihood that someone other than Appellant shot the decedent, there is a reasonable probability that it would have rejected the State's guilt theory. Accordingly, the undisclosed evidence was material and the State's failure to disclose violated Brady. Similarly, counsel was entitled to disclosure once the prosecution witnesses testified on direct, see Super. Ct. Crim. R. 26.2, and their failure to request these statements constituted prejudicially deficient performance.

The lower court's bar determination (O14-15) fails. See Jurisdictional Statement. The State was, and is, under a continuing obligation to disclose material

[11] The court precluded disclosure of these tapes on the basis of its determination in Stevenson's prior Rule 61 proceedings that Stevenson's counsel had a strategic basis for not calling these witnesses. A2408. As Stevenson's counsel's reasons for not calling those witnesses cannot be transferred to Appellant's counsel, reliance on that determination constitutes legal error requiring reversal.

exculpatory evidence. Imbler, 424 U.S. at 427 n.25. Thus, barring disclosure and review violates Due Process. The court also found no actual prejudice for counsel's ineffectiveness. O18-19. As described above, the court's conclusion is contradicted by the record and controlling precedent. Relief or remand for a hearing is required.

4. IMPROPER JOINDER VIOLATED THE U.S. CONST. VI, VIII, AND XIV AND DEL. CONST. ART. I, §§ 4, 7, 9, 11, 12 AND 13.

Questions Presented: Whether the joint trial violated Appellant's rights, and counsel were ineffective for failing to object, raise and litigate these issues? (Preserved A2308-16).

Scope and Standard of Review: See Standard, Argument 2, 3.

Merits of Argument: Appellant's trial was joined with co-defendant Stevenson. As a result, evidence against Stevenson, but not admissible against Appellant, was admitted and considered by the jury, including: the Macy's theft in which Appellant was not involved (A622-23); Stevenson's attempt to obtain a firearm at which Appellant was not present (A670); Stevenson's admissions (A639); and a note found in the cruiser transporting Stevenson containing the address of another Macy's employee involved in Stevenson's theft prosecution (A639-40).

The improper joinder violated the Sixth and Fourteenth Amendment requirements for a verdict beyond a reasonable doubt on the basis of competent, reliable evidence,[12] and the Sixth Amendment right to confrontation and cross-

[12] See United States v. Gaudin, 515 U.S. 506, 514 (1995); Chandler v. Florida, 449 U.S. 560, 574 (1981); Jackson v. Virginia, 443 U.S. 307, 316 (1979); In re Winship, 397 U.S. 358, 364 (1970).

examination.[13]

Counsel moved pretrial for severance and raised the issue of improper joinder on direct appeal but limited the claim to "mutually antagonistic defenses" and failed to present the above constitutional bases requiring severance. Having determined to present this claim, counsel can have no strategic reason for failing to present all bases requiring relief. Hinton, 134 S. Ct. at 1089; Everett v. Beard, 290 F.3d 500, 509 (3d Cir. 2002). Counsel's failures constituted prejudicially deficient performance.

The lower court's bar determination (O14-5) fails. See Jurisdictional Statement. Because Appellant has demonstrated counsel's ineffectiveness for failing to fully develop a claim counsel raised on appeal, he has presented a colorable claim of constitutional error and demonstrated that merits review is in the interests of justice. Relief or, at a minimum, remand for a hearing is required.

[13] See Crawford v. Washington, 541 U.S. 36, 43 (2004); Bruton v. United States, 391 U.S. 123 (1968); Pointer v. Texas, 380 U.S. 400, 405 (1965).

5. IMPROPER ACCOMPLICE INSTRUCTIONS PREJUDICED APPELLANT.

Questions Presented: Whether the instructions on accomplice liability and Stevenson's bad acts evidence unconstitutionally relieved the State of its burden of proof and counsel were ineffective for failing to object, request proper instructions or raise these issues on appeal? (Preserved A2274-82).

Scope and Standard of Review: See Standard, Argument 2, 3.

Merits of Argument: The court's instructions regarding accomplice liability violated Appellant's right to due process and a fair trial. Counsel's failure to object, request proper instructions, or properly raise these issues on appeal constituted prejudicially deficient performance.

Due process requires proof of every element of the offense beyond a reasonable doubt. Winship, 397 U.S. at 364. A verdict must be unanimous. Fountain v. State, 275 A.2d 251 (Del. 1971). Jury instructions that reduce these burdens violate due process.[14] Accomplice instructions should include the provisions of 11 Del. C. § 274 requiring consideration of individual mental culpability. Demby v. State, 744 A.2d 976, 989 (Del. 2000); Chance v. State, 685 A.2d 351, 359 (Del. 1996). Where there

[14] See Cage v. Louisiana, 498 U.S. 39 (1990); Osborne v. Ohio, 495 U.S. 103, 122-23 (1990); Carella v. California, 491 U.S. 263, 265 (1989); Francis v. Franklin, 471 U.S. 307, 313 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979); Smith v. Horn, 120 F.3d 400, 414-15 (3d Cir. 1997).

is a reasonable likelihood that the jury applied the instructions in an unconstitutional manner, relief is required. Boyde v. California, 494 U.S. 370, 380 (1990).

While defining the elements of accomplice liability, the court lumped together all the offenses. See A789 ("in order to find either of the defendants guilty of an offense); Id. ("another person committed the offenses charged"); Id. ("as I will explain these offenses for you"); Id. ("intended to promote or facilitate the commission of the offenses"); Id. ("conscious object or purpose to further or assist the commission of the offenses"); Id. (" defendant aided, counseled, or agreed to aid another person in planning or committing the offense"). The court then told the jury it did not have to be unanimous as to who was the principal or accomplice "so long as you are all agreed as to guilt," A789, and that it could convict Appellant if it found "the other defendant committed all of the elements of the offense and the defendant was an accomplice to those acts as I have defined that term for you . . ." A790; see also A791-92.

Because these instructions confused and conflated the requirements for first degree murder, there is a reasonable likelihood the jury applied the instructions in a manner that relieved the State of its burden of proof for the required intent for first degree murder. By lumping together all the offenses in defining accomplice liability, there is a reasonable likelihood that the jurors, or a juror, interpreted those instructions to mean that, should the jury find sufficient evidence to demonstrate Appellant was an

accomplice to a lesser offense, the State had also met its burden as to murder, regardless of the presence or absence of the required intent. The instructions on murder exacerbated the constitutional error. Rather than specifying that an accomplice must have the requisite intent for murder, the court merely referred the jury to the flawed accomplice charge.

The constitutional errors were further compounded by the court's instruction that the jury's determination need not be unanimous so long as the jurors "agreed as to guilt," because the court failed to specify what it meant by "guilt," whether guilt as to murder or one of the lesser offenses. A789. As a result, there is a reasonable likelihood the jury interpreted this to mean that, although each juror had to reach a determination about who was the principal and who was the accomplice, they did not have to be unanimous on those questions in order to find the State met its burden of proof as to guilt. The instruction unconstitutionally relieved the State of its burden and deprived Appellant of his right to a unanimous jury determination of critical facts.

A state may obtain a verdict where the jury is non-unanimous on the theory of the charge as long as it is unanimous on guilt of the specific charge, but no federal constitutional precedent "suggests that the Due Process Clause would permit a State to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering,

for example, would suffice for conviction." Schad v. Arizona, 501 U.S. 624, 633 (1991) (plurality). The court's instructions here resulted in the probable risk that this is precisely how the jury interpreted and applied these instructions.

While counsel objected to the court's instructions on accomplice liability, A757, they failed to raise the issue on appeal. Counsel's ineffective failure prejudiced Appellant, because had this issue been properly raised on appeal, there is a reasonable probability that a new trial would have been granted.

Counsel's failure to properly preserve and litigate these claims constituted prejudicially deficient performance because there is a reasonable probability that the jury interpreted these instructions in an unconstitutional manner resulting in a non-unanimous verdict based on a lower burden of proof.

The court's bar determination (O14-15) fails. See Jurisdictional Statement. As the improper instructions and counsel's prejudicially deficient performance undermined the reliability of the verdict and the results of the appeal, Appellant has demonstrated colorable claims of constitutional error and that merits review is in the interests of justice. Relief or, at a minimum, remand for a hearing is warranted.

6. THE FAILURE TO REQUEST VOIR DIRE ON RACIAL BIAS VIOLATED U.S. CONST. VI, VIII, AND XIV AND DEL. CONST. ART. I, §§ 4, 7, 11 AND 13.

Questions Presented: Whether the failure to question jurors about racial bias violated Appellant's rights to an impartial jury, due process, and effective assistance of counsel? (Preserved A2167-74).

Scope and Standard of Review: See Standard, Argument 2, 3. A trial court's failure to sufficiently inquire into juror bias is reviewed de novo. Knox v. State, 29 A.3d 217, 220 (Del. 2011).

Merits of the Argument: When race is "inextricably bound" with the issues at trial, adequate voir dire is required to determine potential racial bias. Turner v. Murray, 476 U.S. 28, 32 (1986) (quoting Ham v. South Carolina, 409 U.S. 524, 596-97 (1973)); Ristaino v. Ross, 424 U.S. 589, 597 (1976). Delaware allows additional voir dire where there is a "reasonable probability" of racial bias. Feddiman v. State, 558 A.2d 278, 283 (Del. 1989). Despite the clear racial overtones: two black defendants, a white victim, cross-racial identifications, and white prosecution witnesses, neither counsel nor the court inquired into racial bias in violation of Appellant's right to an impartial jury and effective assistance of counsel. While Appellant need not show prejudice, Turner, 476 U.S. at 37, even if prejudice were required, without adequate voir dire, there was a reasonable probability that one or

more biased jurors were seated. Hollis v. Davis, 941 F.2d 1471, 1483 (11th Cir. 1991); Gov't of Virgin Islands v. Forte, 865 F.2d 59 (3d Cir. 1989).

The lower court barred this claim and denied Appellant's request for juror interviews (A2410). The court's bar determination fails. See Jurisdictional Statement. Seating a juror harboring racial bias constitutes structural error establishing a colorable claim of constitutional error and demonstrating that review is in the interests of justice. Thus, relief or, at a minimum, remand for full disclosure and a hearing is warranted.

7. THE STATE'S DISCRIMINATORY PEREMPTORY STRIKE PREJUDICED APPELLANT.

Questions Presented: Whether the State's peremptory strike based on race and gender violated Appellant's rights to equal protection, due process and an impartial jury, and counsel were ineffective for failing to properly object at trial and on appeal? (Preserved A2174-85).

Scope and Standard of Review: See Standard, Argument 2, 3.

Merits of Argument: The State peremptorily struck an African-American woman from Appellant's jury in violation of Appellant's rights to equal protection, due process and an impartial jury. J.E.B. v. Alabama, 511 U.S. 127, 128-29 (1994); Batson v. Kentucky, 476 U.S. 79, 84 (1986); Swain v. Alabama, 380 U.S. 202, 203-04 (1965). Counsel's failure to object and litigate this issue at all relevant times constituted prejudicially deficient performance.

The prosecutor claimed he struck this black female juror based on the fact that her brother had been convicted of armed robbery and later rehabilitated (A359-61), but then later accepted a white female juror (A364-69) and a white male juror (A431-32) who were similarly situated. The court noted "there was no reason for [the black woman] not to be a juror." A361. The prosecutor also claimed "reciprocity" because the defense had struck white jurors. Id. As discrimination as to even one juror is

prohibited, Batson, 476 U.S. at 97-8, relief is required.

The State's pretextual reasons failed to satisfy Batson. See Riley v. Taylor, 277 F.3d 261, 285 (3d Cir. 2001) (comparison between struck black juror and sitting white juror relevant to pretext); McClain v. Prunty, 217 F.3d 1209, 1220 (9th Cir. 2000). The court also failed to review the totality of the circumstances in determining intent. Miller-El v. Dretke, 545 U.S. 231, 239 (2005).

At the conclusion of the prosecutor's alleged race neutral rationale for striking Ms. Stewart, the court asked if counsel had any comments. Counsel stood silent, merely stating, "No, your Honor. I think the Court's covered it." A361. Counsel failed to raise the improper strike on appeal or during the prior Rule 61 proceedings. Had counsel done so, there is a reasonable probability of a different result.

The lower court restricted review of this claim to whether counsel's ineffectiveness constitutes cause and prejudice. As Appellant has demonstrated structural error, a colorable claim of a miscarriage of justice and review is in the interest of justice, the court's bar determination (O15) fails. See Jurisdictional Statement. Moreover, counsel's prejudicially deficient performance for failing to raise and litigate this claim constitutes cause and prejudice particularly where, as here, counsel's failure resulted in the unconstitutional exclusion of a juror on the basis of race. E.g. Flamer, 585 A.2d at 758 ("if a counsel's failure to pursue a reasonably

available claim is so egregious as to constitute ineffective assistance of counsel under the Sixth Amendment, that failure is not only cause to excuse the procedural default, but also an independent ground to reverse the prior convictions").

8. PROSECUTORIAL MISCONDUCT VIOLATED U.S. CONST. VI, VIII AND XIV AND DEL. CONST. ART. §§ 4, 7, 9, 11 AND 13.

Question Presented: Whether Appellant's right to a fair trial was violated by the prosecutor's inflammatory, misleading, and prejudicial remarks and argument; and counsel were ineffective for failing to properly object, request curative instructions, and properly raise and litigate these issues on appeal? (Preserved A2236-47).

Scope and Standard of Review: See Standard, Argument 2, 3.

Merits of Argument: The duty of the prosecution in a criminal case is not to win, but to seek justice. Berger v. United States, 295 U.S. 78, 88 (1935). This duty includes a special obligation to "refrain from improper methods calculated to produce a wrongful conviction." Id. A prosecutor may not misstate the record, Hughes v. State, 437 A.2d 559 (Del. 1981), or vouch for witnesses. McCoy v. State, 112 A.3d 239, 260, n.74 (Del. 2015); Brokenbrough v. State, 522 A.2d 851, 859 (Del. 1987). When the misconduct implicates specific provisions of the Bill of Rights, courts must take "special care to assure that prosecutorial conduct in no way impermissibly infringes [those rights]." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). The prosecution's misconduct violated each of these fundamental tenets.

The prosecutor made inflammatory remarks deliberately designed to incite the

passions of the jury against Appellant;[15] relied on irrelevant, incompetent and speculative testimony;[16] vouched for his expert witness;[17] and mischaracterized key evidence.[18] Counsel's failure to object or request a curative instruction and raise this claim on appeal constitutes prejudicially deficient performance. Brokenbrough, 522 A.2d at 860 (discussing when prosecutorial misconduct is deemed per se reversible error); see also Chapman v. State, 821 A.2d 867, 870 (Del. 2003) (same). Subsequent counsel's failure to litigate this issue during the initial Rule 61 also prejudiced Appellant. Prejudice is demonstrated because there is a reasonable probability that the jury was inflamed by the prosecutor's improper comments, believed the prosecutor's false and misleading argument, and convicted Appellant on this basis rather than

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[15] See A776; A787 (telling jury that its duty was to "complete" victim's quest for justice because he could not do it for himself).

[16] A664; A769 (relying on witness testimony concerning unidentified males who visited her apartment the night before the offense).

[17] See A786 (arguing that forensic expert's job is just "to tell the truth").

[18] Compare A737; A748 (Dorothy Hackett testimony giving description matching Stevenson and identifying Stevenson as opposed to Appellant) with A770 (prosecutor indicating that Hackett's description "exactly" matches Appellant); A773; A786 (misstating testimony about location of camouflage jacket); A775 (arguing that Mr. Cruz had seen Appellant get into Stevenson's car prior to the offense, when he had not); A771; A613; A628; A631 (misstating Officer Murray's and Witte's testimony about when and where they saw Appellant); and A771 (arguing, in an effort to explain the absence of GSR, that Officer Murray had testified Appellant was sweating after the incident when he had not); see also A615.

competent, reliable evidence. Had counsel raised this issue on appeal or during the Rule 61, there is a reasonable probability that relief would have been granted.

The lower court's bar determinations fail. See Jurisdictional Statement. Where, as here, the prosecution's misconduct compromised the reliability of the verdict, Appellant has presented colorable constitutional claims involving a miscarriage of justice and demonstrated that merits review is in the interests of justice. Relief or, at a minimum, an evidentiary hearing is warranted.

9. JUDICIAL BIAS DEPRIVED APPELLANT OF A FAIR TRIAL.

Question Presented: Whether judicial bias violated Appellant's right to a fair trial and due process, and was counsel ineffective in violation of the 6th, 8th and 14th Amendments and Art. I, §§ 4, 7, 11, and 13? (Preserved A2267-72).

Scope and Standard of Review: See Standard, Argument 2, 3. The appearance of judicial impropriety is reviewed de novo. Gattis v. State, 955 A.2d 1276, 1286 (Del. 2008).

Merits of Argument: "The influence of the trial judge on the jury is necessarily and properly of great weight." Starr v. United States, 153 U.S. 614, 626 (1894) (citation omitted). Judicial conduct that "preclude[s] a fair and dispassionate consideration of the evidence" violates due process. Quercia v. United States, 289 U.S. 466, 472 (1933) (citations omitted). A judge may not try a case where he has an interest in the outcome. In re Murchison, 349 U.S. 133, 136 (1955). Recusal is required if the judge subjectively believes he cannot be impartial, or if an objective review shows the "appearance of bias" may "cause doubt" as to impartiality. Los v. Los, 595 A.2d 381, 385 (Del. 1991).

Judge Barron was clearly biased against Appellant, demonstrated by his specific request to be "specially assigned" to this case, having presided over Stevenson's theft

case. A1163. Former President Judge Ridgely assigned Judge Barron.[19] This Court found Judge Barron's request for assignment improper; that there existed an appearance of impropriety; and that Judge Barron's sentencing decision showed he "harbored strong feelings about the murder." A1098.

Judicial bias constitutes "structural error" that renders the proceedings fundamentally unfair and unconstitutional. Williams v. Pennsylvania, 136 S.Ct. 1899, 1909 (2016); Johnson v. United States, 520 U.S. 461, 468-69 (1997); Tumey v. Ohio, 273 U.S. 510, 535 (1927). Prejudice is not required because the right to an impartial tribunal is "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 76 (1942); see also Williams, 136 S.Ct. at 1909. When "the objective risk of actual bias on the part of a judge rises to an unconstitutional level," the participation of the questioned judge cannot be deemed harmless. Id. at 1910.

Judge Barron's biases and strong feelings about the victim's death impacted his determination of critical trial issues, including: the severance motion, Appellant's

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[19] Justice Ridgely also issued the Report to this Court on appeal from Appellant's resentencing hearing, sat on the panel that decided Appellant's legal issues and wrote the opinion affirming Appellant's death sentence. A1091; A2000. Given his prominent role in Appellant's case prior to that appeal and his exposure to extrajudicial information, Justice Ridgely's recusal from Appellant's case in the subsequent appeal was also required. Williams, 136 S.Ct. at 1905 (citing In re Murchison, 349 U.S. at 136).

request for proper accomplice liability instructions, the admission of Stevenson's hearsay and bad acts evidence against Appellant, and the instructions directing the jury to apply the irrelevant evidence against Appellant. Judge Barron's request for assignment, combined with his failure to disclose the circumstances of that assignment, compromised the integrity of the judicial system. Arizona v. Fulminate, 499 U.S. 279, 309-10 (1991). Counsel conceded no strategic reason for failing to raise this claim on appeal. See A2658-59; A2894.

The lower court's bar determination fails. See Jurisdictional Statement. Reconsideration is warranted under Williams. During Appellant's initial appeal of his 1996 trial and sentencing, this Court vacated Appellant's sentence after finding that Judge Barron's participation in the trial "create[d] too great a risk that a constitutional violation has occurred." A1098. Under Williams, judicial bias does not limit itself to one phase of a trial nor is bias subject to harmless error analysis regarding either phase of trial. Bias, or even the appearance of bias, is structural error requiring a new trial.

Reconsideration is also warranted because the resentencing order invalidated the original judgment of conviction and any failure to raise these claims previously was caused by counsel's ineffectiveness. Because judicial bias involves structural error, prejudice is presumed and a new trial is mandated. Even if a showing of

prejudice were required, there is a reasonable probability that this Court would have granted a new trial had counsel properly raised and litigated this claim, thus prejudice has been demonstrated and relief is required.

10. ADMISSION OF STEVENSON'S STATEMENTS AND BAD ACTS AGAINST APPELLANT AND THE IMPROPER INSTRUCTIONS PREJUDICED APPELLANT.

Questions Presented: Whether admission of Stevenson's statements and bad acts against Appellant, the court's instructions that the jury could consider that evidence as to Appellant and counsel's failure to properly litigate these claims violated the 6th, 8th and 14th Amendments and Article I, §§ 4, 7, 9, 11, 12 and 13? (Preserved A2287-95; A2301-07).

Scope and Standard of Review: See Standard, Argument 2, 3.

Merits of Argument: The prosecution admitted Stevenson's: confession to the Macy's thefts, A622-23; statement about the police chase, A639; and testimony about his attempts to buy a gun. A670. The State had no evidence tying Appellant to this conduct, or any knowledge of the conduct. The court specifically instructed the jury to consider this evidence – despite no connection to Appellant – in determining Appellant's guilt. A793. The admission of this evidence and the court's specific instructions directing the jury to apply it against Appellant in reaching its verdict violated Appellant's rights to confrontation and cross-examination;[20] to a verdict based

[20] See Richardson v. Marsh, 481 U.S. 200, 206 (1987); Bruton, 391 U.S. 123; Pointer, 380 U.S. at 404, 406-07.

on competent, reliable evidence and proof beyond a reasonable doubt;[21] and his due process right to a fair trial. Counsel had no strategic reason for his failure to object or request proper limiting instructions. A1108. As there is a reasonable probability that the jury applied the evidence and instructions in an unconstitutional manner, prejudice is demonstrated. Even though this evidence did not inculpate Appellant, the prosecutor relied on it to show a close relationship between Appellant and Stevenson. Richardson, 481 U.S. at 204. Because the court specifically instructed the jury it could use these statements against Appellant, there is a reasonable probability that the verdict was the result of speculation and conjecture as opposed to competent, relevant evidence. Appellate counsel conceded no strategic basis for failing to raise and litigate the absence of proper instructions on appeal. A1108. Had counsel performed effectively, there is a reasonable probability that the results of the appeal would have been different.

The lower court's bar determination (O14-15) fails. See Jurisdictional Statement. The jury's consideration of improper evidence and argument in reaching its verdict constitutes a colorable constitutional claim and review is warranted in the interests of justice. Moreover, counsel's prejudicially deficient performance for

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[21] Gaudin, 515 U.S. at 514; Chandler, 449 at 574; Jackson, 443 U.S. at 316; Winship, 397 U.S. at 364.

failing to raise and litigate this claim constitutes cause and prejudice particularly where counsel's failure resulted in the jury's consideration of constitutionally improper evidence and argument in reaching its verdict. Flamer, 585 A.2d at 758. Relief or, at a minimum, remand for a hearing is required.

11. THE DENIAL OF A FAIR AND IMPARTIAL JURY VIOLATED THE 6TH, 8TH AND 14TH AMENDMENTS AND ART. I, §§ 4, 7, 11, 13.

Questions Presented: Whether, because of court error and counsel's ineffectiveness, biased jurors were seated at Appellant's trial and the jury was exposed to extraneous influences? (Preserved A2210-25).

Scope and Standard of Review: See Standard, Argument 2, 3. The failure to inquire into juror bias is reviewed de novo. Knox, 29 A.3d at 221.

Merits of Argument: An accused is entitled to an impartial jury, Irvin v. Dowd, 366 U.S. 717, 722 (1961), and "adequate voir dire." Morgan v. Illinois, 504 U.S. 719, 730 (1992). Unqualified jurors include those with a bias that substantially impairs the juror's ability to perform his duties. Gray v. Mississippi, 481 U.S. 648, 657 (1987). Due process also requires that the verdict be free from outside influences, including pervasive, hostile pretrial publicity. Chandler, 449 U.S. at 575; Rideau v. Louisiana, 373 U.S. 723, 726-27 (1963); Mattox v. United States, 146 U.S. 140, 150 (1892); Smith v. State, 719 A.2d 490 (Del. 1988); McBride v. State, 477 A.2d 174 (Del. 1984).

Appellant was tried by jurors who were biased or exposed to pervasive, outside influences. Three jurors saw Appellant in prison garb in violation of the presumption of innocence (A264-66; A270-72; A273-78),[22] but were never asked if this would

[22] Estelle v. Williams, 425 U.S. 501, 518 (1976); Gaito v. Brierley, 485 F.2d 86, 88 (3d Cir. 1973).

impact their verdict or provided a limiting instruction.[23] Three jurors expressed biases during voir dire.[24] Five were familiar with the scene, witnesses, and/or had read about the case in the extensive and hostile media coverage.[25] See A2381-92. Counsel ineffectively failed to challenge these jurors or raise these issues.

The court barred this claim under (i)(2). O15. Reconsideration is warranted because the resentencing order invalidated the original judgment and counsel ineffectively failed to raise these claims. Appellant has also shown that merits consideration is in the interests of justice and presented a colorable claim of a miscarriage of justice. Upon de novo review this Court should grant relief or, at a minimum, remand for an evidentiary hearing.

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[23] Counsel ineffectively refused the court's offer for a recess to permit Appellant to change. A235.

[24] A270-72; A446-47 (Juror Keesler sought medical assistance; was distraught about being selected); A318-21 (Juror Pendergast saw Appellant in prison garb; read media reports; failed to disclose criminal history); A342-45 (Juror Romanoski served on a jury that had convicted counsel's prior client of murder based on strikingly similar facts).

[25] Jurors 3, 10, and 11 had heard or read about the case, A318; A449; A453. Juror 7 knew people who had lived at Cavalier Apartments. A357. Juror 10 lived nearby. A449.

12. THE CUMULATIVE PREJUDICIAL EFFECT OF THE ERRORS VIOLATED U.S. CONST. VI, VIII AND XIV, AND DEL. CONST. ART. §§ 4, 7, 9, 11, 12 AND 13.

Question Presented: Is Appellant entitled to relief based on the cumulative errors in this case? (Preserved A2272-73).

Scope and Standard of Review: See Standard, Argument 2, 3.

Merits of Argument: Constitutional claims of error must be considered cumulatively as well as individually and cumulative error or prejudice may provide a basis for relief whether or not the effect of individual errors warrants relief. Kyles, 514 U.S. at 437-38; Taylor v. Kentucky, 436 U.S. 478, 488 (1978); Berryman v. Morton, 100 F.3d 1089 (3d Cir. 1996); Lesko v. Lehman, 925 F.2d 1527, 1541 (3d Cir. 1991. Although each of the individual claims presented herein requires relief, even if relief is not required on any particular error it is required on the basis of the cumulative effect of these errors denying Appellant a fair trial.

The lower court concluded that Appellant failed to demonstrate actual prejudice, and that there is no jurisdictional or colorable claim of a miscarriage of justice. O24. As demonstrated throughout this brief, the lower court's findings are contradicted by both the record and the law. Because there is a reasonable probability of a different guilt determination, upon de novo review, this Court should grant relief or, at a minimum, remand for full disclosure and an evidentiary hearing.

CONCLUSION

For the reasons presented here, Appellant respectfully requests that this Court vacate his conviction.

Respectfully submitted,

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