



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

**ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE**

STATE'S ANSWERING BRIEF

Elizabeth R. McFarlan (#3759)
Maria T. Knoll (#3425)
Deputy Attorneys General
Department of Justice
Carvel State Office Building
820 N. French Street, 7th Fl.
Wilmington, DE 19801
(302) 577-8500

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NATURE AND STAGE OF THE PROCEEDINGS

On November 13, 1995, Wilmington police arrested Michael Manley. On December 15, 1995, the Superior Court appointed Thomas A. Foley, Esq., and Anthony A. Figliola, Esq., to represent Manley. DI 2, 3.¹ On December 18, 1995, a New Castle County grand jury indicted Manley, charging him with: Murder in the First Degree; two counts of Possession of a Firearm During the Commission of a Felony (“PFDCF”); Conspiracy in the First Degree; Aggravated Act of Intimidation; and Conspiracy in the Second Degree. DI 1. On February 2, 1996, after a proof positive hearing, the Superior Court denied Manley bail pending trial. DI 14. On June 4, 1996, Manley moved to sever his trial from that of co-defendant David Stevenson. DI 20. On August 1, 1996, the Superior Court denied Manley’s severance motion. DI 23.

On October 21, 1996, a joint jury trial for Manley and Stevenson commenced in the Superior Court. On November 13, 1996, the jury found both Manley and Stevenson guilty of all charges. DI 50. After a two-day joint penalty hearing, the jury, by a vote of 7 to 5, found as to Manley that the aggravating circumstances outweighed the mitigating circumstances. DI 53. On January 10, 1997, the Superior Court sentenced Manley to death for his Murder in the First Degree conviction, and

¹ “DI_” refers to docket item numbers in *State v. Manley*, ID No. 9511007022. (A1-63).

an aggregate of 55 years in prison for the remaining convictions. DI 69, 70, 71. On April 14, 1998, this Court affirmed Manley's convictions and sentence.² Manley filed a petition for writ of certiorari, which the United States Supreme Court denied on October 5, 1998.³

On October 20, 1998, the Superior Court appointed Joseph Bernstein, Esq., and Howard Hillis, Esq.,⁴ to represent Manley in postconviction. DI 114. In January 1999, Manley filed his first postconviction motion. DI 119. In April 1999, Manley, *pro se*, moved to proceed as hybrid co-counsel. DI 121. In May 1999, Figliola and Foley each filed affidavits in response to Manley's ineffective assistance of counsel allegations. DI 124, 125. In July 1999, the Superior Court denied Manley's motion to proceed as hybrid co-counsel. DI 133. In April 2000, the court denied Manley's postconviction motion. DI 148. On appeal, this Court reversed the denial of postconviction relief, and remanded the matter to a different Superior Court judge.⁵

In July 2001, the case was re-assigned to a different Superior Court judge. DI 155. In September 2001, Manley filed an amended postconviction motion. DI 165. On January 11, 2002, the Superior Court held an evidentiary hearing on Manley's

² *Manley v. State*, 709 A.2d 643 (Del. 1998).

³ *Manley v. Delaware*, 525 U.S. 893 (1998).

⁴ Hillis was subsequently permitted to withdraw and Joseph Gabay, Esq., was appointed in his place.

⁵ *Stevenson v. State*, 782 A.2d 249 (Del. 2001).

amended motion. DI 174. In March 2003, Manley filed a motion to preclude a new penalty hearing. DI 186. In October 2003, the Superior Court denied Manley's amended postconviction motion and his motion to preclude new penalty hearing. DI 193.⁶ On April 7, 2004, this Court affirmed the October 2003 order denying postconviction relief.⁷

In July 2004, Manley moved to recuse the assigned Superior Court judge. DI 209. In October 2004, the court denied Manley's motion for recusal. DI 214. Beginning on November 8, 2005, the court held a new penalty hearing. On December 6, 2005, the jury unanimously found the existence of three statutory aggravating circumstances, and found by a vote of 11 to 1 that the aggravating circumstances outweighed the mitigating circumstances. DI 260. On February 3, 2006, the Superior Court sentenced Manley to death. DI 268, 269. On January 3, 2007, this Court affirmed the sentence of death.⁸ On May 29, 2007, the United States Supreme Court denied Manley's petition for a writ of certiorari.⁹

In September 2007, the Superior Court appointed Christopher Koyste, Esq. and Christopher Tease, Esq., to represent Manley. DI 299. In January 2008, Manley

⁶ *Manley v. State*, 2003 WL 23511875 (Del. Super. Ct. Oct. 2, 2003).

⁷ *Manley v. State*, 2004 WL 771659 (Del. Apr. 7, 2004).

⁸ *Manley v. State*, 918 A.2d 321 (Del. 2007).

⁹ *Manley v. Delaware*, 127 S. Ct. 2885 (2007).

filed his second postconviction motion. DI 308, 309. In March 2008, the Superior Court granted Anne Saunders, Esq., and Beth Ann Muhlhauser, Esq., Federal Public Defenders from the Middle District of Pennsylvania, permission to represent Manley, with previously appointed counsel. DI 313. In May 2008, Manley filed an amendment to his second postconviction motion and a discovery motion. DI 321, 322. In June 2008, Manley filed a second amendment to his second postconviction motion. DI 328. In October 2008, the State filed its answering brief. DI 343. Manley filed his reply brief in January 2009. DI 348. Thereafter, the parties filed various motions. On November 28, 2011, the court denied Manley's motion to permit juror interviews (DI 390), and granted in part and denied in part Manley's motion to compel discovery (DI 391). The State complied with the discovery order the next day. DI 394.

The Superior Court conducted an evidentiary hearing from November 29 through December 9, 2011. DI 395. At the hearing, the court ruled from the bench as to certain claims at Manley's request. DI 395. The court found claims 1, 10, 12, 14, 21, 24, 25, 26, and *Batson* challenge claims 9 and 10, were procedurally barred. DI 395. The court accepted additional evidence on June 22 and July 6, 2012. DI 423, 424. Upon completion of the hearings, the parties filed additional memoranda. DI 426, 429, 433, 434, 435. In January 2013, the court permitted Manley to amend his postconviction motion. DI 436. The parties then filed additional pleadings

regarding the amendment. DI 440, 441. In September 2013, due to the retirement of the Superior Court judge, the matter was reassigned to a new judge. DI 444. On May 29, 2014, the Superior Court denied Manley's postconviction motion. DI 448.

On June 25, 2014, Manley timely docketed his appeal. DI 453. Manley filed his Opening Brief on February 27, 2015. On May 11, 2015, this Court granted Manley's motion to stay his appeal pending the United States Supreme Court's decision in *Hurst v. Florida*¹⁰. Thereafter, this Court stayed the appeal pending its decisions in *Rauf v. State*¹¹ and *Powell v. State*¹². On February 3, 2017, Manley timely filed his Opening Brief. He filed his Corrected Opening Brief on February 17, 2017, and his Second Corrected Opening Brief on March 6, 2017. This is the State's Answering Brief.

¹⁰ 136 S. Ct. 616 (2016).

¹¹ 145 A.3d 430 (Del. 2016).

¹² 153 A.3d 69 (Del. 2016).

SUMMARY OF THE ARGUMENTS

- I. Admitted. Manley's death sentence should be vacated.
- II. Denied. The Superior Court properly found Manley's argument that trial counsel failed to investigate and present evidence directly disputing his guilt barred under Rule 61(i)(2). The claim is also time-barred under (i)(1) and barred under (i)(4), because Manley previously raised this claim in his first postconviction motion. Review is not required in the interests of justice.
- III. Denied. The Superior Court properly found Manley's *Brady/Giglio* claim barred under Rule 61(i)(2) and (i)(3), because Manley failed to present it on direct appeal or in his first postconviction motion. Manley failed to show prejudice arising from his conclusory claim and therefore failed to substantiate his associated ineffective assistance of counsel claim.
- IV. Denied. The Superior Court correctly found Manley's improper joinder claim was barred by Rule 61(i)(4) as formerly adjudicated. Reconsideration was not required in the interests of justice because, the Superior Court pre-trial, this Court on direct appeal, the Superior Court in postconviction, and this Court on appeal from the denial of postconviction relief, considered and rejected Manley's claim.
- V. Denied. The Superior Court correctly found Manley's challenge to the accomplice liability instruction was barred under Rule 61(i)(4) as formerly

adjudicated. The claim is also barred under Rule 61(i)(1) as untimely and Rule 61(i)(3) for failure to raise the claim on direct appeal. This Court, on Stevenson's direct appeal from their joint trial, properly rejected this claim.

VI. Denied. Manley's claims that counsel failed to request, and the court failed to ask, the jury about racial bias are barred. The Superior Court found that because Manley failed to raise the claims at trial, on direct appeal or in the first postconviction, review was barred under Rule 61(i)(3). The claims are also untimely under Rule 61(i)(1) and barred under (i)(2).

VII. Denied. The Superior Court properly found Manley's *Batson* claim barred under Rule 61(i)(2), because Manley failed to raise it in his first postconviction motion. The claim is also defaulted under (i)(3) and (i)(4), because the claim was also previously adjudicated at trial and not raised on direct appeal.

VIII. Denied. The Superior Court properly found Manley's prosecutorial misconduct claims to be barred under Rule 61(i)(2). The substantive claim is also barred under Rule 61(i)(1) as untimely, (i)(3) for failing to object or raise them on appeal, and certain specific accusations are barred under (i)(4) because this Court denied the claims raised by Stevenson on direct appeal. Because Manley's prosecutorial misconduct claims are meritless, the Superior Court properly found the related ineffectiveness claim barred.

- IX. Denied. The Superior Court did not err in finding Manley's claim of judicial bias procedurally barred. The substantive claim is also barred under Rule 61(i)(1) as untimely, (i)(3) for failing to raise it on appeal, and (i)(4) because this Court denied the same claim raised by Stevenson on direct appeal.
- X. Denied. The Superior Court correctly determined Manley's claims that Stevenson's statements and bad acts were improperly admitted against him were procedurally barred. Manley previously argued the admissibility of the statements, except the conversation Stevenson had about purchasing a gun. The claims are therefore procedurally barred under Rule 61(i)(2), (3) or (4). Manley's complaint that Stevenson's Macy's theft arrest was improperly used against him is procedurally barred under 61(i)(4) and in any case, meritless. Because the defendants conspired together, Stevenson's Macy's theft went to Stevenson's motive *and* their conspiracy to eliminate witnesses.
- XI. Denied. Manley's claims that the jurors saw him in prison clothing, were biased, familiar with the scene, or had been exposed to pretrial media coverage, so as to prejudice them are time barred under 61(i)(1) and procedurally defaulted under (i)(2) and (3) for failure to raise the claims either in the proceedings leading to the judgment of conviction or in Manley's first

postconviction motion. Manley's related claims of ineffective assistance of counsel are procedurally defaulted under 61(i)(2) and meritless.

XII. Denied. None of Manley's individual claims resulted in prejudicial error. Manley cannot prevail on his cumulative error claim.

STATEMENT OF FACTS¹³

In 1994, David Stevenson was employed by Macy's Department Store in the Christiana Mall. While employed at Macy's, Stevenson used customers' credit card information to issue false gift certificates. Macy's security department employees, Parminder Chona and Kristopher Heath, investigated the matter. Stevenson was subsequently charged with theft and the matter was scheduled for trial in the Superior Court.

On the evening prior to Stevenson's scheduled court date, a black male wearing a long puffy black jacket knocked on the door to Heath's residence. Heath's fiancée, Deborah Dorsey, answered. Dorsey told the man that Heath was not at home, and the individual departed. Dorsey called Heath to tell him about the incident and that she was frightened. She also noted that the individual was not Stevenson, as she would have recognized him from her employment at Macy's.

On the morning of November 13, 1995, Heath was murdered in the parking lot of his residence at the Cavalier Country Club Apartments. Heath was shot in the back five times with a nine-millimeter handgun. The murder occurred on the same morning that Heath was to testify against Stevenson at his criminal trial. Upon hearing the gunfire, several residents at the apartment complex called the police.

¹³ The facts are taken directly from *Manley*, 918 A.2d at 324-25.

One resident, Lance Thompson, informed the police that he observed a black male run to, and enter, a mid-sized blue vehicle with faded and peeling paint. Thompson saw the license plate number and gave it to the police. At this time, Patrolman Daniel Meadows of the New Castle County Police broadcast the license plate number and vehicle description over the police radio. It was soon discovered that the license plate was registered to Stevenson and his mother at 206 West 20th Street in Wilmington, Delaware.

Wilmington police arrived in two squad cars at 206 W. 20th Street. The officers saw a car fitting the description given by Meadows arrive at the same time with two black men inside. The passengers started to exit the vehicle but reentered after seeing the approaching officers. The suspects drove away with the patrol cars in pursuit. After a short chase, the suspects fled on foot and were taken into custody.

The occupants of the vehicle were Manley and Stevenson. Manley matched the description of the shooter given by many eyewitnesses. After Stevenson was apprehended and brought to police headquarters, police searched the patrol car used to transport him. On the floor was a slip of paper with the name, address and phone number of Chona, the other Macy's employee who investigated Stevenson for the theft along with Heath.

I. MANLEY’S DEATH SENTENCE SHOULD BE VACATED AND THE SUPERIOR COURT SHOULD RESENTENCE MANLEY TO LIFE IN PRISON WITHOUT THE BENEFIT OF PROBATION, PAROLE OR ANY OTHER REDUCTION.

Question Presented

Whether Manley should receive the benefit of this Court’s holdings in *Rauf v. State* and *Powell v. State*. [Claim 28]¹⁴

Standard and Scope of Review

This Court reviews claims alleging the infringement of a constitutionally protected right *de novo*.¹⁵

Argument

This Court, in *Rauf v. State*,¹⁶ found the capital sentencing procedure in 11 *Del. C.* § 4209 to be unconstitutional. In December 2016, in *Powell v. State*, the Court found that its decision in *Rauf* should have retroactive application.¹⁷ Manley, like Powell, was sentenced to death pursuant to 11 *Del. C.* § 4209. The Court ordered that Powell’s sentence of death be vacated, and that Powell must be

¹⁴ For ease of reference, the bracketed claim numbers refer to the claim numbers in pleadings and the Superior Court’s decision below.

¹⁵ *Keyser v. State*, 893 A.2d 956, 961 (Del. 2006); *Capano v. State*, 781 A.2d 556, 607 (Del. 2001).

¹⁶ 145 A.3d 430 (Del. 2016).

¹⁷ 153 A.3d 69 (Del. 2016).

sentenced to “imprisonment for the remainder of his natural life without benefit of probation or parole or any other reduction.”¹⁸ Because Manley is similarly situated to Powell, he should receive the same application of *Rauf* to his sentence. Accordingly, the Court should vacate Manley’s death sentence and remand the matter to the Superior Court with directions to resentence Manley on his Murder in the First Degree conviction to imprisonment for his natural life without the benefit of probation, parole or any other reduction of sentence in accordance with 11 *Del. C.* § 4209(a).

¹⁸ *Id.* at 76. See also *State v. Reyes*, __A.3d__, 2017 WL 243360, at *18 (Del. Jan. 19, 2017); *Phillips v. State*, __A.3d__, 2017 WL 203601, at *11 (Del. Jan. 17, 2017).

II. THE SUPERIOR COURT CORRECTLY FOUND MANLEY’S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE DISPUTING HIS GUILT PROCEDURALLY BARRED.

Question Presented

Whether the Superior Court appropriately found that Rule 61’s¹⁹ procedural bars applied to Manley’s claim that trial counsel was ineffective for failing to present “readily available” evidence disputing his guilt. [Claim 1]

Standard and Scope of Review

This Court reviews a denial of a postconviction relief motion for abuse of discretion.²⁰ Legal or constitutional questions are reviewed *de novo*.²¹

Argument²²

Manley argues this Court should consider his claim that trial counsel’s failure to “investigate, develop and present evidence directly disputing [his] guilt

¹⁹ All references to Rule 61 are to Del. Super. Ct. Crim. R. 61 as it existed in 2008 when Manley filed his second postconviction motion.

²⁰ *Swan v. State*, 28 A.3d 362, 382 (Del. 2011) (internal citations omitted).

²¹ *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010).

²² Manley’s claims regarding the Delaware Constitution are waived for failure to brief the issue on appeal. *See Wallace v. State*, 956 A.2d 630, 637 (Del. 2008) (“conclusory assertions that the Delaware Constitution has been violated will be considered to be waived on appeal” (quoting *Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005))).

constituted prejudicially deficient performance” (Corr. Op. Brf. at 14) because the Superior Court misapplied Rule 61(i)(2). Manley is mistaken.

Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, Manley must satisfy the two-prong standard of *Strickland v. Washington*,²³ which requires that he prove that trial counsel's performance was objectively unreasonable and that he was prejudiced as a result.²⁴ Under the first prong, judicial scrutiny is “highly deferential.”²⁵ Courts must ignore the “distorting effects of hindsight” and proceed with a “strong presumption” that counsel's conduct was reasonable.²⁶ “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.”²⁷

Under *Strickland*'s second prong, “[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.”²⁸ “[N]ot every error that conceivably could have influenced the outcome undermines

²³ 466 U.S. 668 (1984).

²⁴ *Id.* at 688, 694.

²⁵ *Id.* at 689.

²⁶ *Id.*

²⁷ *Id.* at 690.

²⁸ *Id.* at 693.

the reliability of the result of the proceeding.”²⁹ The movant must show “that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.”³⁰

Manley's Ineffective Assistance of Counsel Claim is Procedurally Barred

Manley's claim relating to his 1996 trial is time barred under 61(i)(1).³¹ Under the terms of the rule in place at the time, Manley had three years after the United States Supreme Court denied his petition for certiorari on October 5, 1998, in which to file his postconviction motion alleging ineffective assistance of counsel at trial. Manley filed a timely first postconviction motion in January 1999, which he amended in September 2001. At that time, Manley presented ineffective assistance of counsel claims, which included a claim that trial counsel was ineffective for failing to present evidence that Manley was not the shooter.³² After trial counsel submitted affidavits and testified at an evidentiary hearing, Manley's postconviction counsel did not brief the claim and thus, the Superior Court deemed the claim

²⁹ *Id.*

³⁰ *Albury v. State*, 551 A.2d 53, 58 (Del. 1988) (quoting *Strickland*, 466 U.S. at 694).

³¹ The Superior Court did not find Manley's claims regarding his 1996 trial time-barred under Rule 61(i)(1). *See Manley*, 2014 WL 2621317, at *5 (Del. Super. Ct. May 29, 2014). However, this Court may affirm the trial court's judgment on alternative reasoning. *See Unitrin, Inc. v. American Gen'l Corp.*, 651 A.2d 1361, 1390 (Del. 1995)).

³² *Manley*, 2003 WL 23511875, at *7-8.

waived.³³ Manley did not present the claim on appeal of the Superior Court's denial of postconviction relief. This Court affirmed the denial of postconviction relief.³⁴

To the extent Manley failed to raise the present ineffective assistance claim in his earlier postconviction motion, the claim was barred under Rule 61(i)(2); to the extent the claim was raised and decided in the first postconviction proceedings, the claim was barred under Rule 61(i)(4). Manley has not alleged lack of jurisdiction, nor has he presented a colorable claim invoking Rule 61(i)(5)'s narrow exception.

In an attempt to avoid Rule 61's bars in his second motion for postconviction relief, Manley refined and restated substantially the same claim by arguing that trial counsel was ineffective for failing to present readily available evidence demonstrating Manley's innocence.³⁵ Manley expanded the procedurally barred argument, alleging that trial counsel failed to develop evidence that successfully rebutted many of the State's witnesses and the State's argument that his Army Reserve status connected him to the murder, and otherwise proved he was not the shooter.³⁶ Manley argued that counsel failed to hire an identification expert that

³³ *Id.*, at *9, *13.

³⁴ *Manley*, 2004 WL 771659. Because the Superior Court resentenced Manley in 2005, Manley could timely raise his claims concerning his 2005 resentencing in the year following the May 29, 2007 denial of his petition for certiorari to the United States Supreme Court.

³⁵ *Manley*, 2014 WL 2621317, at *2.

³⁶ *Id.*

could have challenged the State’s witnesses who identified him as the shooter, failed to challenge Melissa Magalong’s testimony, or show that he was not present for a conversation Stevenson had with Kevin Powlette about purchasing a gun.³⁷

The Superior Court, before the second round of evidentiary hearings, found the restated claim procedurally barred. (A2496). In denying postconviction relief, the Superior Court ruled that any claims Manley raised about his 1996 trial that he failed to present in his first postconviction motion were procedurally barred by Rule 61(i)(2), and the interests of justice did not warrant review.³⁸ The Superior Court was correct. There is no need to review this claim when Manley had ample opportunities to litigate it.³⁹

Trial counsel developed a defense strategy to show both that Manley was not capable of murder and he was not seen leaving the scene. Manley provided nothing new in postconviction to warrant further review of his claim. It was not significant that the jury did not hear that Butler failed to pick Manley out of a photo array (Corr. Op. Brf. at 16), when Butler did not even identify Manley at trial. Butler testified that she only got a quick glimpse of the “person” as he ran by and did not notice much about his appearance. (A569). The hearsay information elicited at the 2011

³⁷ *Id.*

³⁸ *Id.* at *6.

³⁹ *Riley v. State*, 585 A.2d 719, 721 (Del. 1990).

hearings, that Hudson told a defense investigator in 1996 that he was “pretty sure” that Manley was the individual he identified in the photo array, was insignificant because 1) the statement was hearsay to which Manley has not identified an exception, and 2) Hudson did not identify Manley at trial. (A571-75).

Manley’s argument that the jury would have rendered a different verdict if they had heard Dorsey make what he terms “racially biased” statements as she described the events surrounding her fiancé’s murder, (Corr. Op. Brf. at 17), is unavailing. Dorsey was candid in her lack of identification of the suspects both before and at trial. Her statements do not reflect racial bias, only a distressed eyewitness account of her fiancé’s murder.

An identification expert (Corr. Op. Br. 17-18) would not have assisted Manley’s case. Trial counsel’s theory, based upon what Manley told them, was that Manley was not capable of murder nor was he at the scene. Counsel effected this strategy through presentation of defense witnesses and competent cross-examination of the State’s witnesses. It was nevertheless apparent that the police arrested Manley minutes after Heath’s murder, fleeing from the car that was involved in the shooting. An identification expert was not going to change those facts nor add anything to the already competent defense presented by Manley’s attorneys. Similarly, Manley’s postconviction GSR expert offered nothing new, just supposition.

Manley failed to show that trial counsel ineffectively failed to investigate aspects of his Army Reserve service. (Corr. Op. Brf. at 19). At trial, the State presented Army Sergeant Wohlgemuth to testify that one could only purchase the Army jacket found in the trunk with military identification from a military clothing store, the Army Exchange or Army supply channels. (A558). The sergeant testified the jacket in evidence was Manley's size and bore his rank, Specialist E4. (A559). On cross-examination, trial counsel elicited that as an E4 specialist, Manley had not undergone weapons training or been issued a pistol. (A560). The postconviction hearings revealed nothing new.

Manley's claim that there was a more likely suspect, George Stevenson ("George"), is similarly unavailing, as that is nothing more than speculation that Manley failed to substantiate. Manley's claim that Susan Brown's statement (A2394) supports George as the shooter is similarly lacking. Brown was a teenager, sitting in the hallway of Building 12 of Cavalier Apartments, when she heard the gunshots. (A2394). By the time she came outside, the car involved in the shooting was gone.

Manley cursorily argues that trial counsel was ineffective for failing to object to Magalong's brief testimony that she heard two male voices and a knock at the door of her home, where the victim previously lived, the night before the murder as irrelevant and speculative. (A664). But the evidence was clearly relevant and

admissible. Similarly meritless is the claim that counsel was ineffective for failing to argue that Manley was not present when Stevenson and Powlette discussed obtaining a gun. It is apparent from the trial testimony that Manley was not present. (A667). Moreover, when counsel debated over the admissibility of the statement at trial, Manley argued for the statement's admissibility because it was obviously exculpatory to him. (A667).

III. THE SUPERIOR COURT CORRECTLY FOUND MANLEY'S *BRADY/GIGLIO*⁴⁰ CLAIM PROCEDURALLY BARRED.

Question Presented

Whether the Superior Court properly found Manley's *Brady/Giglio* claim procedurally barred. [Claim 2]

Standard and Scope of Review

This Court reviews a denial of a postconviction relief motion for abuse of discretion.⁴¹ Legal or constitutional questions are reviewed *de novo*.⁴²

Argument⁴³

Manley argues the State failed to disclose material evidence including taped interviews of several witnesses⁴⁴ and 911 calls.⁴⁵ (Corr. Op. Brf. at 24). This claim

⁴⁰ *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

⁴¹ *Swan*, 28 A.3d at 382.

⁴² *Zebroski*, 12 A.3d at 1119.

⁴³ Manley's claims regarding the Delaware Constitution are waived for failure to brief the issue on appeal. *See Wallace*, 956 A.2d at 637.

⁴⁴ Manley acknowledges receiving transcripts of several tapes but argues they contained material blanks and omissions. (Corr. Op. Brf. at 24).

⁴⁵ The transcript of the 1996 trial reveals that defense counsel received the 911 tapes and listened to them (A722-23) and, further stated that the State had been very forthcoming with discovery. (A595). The State provided statements of Marlene Farmer, Jessica Wing, and Carol Schweda, who did not give taped statements, from the police reports. (A2352, 2354).

is barred by Rule 61(i)(1).⁴⁶ The Superior Court also correctly found the claim barred under Rule 61(i)(2) and (i)(3), because Manley failed to present it either on direct appeal or in his first postconviction motion.⁴⁷ To the extent Manley argued ineffective assistance of counsel as cause for his failure to raise the claim on direct appeal, the Superior Court appropriately found no prejudice.⁴⁸

Manley offers the conclusory argument that the 911 calls and the previously undisclosed portions of the taped interviews offered significant impeachment fodder, such as Dorsey's "racial biases," the witnesses' trauma from the shooting, and the fact that witnesses spoke to each other about the shooting. (Corr. Op. Brf. at 24). But, Manley offers no specifics and certainly nothing new.

Manley has not satisfied the components of a *Brady* violation. Nor has he substantiated his claim of attorney ineffectiveness for not requesting witnesses' statements after the witnesses testified at trial. (Corr. Op. Brf. at 25). As the Superior Court determined, Manley has failed to overcome his procedural hurdles.

⁴⁶ See *Unitrin, Inc.*, 651 A.2d at 1390.

⁴⁷ *Manley*, 2014 WL 2621317, at *2, *6. In his first postconviction motion, Stevenson raised claims about witnesses counsel failed to call at trial; Manley did not. *Manley*, 2003 WL 23511875, at *12.

⁴⁸ *Manley*, 2014 WL 2621317, at *7-8. The Superior Court previously ruled that the State was not required to produce Tierra Koston's statement. *State v. Manley*, 2011 WL 6000796, at *2 (Del. Super. Ct. Nov. 28, 2011). Koston's statement that Stevenson was driving alone near his home shortly after the shooting, (Corr. Op. Brf. at 25), was in direct contradiction to the undeniable evidence that Manley and Stevenson fled from Stevenson's car as the police pursued them.

IV. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FINDING MANLEY’S JOINDER CLAIM PROCEDURALLY BARRED UNDER RULE 61(i)(4).

Question Presented

Whether the Superior Court erred in denying as procedurally barred Manley’s claim that his joint trial with Stevenson violated his rights because counsel failed to argue all possible bases for severance. [Claim 25]

Standard and Scope of Review

This Court reviews the Superior Court’s denial of a motion for postconviction relief for abuse of discretion.⁴⁹ Legal or constitutional questions are reviewed *de novo*.⁵⁰

Argument⁵¹

Manley asserts that the Superior Court abused its discretion by failing to reconsider his claim of improper joinder at trial because he presented a colorable claim of ineffective assistance of counsel in failing to fully develop this claim pre-trial and on direct appeal. (Corr. Op. Br. at 28). The Superior Court, however, found the claim was barred by Rule 61(i)(4) as formerly adjudicated and reconsideration

⁴⁹ *Swan*, 28 A.3d at 382.

⁵⁰ *Zebroski*, 12 A.3d at 1119.

⁵¹ Manley’s claims regarding the Delaware Constitution are waived for failure to brief the issue on appeal. *See Wallace*, 956 A.2d at 637.

was not required in the interests of justice.⁵² The Superior Court did not abuse its discretion in finding this claim procedurally barred.⁵³

The Superior Court pre-trial,⁵⁴ this Court on direct appeal,⁵⁵ the Superior Court in postconviction proceedings,⁵⁶ and this Court on appeal from the denial of postconviction relief considered and rejected Manley's claim that the defendants should have been severed for trial.⁵⁷ Because the Delaware courts have previously adjudicated Manley's severance claim, the claim is now foreclosed by Rule 61(i)(4). Manley has not presented any reason for further consideration. To the extent that Manley is simply reframing his hearsay argument regarding admission of Stevenson's statements, those issues have also been adjudicated.⁵⁸ And, if Manley is raising ineffective assistance of trial and appellate counsel as cause for his procedural default, that claim too was adjudicated in Manley's first postconviction

⁵² *Manley*, 2014 WL 2621317, at *6. See A2496 (finding this claim procedurally barred).

⁵³ Although the Superior Court did not find the claim to be untimely, the State also contends, as it did below, that claims regarding the 1996 trial were time barred under Rule 61(i)(1).

⁵⁴ *State v. Manley*, 1996 WL 527322 (Del. Super. Ct. Aug. 1, 1996).

⁵⁵ *Manley*, 709 A.2d at 653 (“we hold that Manley was not prejudiced by a joint trial, i.e. denied a specific trial right or tried by a jury which could not make a reliable judgment about his individual guilt or innocence.”).

⁵⁶ *Manley*, 2003 WL 23511875, *24-26.

⁵⁷ *Manley*, 2004 WL 771659.

⁵⁸ See *Manley*, 2003 WL 23511875, at *25.

proceeding.⁵⁹ The claim, in any of its permutations, is accordingly barred by Rule 61(i)(4).⁶⁰

Manley complains that evidence against Stevenson, “but not admissible against [Manley],” (Corr. Op. Br. at 27), was admitted at trial. Manley has offered no reason why the evidence was not admissible against him. Manley was charged with conspiring with Stevenson. Evidence of Stevenson’s theft went to the motive for the conspiracy to eliminate the witnesses. Thus, the motive was relevant to both. The State never suggested Manley was involved in the Macy’s thefts. The Superior Court instructed the jury that only Stevenson was alleged to have been involved in the Macy’s thefts. (A793). The trial judge went through a *Getz*⁶¹ analysis and found the evidence relevant and not unduly prejudicial. (A626-27). The evidence would have been admissible in separate trials to establish motive and identity, the defendants were properly joined, and Manley cannot overcome the procedural bars to the claim.

⁵⁹ See *Manley*, 2003 WL 23511875, *24-28.

⁶⁰ See *Skinner v. State*, 607 A.2d 1170, 1172 (Del. 1992) (“[A] defendant is not entitled to have a court re-examine an issue that has been previously resolved ‘simply because the claim is refined or restated.’” (quoting *Riley*, 585 A.2d at 721).

⁶¹ *Getz v. State*, 538 A.2d 726 (Del. 1988).

V. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FINDING MANLEY'S ACCOMPLICE LIABILITY INSTRUCTION CLAIM PROCEDURALLY BARRED.

Question Presented

Whether the Superior Court abused its discretion in finding Manley's accomplice liability instruction claim, which has previously been rejected several times, procedurally barred in a successive postconviction proceeding. [Claim 20]

Standard and Scope of Review

This Court reviews the Superior Court's denial of a motion for postconviction relief for abuse of discretion.⁶² Legal or constitutional questions are reviewed *de novo*.⁶³

Argument

Manley asserts that the accomplice liability instruction given at the 1996 trial violated his right to a fair trial and counsel were prejudicially deficient in failing to object, request proper instructions or raise the claim on appeal. (Corr. Op. Br. at 29). Manley then concedes that counsel did object to the instruction at trial. (Corr. Op. Br. at 32). Not only is this claim untimely under Rule 61(i)(1),⁶⁴ but the Superior Court correctly found this claim to be procedurally barred under Rule 61(i)(4) as

⁶² *Swan*, 28 A.3d at 382.

⁶³ *Zebroski*, 12 A.3d at 1119.

⁶⁴ *See Unitrin, Inc.*, 651 A.2d at 1390.

formerly adjudicated.⁶⁵ The claim is also barred under Rule 61(i)(3) for failure to raise the claim on direct appeal.

This Court, on Stevenson's direct appeal from their joint trial, considered and rejected this claim, and held:

The Superior Court correctly informed the jurors that, under Delaware law, to find a defendant guilty under a theory of accomplice liability, they must unanimously find that the requisite degree of complicity existed between the parties and that the crime, Heath's murder, was committed by one of them.⁶⁶

The Superior Court, in rejecting Manley's ineffective assistance of counsel claim in the prior postconviction motion, found:

In light of the defendants' convictions of conspiracy in the first degree, coupled with the original trial judge's instruction on accomplice liability, there is no factual or legal basis for a *Chance* instruction, and if the issues were raised, the probability was high that no error would have been found. This conclusion is further buttressed by the fact that Stevenson claimed on appeal that the trial judge erred in not giving a unanimity instruction. ... [T]his claim of error was rejected.

Finally, the facts of this case show that no reasonable jury could have convicted either Manley or Stevenson of any lesser degree of homicide. For all these reasons, the claims that the defendants assert based on *Chance* and its progeny fail. They fail to meet their burden of showing that a standard for appellate counsel was violated. Moreover, even if

⁶⁵ *Manley*, 2014 WL 2621317, at *6. The Superior Court appears to have found the claim barred under Rule 61(i)(2) and (i)(4), but Manley raised this claim in his prior postconviction motion as an ineffective assistance of counsel claim for failing to raise the issue on direct appeal and the court found the claim meritless. *See Manley*, 2003 WL 23511875, at *14-23.

⁶⁶ *See Stevenson v. State*, 709 A.2d 619, 634-35 (Del. 1998).

the defendants had shown attorney deficiency, they still could not show prejudice.⁶⁷

This Court affirmed that holding.⁶⁸ Manley's claim regarding the accomplice liability instructions unquestionably has been decided against him. Manley has offered no reason for this Court to reconsider the claim now. Manley cannot overcome the procedural bars, and the claim should be dismissed.

⁶⁷ *Manley*, 2003 WL 23511875, at *23.

⁶⁸ *Manley*, 2004 WL 771659.

VI. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING MANLEY'S CLAIM THAT THE JURY SHOULD HAVE BEEN VOIR DIRE ON RACIAL BIAS AS PROCEDURALLY BARRED.

Question Presented

Whether the Superior Court abused its discretion in finding a claim that the jury should have been voir dired on racial bias procedurally barred. [Claim 8]

Standard and Scope of Review

This Court reviews the Superior Court's denial of a motion for postconviction relief for abuse of discretion.⁶⁹ Legal or constitutional questions are reviewed *de novo*.⁷⁰

Argument⁷¹

Manley argues that the Superior Court abused its discretion by finding the claims that the trial court failed to ask, and trial counsel failed to request, that the court ask the jury about racial bias were procedurally barred. The Superior Court found that because Manley failed to raise the claims at trial, on direct appeal or in the first postconviction proceedings, review was barred under Rule 61(i)(3).⁷² The

⁶⁹ *Swan*, 28 A.3d at 382.

⁷⁰ *Zebroski*, 12 A.3d at 1119.

⁷¹ Manley's claims regarding the Delaware Constitution are waived for failure to brief the issue on appeal. *See Wallace*, 956 A.2d at 637.

⁷² *Manley*, 2014 WL 2621317, at *6.

claims are also untimely under Rule 61(i)(1) and barred under (i)(2) for failing to raise the claim in the first postconviction motion. Manley makes only a conclusory claim that seating a biased juror constitutes structural error. He comes too late.

Trial counsel did not request the judge to ask the prospective jurors about their possible racial prejudices.⁷³ Because there is no requirement under federal or state law that potential jurors be questioned specifically about racial bias unless requested to do so, Manley's claim has no merit.⁷⁴

As to the related ineffectiveness claim, Manley has failed to establish *Strickland* prejudice.⁷⁵ Nor has he offered any reason for his failure to raise this claim in his prior postconviction relief motion. Because Manley failed to allege cause for his procedural defaults of this claim, or resulting prejudice under *Strickland*, the Superior Court did not abuse its discretion by denying the claim as procedurally barred.

⁷³ See *Turner v. Murray*, 476 U.S. 28, 37 n.10 (1986) (“Should defendant’s counsel decline to request *voir dire* on the subject of racial prejudice, we in no way require or suggest that the judge broach the topic *sua sponte*.”).

⁷⁴ See *Rosales-Lopez v. United States*, 451 U.S. 182, 190-91 (1981); *Filmore v. State*, 813 A.2d 1112, 1116-17 (Del. 2003).

⁷⁵ See, e.g., *Jackson v. Herring*, 42 F.3d 1350, 1361-62 (11th Cir. 1995) (finding no prejudice under *Strickland* where counsel failed to object to prosecutor’s discriminatory use of peremptories). See also *United States v. Cotton*, 535 U.S. 625, 631-33 (2002) (requiring a showing of prejudice for consideration of forfeited claim of alleged structural error); *Jacobs v. Horn*, 395 F.3d 92, 118-19 (3d Cir. 2005) (finding no deficient performance for failing to ask for racial bias *voir dire*).

VII. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FINDING MANLEY'S *BATSON* CLAIM PROCEDURALLY BARRED.

Question Presented

Whether the Superior Court appropriately applied Rule 61's procedural bars to Manley's *Batson* claim. [Claim 10]

Standard and Scope of Review

This Court reviews a denial of a postconviction relief motion for abuse of discretion.⁷⁶ Legal or constitutional questions are reviewed *de novo*.⁷⁷

Argument

Manley argues that the State's use of a peremptory challenge to strike a female African-American juror, Phyllis Stanley, during his 1996 jury selection constituted a *Batson*⁷⁸ violation. This claim is time-barred under Rule 61(i)(1) and procedurally defaulted under Rule 61(i)(3), because the claim was not raised on direct appeal from Manley's conviction.⁷⁹ As the Superior Court determined, the claim is also procedurally barred under Rule 61(i)(2), because Manley failed to raise it in his first postconviction motion.⁸⁰ Finally, because the trial court raised the claim itself

⁷⁶ *Swan*, 28 A.3d at 382.

⁷⁷ *Zebroski*, 12 A.3d at 1119.

⁷⁸ *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁷⁹ *See Unitrin, Inc.*, 651 A.2d at 1390.

⁸⁰ *Manley*, 2014 WL 2621317, at *6.

during *voir dire* and ruled that there was no *Batson* violation, the claim is barred under Rule 61(i)(4) as previously adjudicated.

The claim is also meritless. *Batson* mandated a tripartite analysis of a claim that the prosecution used peremptory challenges in a racially discriminatory manner.

In *Robertson*,⁸¹ this Court explained the analysis:

First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges based on race.... Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question.... Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination....⁸²

The State first used a strike against a white male who opposed the death penalty. (A246-47). The State then peremptorily struck a white female who equivocated about her ability to impose the death penalty. (A299). When the State used a peremptory strike to remove Stanley, Manley had already struck five white venirepersons and Stevenson had struck four. The trial judge, asserting no pattern of discrimination, asked the prosecutor why he had struck Stanley, because he was “curious, in light of her race.” (A361). The State asked the court for “some reciprocity,” i.e., if the court questioned the State’s strike, it should question Manley and Stevenson’s strikes. (A361). Then, the prosecutor stated he was concerned that

⁸¹ *Robertson v. State*, 630 A.2d 1084 (Del. 1993).

⁸² *Id.* at 1089 (citing *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991)).

Stanley had a brother who had been incarcerated at a young age, but was later rehabilitated. (A351). The State was concerned that Stanley might not recommend the death penalty in this case, believing that Manley and Stevenson might also be rehabilitated. (A361). The court found this explanation to be race neutral; Manley did not object. (A361).

The Superior Court engaged in the necessary tripartite analysis. The State provided a race-neutral explanation for its strike. Manley failed to show the State committed purposeful discrimination. Manley argues his counsel was ineffective by merely stating that had counsel argued more or raised the issue on appeal or in Rule 61, there was a reasonable probability the result would have been different. But, the record makes clear that Manley's *Batson* claim is meritless and any ensuing ineffective assistance of counsel claim, therefore, similarly fails.

VIII. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FINDING MANLEY’S CLAIM OF PROSECUTORIAL MISCONDUCT PROCEDURALLY BARRED.

Question Presented

Whether the Superior Court abused its discretion in finding Manley’s claims of prosecutorial misconduct barred for failure to have raised the claim in his first postconviction motion. [Claim 14]

Standard and Scope of Review

This Court reviews the Superior Court’s denial of a motion for postconviction relief for abuse of discretion.⁸³ Legal or constitutional questions are reviewed *de novo*.⁸⁴

Argument⁸⁵

Manley asserts that the prosecutor made inflammatory remarks, relied on irrelevant testimony, vouched for his expert and mischaracterized evidence, and counsel’s failure to object or raise these claims on appeal constitutes ineffective assistance of counsel. (Corr. Op. Br. at 38-39). The Superior Court found the claim

⁸³ *Swan*, 28 A.3d at 382.

⁸⁴ *Zebroski*, 12 A.3d at 1119.

⁸⁵ Manley’s claims regarding the Delaware Constitution are waived for failure to brief the issue on appeal. *See Wallace*, 956 A.2d at 637.

to be barred under Rule 61(i)(2).⁸⁶ The substantive claim is also barred under Rule 61(i)(1) as untimely, (i)(3) for failing to object or raise on appeal, and certain specific accusations are barred under (i)(4) because this Court denied the claims raised by Stevenson on direct appeal.⁸⁷ Because Manley's prosecutorial misconduct claims are meritless, the Superior Court properly found the related ineffectiveness claim barred.

On direct appeal, Stevenson alleged that the prosecutor's statement that importuned the jury to do justice for the victim was misconduct. This Court found that "the record in this case does not reflect the prosecutor's isolated remarks about justice for the victim constituted plain and reversible error."⁸⁸ The Court likewise found the prosecutor's rebuttal statement that the agent's "job is not to come in here and do anything for any party but to tell the truth," was "an appropriate and measured response to the closing argument made by Stevenson's attorney."⁸⁹

The prosecutor's statement in closing that the jacket was in the back seat instead of the trunk, (A786), was an honest mistake and not material to the resolution of the case. The reference to Mario Cruz's testimony related to the section 3507

⁸⁶ *Manley*, 2014 WL 2621317, at *6.

⁸⁷ *See Unitrin, Inc.*, 651 A.2d at 1390.

⁸⁸ *Stevenson*, 709 A.2d at 633-34.

⁸⁹ *Id.* at 634 (citing *Brokenbrough v. State*, 522 A.2d 851, 858 (Del. 1987)).

statement admitted through Officer Townley. (A586; A593-95). That the prosecutor said Manley (instead of Stevenson) was sweating when stopped, in addition to being out of breath and having a bleeding puncture wound on his hand, was also inaccurate but hardly material and was not made in relation to any argument about GSR. (A771). The prosecutor's closing and rebuttal arguments did not constitute misconduct; trial counsel was not deficient in electing not to object; appellate counsel was not deficient for not raising a plain error claim; and first postconviction counsel cannot be faulted for failing to allege the meritless claim in collateral review. The Superior Court acted within its discretion in finding the claim procedurally barred.

IX. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE PREVIOUSLY ADJUDICATED CLAIM OF JUDICIAL BIAS PROCEDURALLY BARRED.

Question Presented

Whether this Court erred in remanding this case back for a new sentencing hearing instead of for a new trial based on the appearance of possible judicial bias and whether counsel were ineffective in failing to raise this claim thereafter. [Claim 16, 18]

Standard and Scope of Review

This Court reviews the Superior Court's denial of a motion for postconviction relief for abuse of discretion.⁹⁰ Legal or constitutional questions are reviewed *de novo*.⁹¹

Argument⁹²

Manley argues that he is entitled to a new trial because this Court should have vacated the convictions instead of merely allowing a new penalty phase, and counsel were ineffective in failing to raise a claim of judicial bias during the guilt phase. (Corr. Op. Br. at 41-44). The Superior Court did not abuse its discretion in finding

⁹⁰ *Swan*, 28 A.3d 382.

⁹¹ *Zebroski*, 12 A.3d at 1119.

⁹² Manley's claims regarding the Delaware Constitution are waived for failure to brief the issue on appeal. *See Wallace*, 956 A.2d at 637. The same is true for any claim regarding recusal of former Justice Ridgely.

the claim of judicial bias procedurally barred.⁹³ The substantive claim is also barred under Rule 61(i)(1) as untimely, (i)(3) for failing to raise it on appeal, and (i)(4) because this Court denied the same claim raised by Stevenson on direct appeal.⁹⁴

Manley cites *Williams v. Pennsylvania*,⁹⁵ to support his claim. *Williams* considered a state court decision denying a defendant postconviction relief on his first degree murder conviction and death sentence. One justice of the Pennsylvania Supreme Court had been the district attorney who gave the official approval to seek the death penalty in the defendant's case. The defendant's motion for that justice's recusal had been denied. The *Williams* Court held due process required the justice's recusal because the justice had "significant, personal involvement in a critical decision in [the petitioner's] case [that] gave rise to an unacceptable risk of actual bias."⁹⁶ *Williams* is inapposite.

Unlike *Williams*, Manley's trial judge was not part of the prosecution team, or privy to the prosecution's case strategy. The trial judge did not have "significant, personal involvement in a critical decision." Further, because *Williams* was decided

⁹³ *Manley*, 2014 WL 2621317, at *6.

⁹⁴ *Stevenson*, 782 A.2d at 260-61. See *Unitrin, Inc.*, 651 A.2d at 1390.

⁹⁵ 136 S. Ct. 1899 (2016).

⁹⁶ *Id.* at 1908.

more than twenty years after trial, and has not been made retroactive on collateral review, there is no reason to reconsider Manley's judicial recusal claim now.

Manley complains that counsel was ineffective in failing to seek a new trial based on the circumstances surrounding the assignment of the original trial judge. Stevenson raised this issue to this Court in his direct appeal from the 1996 trial, and the Court rejected the claim finding that the record did not support recusal.⁹⁷ If Manley's claim is that his trial attorneys and ensuing appellate attorneys should have raised the claim, it is foreclosed by the decision in Stevenson's case, as there is no reason to believe he would have been more successful than Stevenson.⁹⁸

To succeed on his ineffective assistance claim, Manley would have to show that arguing for a new trial would have been reasonably likely to be successful and identify specific instances of prejudice.⁹⁹ He cannot. This Court specifically noted:

While a new penalty hearing is required in any event, the successor judge should first consider the reasserted postconviction petitions in order to determine whether relief involving the guilt phase is also required. We express no opinion on that matter and *we emphasize that our ruling that the trial judge should not have participated in the sentencing process does not suggest that the trial judge's participation in the guilt phase resulted in any specific prejudice to the defendants.* The appellants have not identified any instance of such prejudice and

⁹⁷ *Stevenson*, 709 A.2d at 635.

⁹⁸ *See Skinner*, 607 A.2d at 1172-73 (a defendant cannot refine a claim that has already been adjudicated against him by characterizing it as ineffective assistance of counsel when the prior ruling precludes a finding of prejudice).

⁹⁹ *See Capano*, 781 A.2d at 641-42; *Stevenson*, 782 A.2d at 261.

our decision in the direct appeal found no error with respect to the claims there asserted.¹⁰⁰

Adverse rulings upheld on appeal do not constitute prejudice. Manley's claim fails.

¹⁰⁰ *Stevenson*, 782 A.2d at 261 (emphasis added).

X. MANLEY’S CLAIM THAT STEVENSON’S STATEMENTS AND BAD ACTS WERE IMPROPERLY ADMITTED AGAINST HIM ARE PROCEDURALLY BARRED.

Question Presented

Whether Manley’s claim that Stevenson’s bad acts and statements were improperly used against him were procedurally barred. [Claim 22, 24]

Standard and Scope of Review

This Court reviews a denial of a postconviction relief motion for abuse of discretion.¹⁰¹ Legal or constitutional questions are reviewed *de novo*.¹⁰²

Argument¹⁰³

Manley asserts that hearsay statements of Stevenson as well as Stevenson’s bad acts were improperly admitted against him at trial. (Corr. Op. Brf. at 45). Manley further argues that the trial court’s related jury instruction further prejudiced him. As the Superior Court found, Manley’s claims are procedurally barred.

Manley’s counsel objected at trial to Stevenson’s statement, “I don’t know why you were chasing me from my car,” as prejudicial hearsay. (A639). The trial court overruled the objection. Manley then unsuccessfully raised a claim attacking

¹⁰¹ *Swan*, 28 A.3d at 382.

¹⁰² *Zebroski*, 12 A.3d at 1119.

¹⁰³ Manley’s claims regarding the Delaware Constitution are waived for failure to brief the issue on appeal. *See Wallace*, 956 A.2d at 637.

that statement to this Court on direct appeal of his conviction.¹⁰⁴ Any attack on Stevenson's statement to the police about "chasing his car" is therefore barred as previously adjudicated under Rule 61(i)(4). The interests of justice do not require review.¹⁰⁵ Manley raised a claim regarding Stevenson's statements confessing to the Macy's thefts (A622-23),¹⁰⁶ in his first postconviction motion.¹⁰⁷ This Court affirmed the Superior Court's judgment denying relief.¹⁰⁸ Any claim related to that statement is therefore procedurally barred as previously adjudicated under Rule 61(i)(4). Because Manley failed to raise a claim about Stevenson discussing purchasing a gun with Kevin Powlette (A670), any related claim is procedurally defaulted under Rule 61(i)(3) for failure to have previously raised it. And the entirety of Manley's claim is time-barred under Rule 61(i)(1).¹⁰⁹

¹⁰⁴ *Manley*, 709 A.2d at 656-57.

¹⁰⁵ *See Manley*, 2014 WL 2621317, at *6.

¹⁰⁶ Manley asked for a limiting instruction, but the court did not give an instruction at that point. *Manley*, 2003 WL 23511875, at *26. During the prayer conference, the parties extensively discussed the wording of the instruction. *Id.* Manley's counsel did not object to the charge as a whole but sought to limit references in it to Stevenson.

¹⁰⁷ *Id.* at *26.

¹⁰⁸ *Manley*, 2004 WL 771659.

¹⁰⁹ *See Unitrin, Inc.*, 651 A.2d at 1390.

Manley and Stevenson conspired together. As previously argued,¹¹⁰ Stevenson's Macy's theft went to Stevenson's motive *and* the conspiracy to eliminate the witnesses, as did Stevenson's other statements. In denying Manley's claim in his first postconviction motion, the Superior Court determined Stevenson's theft indictment was the alleged motive for Heath's murder and the conspiracy to commit murder. The inference the State presented to the jury was:

Stevenson was implicated in the thefts and because of the friendship between Stevenson and Manley, Manley agreed to participate in the crime. And while the motive was more compelling with regard to Stevenson than to Manley, because it was Stevenson who was facing the possibility of jail time should he be convicted, that fact goes to the evidence's probative value, not its relevance. In short, the evidence was relevant because it tended to show that Manley had a motive to eliminate Heath, to help his friend avoid a conviction of imprisonment.¹¹¹

Manley was free to argue that he was uninvolved to the jury. The State, however, was entitled to present evidence of a motive for the conspiracy to kill Heath. The trial court instructed the jury to consider the liability of each defendant separately and that a conclusion reached with regard to one defendant did not mean that the same conclusion would apply to the other defendant.¹¹² The trial court specifically directed the jury to segregate and consider the evidence separately for each

¹¹⁰ *See supra* Argument IV.

¹¹¹ *Manley*, 2003 WL 23511875, at *27.

¹¹² *See Robertson*, 630 A.2d at 1094.

defendant. Manley's claims are meritless and he cannot establish prejudice from any alleged failure of counsel to raise these arguments at any point.

A codefendant's statement is admissible where the statement is not incriminating on its face but becomes so only when linked to other evidence introduced later at trial.¹¹³ None of the statements to which Manley objects are incriminating as to Manley without linking the statements to other evidence in the State's case. Accordingly, the admission of Stevenson's statements did not violate Manley's rights under the Confrontation Clause. And, because Manley and Stevenson were charged as conspiring to murder Heath, the trial court correctly instructed the jury. Because Manley's claims are both procedurally barred and in any case, meritless, Manley's associated ineffective assistance of counsel claims fail.

¹¹³ *Richardson v. Marsh*, 481 U.S. 200, 208 (1987).

**XI. THE SUPERIOR COURT PROPERLY FOUND
MANLEY’S CLAIM THAT HE WAS DENIED AN
IMPARTIAL JURY PROCEDURALLY BARRED.**

Question Presented

Whether the Superior Court appropriately applied Rule 61’s procedural bars to Manley’s claim that he was denied an impartial jury. [Claim 12]

Standard and Scope of Review

This Court reviews a denial of a postconviction relief motion for abuse of discretion.¹¹⁴ Legal or constitutional questions are reviewed *de novo*.¹¹⁵

Argument¹¹⁶

Manley argues that because the jurors saw Manley in prison clothing, some jurors said they were biased, and some were either familiar with the scene or had been exposed to pretrial media coverage, his jury was unfairly prejudiced against him. These claims are time barred under Rule 61(i)(1) and procedurally defaulted under Rule 61(i)(2) and (3) for failure to raise the claims either in the proceedings leading to the judgment of conviction or in Manley’s first motion for postconviction

¹¹⁴ *Swan*, 28 A.3d at 382.

¹¹⁵ *Zebroski*, 12 A.3d at 1119.

¹¹⁶ Manley’s claims regarding the Delaware Constitution are waived for failure to brief the issue on appeal. *See Wallace*, 956 A.2d at 637.

relief.¹¹⁷ Manley's claims of ineffective assistance of trial and appellate counsel are likewise procedurally defaulted under Rule 61(i)(2). Moreover, because Manley cannot show prejudice from any of his counsel's alleged deficiencies, his claims fail.

Manley's counsel informed the Court on the first day of jury selection that because of a prison problem, Manley was not wearing civilian clothing. (A235). Counsel chose to proceed with jury selection that day. (*Id.*). While the United States Supreme Court has held that a State cannot *compel* an accused to stand trial before a jury while dressed in prison clothes,¹¹⁸ there was no State compulsion here. "Without the element of compulsion, there is no constitutional violation."¹¹⁹ Manley is not entitled to relief.

Days after Juror #2 was selected to serve, the prosecutor told the court that he had been informed that the juror had sought a medical excuse to be relieved of jury service because she was devastated to be on a capital murder jury. (B-1). Manley proposed excusing the juror only if she came forward. (B-2). The court questioned the juror, who denied having a problem with service and declined excusal. (B-3).

¹¹⁷ *Manley*, 2014 WL 2621317, at *6. *See also Unitrin, Inc.*, 651 A.2d at 1390.

¹¹⁸ *Estelle v. Williams*, 425 U.S. 501, 512 (1976).

¹¹⁹ *Poteat v. State*, 2007 WL 2309983, at *2 (Del. Aug. 14, 2007) (citing *Estelle*, 425 U.S. at 512).

Over Manley's objection, the court created a record with the juror. (B-3). Nothing indicates Juror #2 was biased or incapable of acting as a juror.

Juror #3 had trouble finding the correct courtroom and could not remember questions. After *voir dire*, the prosecutor noted that the juror had failed to mention an old possession of marijuana conviction. (A277). The juror explained that he had received a first offender agreement for the conviction and that he believed this meant his conviction would be "erased from my record." (A278). The juror assured the court he had no resentment resulting from his conviction. (*Id.*). Nothing indicates bias on the part of this juror.

Juror #5 informed the court she had previously been a juror in a murder case. (A342). Manley's counsel had been one of the attorneys in that case and requested that the juror be struck for cause, the State objected, and the court decided to do more questioning. (A343). The juror stated she was positive she could be impartial and fair. (*Id.*). Manley's counsel did not renew his request to have the juror struck for cause. (A344). Manley cannot show evidence of bias.

Manley's assertion that the jury was exposed to adverse external influences simply as a result of the trial is likewise conclusory. Indeed, Manley has not explained how any external influences adversely affected the trial.

XII. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FINDING NO CUMULATIVE ERROR.

Question Presented

Whether alleged errors in the 1996 trial, when considered cumulatively, were so prejudicial as to require postconviction relief. [Claim 19]

Standard and Scope of Review

This Court reviews the Superior Court's denial of a motion for postconviction relief for abuse of discretion.¹²⁰ Legal or constitutional questions are reviewed *de novo*.¹²¹

Argument¹²²

Manley alleges that he is entitled to postconviction relief based on cumulative error. This Court has recognized that cumulative error may be the basis for reversing a conviction, even when one error, standing alone, would not be the basis for reversal.¹²³ Harmless errors, even when added together, may nevertheless remain

¹²⁰ *Swan*, 28 A.3d at 382.

¹²¹ *Zebroski*, 12 A.3d at 1119.

¹²² Manley's claim under the Delaware Constitution is waived for failure to brief the issue on appeal. *See Wallace*, 956 A.2d at 637.

¹²³ *See Wright v. State*, 405 A.2d 685, 690 (Del. 1979).

harmless.¹²⁴ Cumulative error cannot merely be the result of multiple harmless errors, but must derive from errors that caused actual prejudice.¹²⁵

Here, none of Manley's individual claims resulted in prejudicial error. As such, Manley cannot prevail on his cumulative error claim.

¹²⁴ See *Michael v. State*, 529 A.2d 752, 765 (Del. 1987).

¹²⁵ *Fahy v. Horn*, 516 F.3d 169, 205 (3d Cir. 2008).

CONCLUSION

For the foregoing reasons, this Court should remand the matter with directions to vacate Manley's death sentence and to resentence Manley to natural life in prison without the benefit of probation, parole or any other reduction of sentence; as to all claims regarding Manley's convictions, the judgment of the Superior Court should be affirmed.

/s/Elizabeth R. McFarlan (#3759)

/s/Maria T. Knoll (#3425)

Deputy Attorneys General

Department of Justice
Carvel State Office Building
820 N. French Street, 7th Fl.
Wilmington, DE 19801
(302) 577-8500

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL MANLEY,)	
)	
Defendant Below,)	
Appellant,)	No. 344, 2014
)	
v.)	On appeal from
)	the Superior Court
STATE OF DELAWARE,)	
)	
Plaintiff Below,)	
Appellee.)	

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT
AND TYPE-VOLUME LIMITATION**

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.
2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 9,824 words, which were counted by Microsoft Word 2016.

Dated: May 4, 2017

/s/ Elizabeth R. McFarlan

CERTIFICATE OF SERVICE

I, Elizabeth R. McFarlan, Esq., do hereby certify that on May 4, 2017, I have caused the State's Answering Brief to be served by Lexis File & Serve*Xpress* to:

Christopher Koyste, Esquire
Law Office of Christopher S. Koyste, LLC
709 Brandywine Boulevard
Wilmington, DE 19809

/s/ Elizabeth R. McFarlan
Elizabeth R. McFarlan (No. 3579)
Chief of Appeals