IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID STEVENSON, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	))))))))	No. 287, 2014 On Appeal from the Superior Court of the State of Delaware in and for New Castle County

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

APPELLANT'S (CORRECTED) AMENDED OPENING BRIEF

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PRELIMINARY STATEMENT CONCERNING CITATIONS AND FORM

Citations preceded by "A" refer to the Appendix, and citations preceded by "O" refer to the Opinion denying Rule 61 relief, which is attached at the end of this brief. Volumes I-VIII of the Appendix were filed with the Initial Brief on October 27, 2014. Volume IX is submitted with this Amended Brief and is paginated consecutively with the first eight volumes. Mr. Stevenson is referred to by name or as the Appellant. Citations preceded by "*Stevenson*-" refer to Mr. Stevenson's opinions and orders:

Stevenson-1 refers to *State v. Manley and Stevenson*, 1997 Del. Super. Lexis 5, Nos. 9511007022, 9511006992 (Del. Super. Ct. Jan. 10, 1997), A-1012.

Stevenson-2 refers to *Stevenson v. State*, 709 A.2d 619 (Del. 1998), A-1117.

Stevenson-3 refers to *State v. Stevenson*, 1999 Del. Super. Lexis 118, No. 9511006992 (Del. Super. Ct. Jan. 8, 1999), A-1141.

Stevenson-4 refers to *Stevenson v. State*, *Manley v. State*, 782 A.2d 249 (Del. 2001), A-1265.

Stevenson-5 refers to *State v. Manley, State v. Stevenson*, 2003 WL 23511875, Nos. IN95-11-1047-1049, IN95-12-0687-0689 (Del. Super. Ct. October 2, 2003), A-1326.

Stevenson-6 refers to *State v. Stevenson*, 2004 Del. Super. Lexis 341, Nos. IN95-11-1047-1049, IN95-12-0687-0689 (Del. Super. Ct. Oct. 18, 2004), A-1433.

Stevenson-7 refers to *Stevenson v. State*, 846 A.2d 239 (Del. 2004), A-1418.

Stevenson-8 refers to *State v. Stevenson*, Sentencing Decision (Del. Super. Ct. Feb. 3, 2006), A-2289.

Stevenson-9 refers to *Stevenson v. State*, 918 A.2d 321 (Del. 2007), A-2441.

TABLE OF AUTHORITIES

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NATURE OF PROCEEDINGS

A. Introduction

Appellant David Stevenson, a death-sentenced prisoner, appeals the denial of post-conviction relief, pursuant to Superior Court Criminal Rule 61. Mr. Stevenson was one of two black youths charged with the capital murder of a white victim. His trial judge steered the jury towards conviction. His attorneys failed to present available exculpatory evidence. The judge's bias was later found to warrant reversal of Mr. Stevenson's death sentence, but not his unconstitutionally rendered conviction.

The Superior Court denied Mr. Stevenson's request for an evidentiary hearing on his claims related to his guilt/innocence. This Court should grant a new trial or remand for an evidentiary hearing.

B. Procedural History

On November 13, 1996, Mr. Stevenson was tried and convicted of capital murder before the Hon. Norman Barron in the Superior Court for New Castle County. A-1003. On January 10, 1997, Judge Barron sentenced Mr. Stevenson to death over the vote of four jurors who voted for a life sentence. *Stevenson*-1. Mr. Stevenson retained Leo Ramunno, who represented him on direct appeal and post-conviction proceedings. Following affirmance on direct appeal, *Stevenson*-2, and denial of certiorari, *Stevenson v. Delaware*, 525 U.S. 967 (1998), the Superior

Court denied Mr. Stevenson's initial Motion for Post-Conviction Relief, pursuant to Superior Court Rule 61, on February 8, 1999. *Stevenson*-3. Reversing, this Court remanded for a new penalty hearing because the trial judge was demonstrably biased, and directed that the merits of guilt phase claims be considered by the new court *ab initio*. *Stevenson*-4.

On July 2, 2001, the case was re-assigned to the Hon. Jerome O. Herlihy. In a letter dated August 7, 2001, Judge Herlihy instructed the parties to file an amended motion for post-conviction relief incorporating prior claims, and indicated that, to withdraw any claims, the parties must memorialize the withdrawal in writing. A-1275. On September 7, 2001, Mr. Stevenson filed a Motion for Post-Conviction Relief restating eight of the previously raised nine claims. A-4438. At no point did counsel withdraw any claims in writing. On February 2, 2002, Judge Herlihy held an evidentiary hearing on certain guilt phase claims. Around this time, Mr. Ramunno was replaced by court appointed attorneys Jerome Capone and Michael Heyden, who represented Mr. Stevenson for the duration of the proceedings, through the penalty retrial, and on direct appeal from the penalty retrial.

On October 3, 2003, Judge Herlihy issued a memorandum opinion denying post-conviction relief. *Stevenson*-5. Addressing only three claims raised by Mr. Capone and Mr. Heyden in a post-hearing brief, Judge Herlihy ruled that Mr.

Stevenson had waived all other claims—including the eight claims raised in the amended and restated motion filed on September 7, 2001, and the 9th claim that also had never been withdrawn in writing. Mr. Stevenson moved unsuccessfully to recuse Judge Herlihy on the ground that he was biased. *Stevenson*-6. On April 7, 2004, this Court affirmed Judge Herlihy's October 2003 order denying relief on Mr. Stevenson's guilt phase claims. *Stevenson*-7.

On November 16, 2005, penalty retrial began, and the jury recommended a death sentence by a 10-2 vote. On February 3, 2006, Judge Herlihy sentenced Mr. Stevenson to death. *Stevenson*-8. This Court affirmed the sentence on January 3, 2007. *Stevenson*-9. The Supreme Court denied certiorari on May 29, 2007. *Stevenson v. Delaware*, 550 U.S. 971 (2007), A-2470.

On August 14, 2007, undersigned counsel were appointed by the Honorable Gregory Sleet, U.S. District Judge, in order to investigate, prepare, and file a federal habeas petition on Mr. Stevenson's behalf. A federal habeas petition was filed on February 15, 2008. On June 19, 2008, Judge Sleet stayed the habeas proceedings, and ordered Mr. Stevenson to exhaust all unexhausted claims in state court. Undersigned counsel, appearing *pro hac vice*, filed a Rule 61 motion. A-2498-2617. An evidentiary hearing was held in December 2011 and April 2012. Judge Herlihy limited the hearing to claims relating to the penalty retrial, and refused to permit factual development of claims arising from the 1996 guilt phase.

A-2989. After Judge Herlihy retired, the Hon. James Vaughn denied relief on April 30, 2014. O-1. Mr. Stevenson filed a timely appeal.

SUMMARY OF ARGUMENT

1. The lower court erred in barring, under Rule 61 (i)(2) and (i)(4), Mr. Stevenson's claim that he was deprived of his right to trial by a fair and impartial tribunal in 1996 because of Judge Barron's bias. Trial counsel and appellate counsel rendered ineffective assistance by failing to raise a bias claim.

2. The lower court erred in barring, under Rule 61(i)(2) and (i)(4), the claim that Mr. Stevenson was deprived of the effective assistance of trial counsel at the 1996 guilt-innocence phase, because his attorneys failed to present available exculpatory evidence from several witnesses.

3. The lower court erred in barring, under Rule 61(i)(2) and (i)(4), Mr. Stevenson's claim that the jury instructions at the 1996 trial deprived him of due process and a fair trial. Trial and appellate counsel were ineffective in failing to challenge the instructions or raise the issue effectively on appeal.

4. The lower court erred in barring, under Rule 61 (i)(2) and (i)(4), Mr. Stevenson's claim that the prosecutor at his 1996 trial made inflammatory remarks. Mr. Stevenson was deprived of the right to due process. His trial and appellate counsel ineffectively challenged the claim.

5. Mr. Stevenson should be resentenced to life without parole pursuant to *State v. Rauf*.

STATEMENT OF THE CASE

In 1994, David Stevenson was a college student employed at Macy's, accused of using customer credit cards to obtain redeemable gift certificates. A-818, 857. Store employee Kristopher Heath testified at a suppression hearing held before Hon. Norman Barron. On the day of the theft trial, Mr. Heath was found dead, and Mr. Stevenson and Michael Manley were arrested.

Judge Barron learned about the homicide before Mr. Stevenson's indictment, and requested appointment to preside over the murder case. A-1268. This request was not put on the record. *See* A-1175. Nor did the record show that Judge Barron's twin brother Tim Barron was a capital case prosecutor in New Castle County, and like the victim, had been previously employed as a security guard in a department store. In January 1996, the President Judge appointed Judge Barron to Mr. Stevenson's capital murder trial. *Stevenson*-4.

The State's theory at trial was that Mr. Stevenson planned the shooting, and enlisted the aid of Mr. Manley as the shooter. A-981. None of the State's witnesses directly identified Mr. Stevenson and no gunshot residue linked him to the crime.[1] A-788. The defense argued that Mr. Stevenson did not participate in

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[1] Apartment residents described the shooter as a black male with a build more similar to Mr. Manley's than Mr. Stevenson's. A-768 (Susan Butler); A-772 (Phillip Hudson); A-776 (Lance Thompson); A-762, 733 (Deborah Dorsey).

the crime. *Id*. at 104, A-987. The jury found Mr. Stevenson and Mr. Manley guilty of first-degree murder and related charges. A-1007.

Subsequent investigation revealed that trial counsel, Timothy Weiler, had received police reports containing information about a white man seen at the scene of the crime. A-1308. *See* A-58 to A-63. Counsel testified he made no attempts to follow up with these witnesses, A-1300, and conceded this evidence should have been presented. A-1308. On February 11, 2008, Phillip Hudson signed a declaration that, after the shooting, he was taken to the police station where he positively identified Mr. Manley in a photographic array. *See* A-4218. Another state's witness, Lance Thompson, testified at trial that the person he saw enter the car after the shooting was black, but told current counsel that he could not tell the race of the person he saw. *See* A-2609.

At the most recent evidentiary hearing, the court prohibited Mr. Stevenson's counsel from presenting evidence on any claims related to the 1996 guilt-innocence trial. A-2989.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to entertain the merits of each claim under Superior Court Rule of Criminal Procedure 61(a)(1). Pursuant to Rule 61(i), the Superior Court refused to review the merits of all four of the claims Mr. Stevenson

presents in this appeal. O-1.[2] Delaware Superior Court Rule 61(i) bars post-conviction review of claims that were not timely raised. Rule 61 (i)(2) bars claims that could have been raised in earlier post-conviction proceedings, (i)(3) bars claims that were not raised before conviction, and (i)(4) bars claims formerly adjudicated. The Rule also provides exceptions to the procedural bars, permitting a court to review the underlying claim in certain instances. A claim that implicates the "interests of justice" is an exception to the bars of (i)(2) and (i)(4). *Zebroski v. State*, 12 A.3d 1115, 1120 (Del. 2010) ("interest of justice exception" to (i)(4) and (i)(2) "[i]s based on the 'law of the case' doctrine." The law of the case does not apply "when the previous ruling was clearly in error" or when the "equitable concern of preventing injustice" trumps the doctrine. *Id.* at 1120 (quoting *Weedon v. State*, 750 A.2d 521, 527-28 (Del. 2000)).

Moreover, (i)(5) provides exceptions to the procedural bars of (i)(1), (i)(2) and (i)(3) where the Appellant raises "a colorable claim of any constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction." *See Bailey v. State*, 588 A.2d 1121, 1129 (Del. 1991) (exception applies to bars of (i)(1)-(3)); *Younger v.*

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[2] Appellant's claims are governed by the version of Rule 61 in effect before its 2015 amendment.

State, 580 A.2d 552, 555 (Del. 1990) ((i)(5) applies to deprivation of substantial constitutional right); *Zebroski*, 12 A.3d at 1121 (colorable claim of prejudicial constitutional error establishes (i)(5)); *Webster v. State*, 604 A.2d 1364, 1366 (Del. 1992) ((i)(5) exception applied to constitutional violation that was colorable and was "not yet established"). Thus, to surpass the (i)(5) gateway, a Appellant need only establish that the underlying claim of a constitutional violation is colorable.

Rule 61 (i)(5) encompasses all instances of fundamental unfairness. *See Younger*, 580 A.2d at 555 (newly recognized right qualifies under (i)(5) exception). Ineffective assistance of counsel claims readily satisfy the standard. *See St. Louis v. State*, 2008 WL 601630 at *2 (Del. Super. 2008). Other meritorious constitutional claims will satisfy the rule as well.[3]

Appellant raises claims alleging that his convictions resulted from violations of the Delaware Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The discussion below demonstrates why each of

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[3] *See State v. White*, No. CR. 9708020598, 2004 WL 2750821 at *1 (Del. Super. 2004) (witness recantation evidence presents a Acolorable claim that there was a miscarriage of justice@ under Rule 61(i)(5)); *State v. Briggs*, No. 89010396DI, 1998 WL 1029256 at * 2 (Del. Super. 1998) (newly discovered evidence Apotentially present[s] >a colorable claim that there was a miscarriage of justice=@); *Deputy v. State*, No. IK79-11-0232-0235R1, 1993 WL 332667 at * 1 (Del. Super.1993) (confrontation clause violation could provide Aconstitutional basis triggering the fundamental fairness exception under Rule 61(i)(5)@); *State v. Rosa*, No. IN 90-02-1345R1, 1992 WL 302295 (Del. Super. 1992) (jury instruction lessening state's burden of proof stated a colorable claim).

Appellant=s constitutional claims is, at a minimum, colorable and meritorious, and thus entitles Appellant to a “miscarriage of justice” review, or else warrants “interests of justice review,” and ultimately relief.

LEGAL STANDARD FOR INEFFECTIVE ASSISTANCE CLAIMS

Appellant raises several claims of ineffective assistance of counsel. They are governed by *Strickland v. Washington*, 466 U.S. 668, 686, 696 (1984), which requires a showing that counsel's performance was deficient under prevailing norms, and that but for counsel's errors, there is a reasonable probability of a different outcome. *See* U.S. Const. amend. V, VI, XIV; Del. Const. §§ 4, 7. Where counsel advances a purportedly strategic decision, courts evaluate the extent to which it was informed by the relevant facts and law. *See Marshall v. Cathel*, 428 F.3d 452, 471 (3d Cir. 2005) ("[c]ounsel's 'beliefs' are not a substitute for informed strategy"); *Neal v. State*, 80 A.3d 935, 944 (Del. 2013) ("[a] reasonably competent attorney patently is required to know the state of the applicable law") (citation omitted). *Strickland* "prejudice" analysis is not an outcome-determinative test. *Strickland*. *Id*. at 693-94. Accordingly, trial counsel's failure to object to a meritorious issue may constitute ineffective assistance.

Finally, appellate counsel's performance is evaluated under the same test as the one set forth in *Strickland*. *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000), *U.S. v. Mannino*, 212 F.3d 835, 842-43 (3d Cir. 2000); *Ploof v. State*, 75 A.3d 811, 831 (Del. 2013). The deficiency of appellate counsel's performance can be established by showing that counsel failed to raise an obvious and potentially successful issue. *Mannino*, 212 F.3d at 844. While the omission of an issue on

appeal may be supported by a strategic decision, omission due to "oversight" cannot be considered strategic.[4] Courts routinely find prejudice where counsel failed to raise a meritorious issue on appeal,[5] or inadequately briefed an issue.[6]

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[4] *State v. Garden*, 2011 WL 1887110, No. 9912015068, *6 (Del. 2011).

[5] *See Cupon v. State*, 833 So. 2d 302, 305 (Fla. Dist. Ct. App. 2002) (finding counsel's failure to raise a preserved meritorious issue on appeal caused prejudice because the conviction would have been reversed on appeal); *Mason v. Hanks*, 97 F.3d 887, 892 (7th Cir. 1996) (finding appellate counsel ineffective for failing to raise claim relating to the erroneous admission of hearsay evidence); *Mayo v. Henderson*, 13 F.3d 528, 536 (2d Cir. 1994) (finding appellate counsel ineffective for failing to raise issue related to state discovery rule). The failure to raise a meritorious issue on direct appeal is prejudicial when ignored issues are "clearly stronger" than those presented. *Ploof*, 75 A.3d at 831-32.

[6] In *Patrick v. State*, prejudice was found in counsel's ineffective briefing of an issue, because the issue would have won on appeal when analyzed under the proper precedent. 562 S.E.2d 609, 611, 612 (S.C. 2002); *Dunn v. Cook*, 791 P.2d 873, 875 (Utah 1990) (appellate counsel ineffectively briefed 4 issues on appeal by merely reciting prosecution and defense evidence, presenting no argument, failing to cite to record, and listing cases without including case facts).

ARGUMENT

I. THE JUDGE WHO PRESIDED OVER THE 1996 GUILT-OR-INNOCENCE PHASE WAS BIASED AND DEPRIVED PETITIONER OF HIS RIGHT TO A FAIR TRIAL.

Questions Presented

Whether (1) the 1996 trial judge's bias and partiality violated Mr. Stevenson's constitutional rights; (2) counsel ineffectively failed to seek his recusal; (3) counsel raised the issue ineffectively on appeal; and (4) the lower court erroneously ruled the claim barred under former Rules 61(i)(2) and (4)? (Preserved at A-2595).

Standard of Review

This Court reviews Rule 61 decisions for abuse of discretion. *Swan v. State*, 28 A.3d 362, 382 (Del. 2011). It reviews questions of law – including those involving constitutional violations, appearance of impropriety and Rule 61(i) bars – and mixed questions of law and fact *de novo. Zebroski*, 12 A.3d at 1119; *Gattis v. State*, 955 A.2d 1276, 1286 (Del. 2008); *Webster*, 604 A.2d at 1366.

Merits of Argument

A. Introduction

The judge at the trial that ended in David Stevenson's conviction of first-degree murder and death sentence had made special efforts to receive an assignment to his case. Judge Norman Barron had presided over the pretrial suppression hearing in the theft case at which the murder victim, Kristopher Heath, had testified on behalf of the State, and was to preside at the trial of the theft charges beginning on the day of the homicide. His twin brother, Tim Barron, was a capital case prosecutor in New Castle County at the time of the trial, and, like the victim, had previously worked as a security guard in a department store. *See* A-1147. Judge Barron wrote a letter to the President Judge requesting "special[] assign[ment]" to preside over the murder case. A-1268.[7] Neither the President Judge nor Judge Barron sent this letter to defense counsel or the Prothonotary, although the prosecutor received a copy. *Id.* The President Judge complied with Judge Barron's request.

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[7] Judge Barron wrote: "the defendants in the above capital murder case have now been indicted. (See attached copy of indictment.) As we discussed, I request that this case be specially assigned to me for pretrial and trial purposes. Thank you." *Stevenson-4*, A-1268.

In 2001, this Court decided in Mr. Stevenson's post-conviction appeal that Judge Barron's undisclosed personal investment in his case created an appearance of partiality and an impermissible risk of actual bias, requiring relief. *Stevenson-4*, A-1265. Relying both on state precedents construing the Delaware Judges Code of Judicial Conduct and on United States Supreme Court precedents construing the Due Process Clause, it applied a two-part test of judicial bias that assessed both the judge's subjective, actual bias and the objective appearance of impropriety. A-1269-70 (citing *Los v. Los*, 595 A.2d 381, 384 (1991), and *In re Murchison*, 349 U.S. 133, 136 (1995)). The Court ruled that Judge Barron had violated the objective test by requesting the assignment of the murder case, "in view of his contact with the victim at the suppression hearing," and by failing to disclose that request to the defense. A-1270. The Court observed that the "tone of personal affront" in the judge's sentencing findings showed that he viewed the murder of a witness as an attack on the judicial process over which he had personally presided. A-1272. It recognized that the non-disclosure had prevented counsel from making a record that would have facilitated appellate review, and that the judge did not even disclose his earlier request for the case after Mr. Stevenson moved to recuse him in post-conviction proceedings. A-1270-71 & n.4.

When the Court turned to relief, it focused only on the penalty phase. It acknowledged that it must grant relief regardless of prejudice because, "'[i]f there is an appearance of partiality, that ends the matter.'" A-1271 (quoting *United States v. Antar*, 53 F.3d 568, 576 (1995) (ordering new jury trial for appearance of impropriety under federal statute)). It cited due process precedents that focused on the "unacceptable risk" that a "reasonable observer" would discern bias. A-1271, 1273 & n.6. But it never applied those precedents to the guilt-innocence phase of trial. It ordered a new penalty phase before a different judge, and ordered that judge to reconsider the post-conviction guilt-innocence phase claims – which included the very claim of judicial bias the court had just reviewed. A-1273.

B. The Trial Judge's Bias Deprived Mr. Stevenson of Due Process at the Guilt Phase, and Created an Appearance of Partiality.

Judicial bias violates due process when the circumstances present "'a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused." *Murchison*, 349 U.S. at 136 (1955) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)). The test is objective: whether the judge's interest "'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately

implemented.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-84; *see also Rippo v. Baker*, No. 16-6316, ___ U.S. ___, 2017 WL 855913 at *1 (Mar. 6, 2017) (per curiam) (state court erroneously applied subjective, instead of objective, test of bias under Due Process Clause).[8] Delaware courts have also required reversal for an objective "appearance of bias sufficient to cause doubt as to the judge's impartiality." *Los*, 595 A.2d at 385; *Watson v. State*, 934 A.2d 901, 906 (Del. 2007).

This Court held in 2001 that the trial judge's personal involvement and non-disclosure created an appearance of partiality and a risk of bias. His sense of "personal affront" required his recusal. *See State v. Charbonneau*, No. 0207003810, 2006 WL 2588151, at *9 (Del. Super. Sept. 8, 2005) ("*Stevenson* is based on the trial judge's comments which carried a tone of personal insult.").

[8] The Supreme Court has acknowledged that actual, subjective bias can also violate due process, but is difficult to prove. *Caperton*, 556 U.S. at 884-85. Courts have found due process violations, because of a judge's personal interest or involvement, in a variety of circumstances. *See Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) (judge was plaintiff in pending suit that presented nearly identical claims); *Taylor v. Hayes*, 418 U.S. 488, 501 (1974) (contumacious conduct generated "marked personal feelings" in trial court's response); *Ward v. Monroeville*, 409 U.S. 57 (1972) (mayor's interest in revenue for village operations), *Johnson v. Mississippi*, 403 U.S. 212, 215-16 (1971) (both judge's intemperate remarks and fact that he had been losing party in petitioner's civil rights suit made him too "enmeshed in matters involving petitioner"); *Matter of Jafree*, 741 F.2d 133, 137 (7th Cir. 1984) (recusal required in light of "insulting attack on the integrity of the judge").

Furthermore, the Court held that the error was not amenable to harmless error review. A-1271. It nevertheless applied the structural error principle only to the penalty phase, without extending it to the penalty phase.

The Supreme Court has repeatedly indicated that the right to an impartial tribunal is so fundamental that it is one of the few structural errors that requires automatic reversal. *See Washington v. Recuenco*, 548 U.S. 212, 218-19 n.2 (2006) (citing *Tumey*); *Brice v. State*, 815 A.2d 314, 324 (Del. 2003) ("The presence of a structural defect invalidates the proceeding and requires reversal."), *overruled on other grounds*, *Rauf v. State*, 145 A.3d 430 (Del. 2016).

The Supreme Court's recent decision in *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), clarifies the broad scope of the structural error doctrine. The former District Attorney who had authorized Williams's capital prosecution later participated, as Chief Justice, in an appellate decision denying relief. The Supreme Court held that the Chief Justice's "significant, personal involvement in a critical decision" created an unacceptable risk of actual bias and violated due process. *Id.* at 1903, 1908-09. Even though the Chief Justice did not cast the deciding vote, the error was structural; it could not be harmless and "affected the . . . whole adjudicatory framework below." *Id.* at 1909-10.

This Court should now address the issue it left unaddressed in *Stevenson*-4. The Court recognized that the trial judge's pre-indictment actions reflected bias, that his nondisclosure prevented counsel from making an adequate pretrial recusal motion, and that his actions affected the penalty phase, the direct appeal, and the post-conviction petition. It did not explain why it omitted any discussion of the guilt-innocence phase.

After *Williams*, the scope of the constitutional error is clear. Judge Barron's bias "affected the whole adjudicatory framework" of Mr. Stevenson's case. *Williams*, 136 S. Ct. at 1910. Just as the Chief Justice's participation in Williams's appeal was structural error even though he did not cast the deciding vote, Judge Barron's participation in Mr. Stevenson's guilt-innocence phase was structural error even though he shared decision-making functions at that phase with a jury.

Other courts have repeatedly found structural error or its equivalent in similar circumstances. For example, in *Parenteau v. Jacobson*, 586 N.E.2d 15, 19 (Mass. 1992), a judge acknowledged that his prior contact with the defendant would require his recusal from a bench trial, but instead of stepping down ordered the parties to try the case to a jury. The Massachusetts Supreme Judicial Court rejected this partial recusal approach:

> Further, a judge cannot partially recuse himself. Once a judge concludes that there are grounds for recusal, he must completely dissociate himself from participating in the case. Ordering a jury trial, as the judge did here, does not substitute for allowance of a recusal motion. Even if he is not the fact-finder, a judge presiding at a jury trial performs important functions. Obviously, during the course of a jury trial, a judge by exercising his discretion on various matters makes important decisions which may affect the verdicts returned by the jury. Therefore, a courtroom has no place for a judge whose impartiality in a matter may be reasonably questioned, even if he is not the fact-finder.

Id. at 19 (citations omitted); *accord Murray v. Scott*, 253 F.3d 1308, 1310-11 (11th Cir. 2001) (judge considering recusal must consider "overall case", not "each separate issue or each stage of the litigation."); *United States v. Feldman*, 983 F.2d 144, 145 (9th Cir. 1992) (no discretion to recuse "by subject matter or only as to certain issues and not others"); *United States v. McIlwain*, 66 M.J. 312, 314 (C.A.A.F. 2008) (military judge could not properly find that involvement in related cases precluded sitting as trier of fact but not as judge at military "jury" trial); *State v. Sawyer*, 305 P.3d 608, 614 (Kan. 2013) (recusal required when judge could not fairly sit in bench trial given past dealings with defendant, but then refused to recuse from jury trial); *Maharaj v. State*, 684 So.2d 726, 728 (Fla. 1996) (judge should have recused from entire case if he believed himself ineligible to preside

over evidentiary hearing); *cf. Moody v. Simmons*, 858 F2d 137, 138 (3d Cir. 1988) (trial judge improperly continued to rule on substantive matters after announcing intent to recuse; once "impartiality could reasonably be questioned" he could not perform judicial actions).

As these cases demonstrate, the 2001 opinion's partial recusal approach left Mr. Stevenson with incomplete relief for structural error.

C. The Judge's Bias Prejudiced Petitioner.

Moreover, Judge Barron's bias did cause prejudice. He made a series of discretionary rulings against the defense that raised the "appearance of bias sufficient to cause doubt as to the judge's impartiality," *Los*, 595 A.2d at 385, and created a "risk of injustice." *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 864 (1988).

Judge Barron denied a motion for continuance to retain counsel,[9] denied a motion for severance,[10] diminished the prosecution's burden of proof,[11] and

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[9] The judge denied a request for a 30-day continuance to substitute retained counsel, complaining that the request "interferes grievously with this court's horrendous work schedule." A-290, A-327. He exceeded his discretion under *Riley v. State*, 496 A.2d 997 (Del. 1985), because Mr. Stevenson was indigent, and had no prior opportunity to obtain substitute counsel,

permitted prosecutorial misconduct in closing argument.[12] His denial of the request for continuance prevented Mr. Stevenson from retaining his counsel of choice and exposed him to ineffective assistance. His denial of severance exposed Mr. Stevenson to the zeal, not only of the prosecutor, but of counsel for his co-defendant, who attempted to shift the blame for the shooting from the co-defendant to Mr. Stevenson. The State's inflammatory argument in closing improperly appealed to the jurors' emotions, and the instructional errors deprived the jurors of an avenue to give effect to any reasonable doubts about guilt of first-degree murder. Judge Barron's conduct raised the "appearance of bias sufficient to cause doubt as to [his] impartiality," *Los*, 595 A.2d at 385, and prejudiced the defense.

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given that he was incarcerated. *See Ketchum v. State*, 567 A.2d 422, at *2 (Del. 1989); *Hunter v. State*, 659 A.2d 228, at *2 (Del. 1994).

[10] Mr. Stevenson's defense was that he was not present at the shooting, which the State attributed to Manley. A-985. Manley's defense was that Mr. Stevenson was the shooter. Antagonistic defenses classically require severance. *See Bradley v. State*, 559 A.2d 1234, 1241-42 (Del. 1989) (co-defendants each presented evidence of the other's confession, and discredited and pointed to each other in closing argument); *State v. Anker*, 2005 WL 823750, *2 (Del. Super. April 4, 2005) (jury would have to reject core of defense offered by co-defendant to accept defendant's defense).

[11] Judge Barron lessened the State's burden of proof beyond a reasonable doubt, gave erroneous instructions on the key issue of accomplice liability, and permitted the jurors to rest their guilty verdict on a prior inconsistent statement. *See* Claim III.

[12] The judge permitted the prosecutor to make remarks designed to inflame the jurors' passions and demean the defense. *See* Claim IV.

D. Trial Counsel Ineffectively Failed to Move for Recusal.

1. Deficient Performance

This Court recognized in *Stevenson*-4 that Judge Barron's failure to disclose had prevented counsel from developing the evidence of bias. A-1271. In any case, the judge's bias was apparent from the record,[13] and there was no reasonable basis for trial counsel to fail to move for recusal.[14] At the very least, the judge's sentencing remarks should have prompted a new trial motion. Nevertheless, the issue was not raised until Mr. Stevenson retained new counsel for direct appeal. The Court of Appeals for the Third Circuit recently granted habeas relief on ineffectiveness grounds in similar circumstances. In *McKernan v. Superintendent, Smithfield SCI*, ___ F.3d ___ No. 14-4506, 2017 WL 765793 (3d Cir. Feb. 28, 2017), the trial judge became personally embroiled in the case, but the petitioner's attorney persuaded him to go forward with a bench trial. The court held that, while choosing a bench trial may have been reasonable strategy initially, after the judge

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[13] Trial counsel knew that the victim had testified before Judge Barron at the motion to suppress, and that the victim's murder had aborted the theft trial at which the judge was about to preside.

[14] *See Thompson v. State*, 990 So.2d 482, 489-90 (Fla. 2008) (failure to file timely motion to disqualify trial judge was deficient); *State v. Goines*, 708 So.2d 656, 660-61 (Fla. Ct. App. 1998) (counsel's failure to file motion was deficient); *Owens v. State*, 750 N.E.2d 403, 408-09 (Ind. Ct. App. 2001) (same).

revealed in a robing room conference that she was "actively concerned" with securing the approval of the victim's family, any reasonably competent attorney would have changed course. Counsel "advised his client to proceed before a court that was structurally deficient, something no competent attorney would do." 2017 WL at *6. In the same way, the record made clear that the judge in Mr. Stevenson's case was "actively concerned" with vindicating what he viewed as an affront to his courtroom and the system of justice. Counsel's acquiescence in the judge's continued assignment to the trial was deficient.

2. Prejudice

Because counsel failed to seek relief for presumptively prejudicial error, his deficient performance was necessarily prejudicial. In *Goines*, similarly, where counsel's failure to seek the removal of a non-impartial judge rendered his trial fundamentally unfair, prejudice was established because of the "intolerable appearance of unfairness." *Goines*, 708 So.2d at 661.[15]

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[15] *See also Miller v. Dormire*, 310 F.3d 600, 603-04 (8th Cir. 2002) (prejudice presumed because counsel waived right to jury trial, creating structural error); *Harding v. Davis*, 878 F.2d 1341, 1345-46 (11th Cir. 1989) (prejudice presumed for failure to object to directed verdict against client).

Even if prejudice must be shown, there is a reasonable probability that, if counsel had moved for recusal, Judge Barron would have recused himself and declared a mistrial. *See Strickland*, 466 U.S. at 693-94. At a minimum, there is a reasonable probability that, with a more developed record, this Court would have ordered a new trial of guilt on post-conviction appeal in 2001. *See Stevenson*-4, A-1271. Mr. Stevenson would have had a new trial before an impartial tribunal – with a reasonable probability of a different outcome – instead of suffering an unconstitutionally rendered conviction. *See McKernan*, 2017 WL at * 7 (failure to seek recusal prejudiced the defense).

E. Counsel Rendered Ineffective Assistance in the Post-Conviction Appeal of the Recusal Issue.

Appellate counsel's representation, like that of trial counsel, must conform to prevailing norms, measured by the same two-part *Strickland* test employed to assess trial counsel performance. *See Ploof*, 75 A.3d at 831 (citing *Evitts v. Lucey*, 469 U.S. 387, 396–97 (1985)); *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000);

Mannino, 212 F.3d at 842-43. Counsel's presentation of the judicial bias issue on Mr. Stevenson's post-conviction appeal fell short of those standards. [16]

1. Failure to Argue Structural Error

Attorney Leo Ramunno[17] represented Mr. Stevenson on direct appeal and in post-conviction, and moved to recuse Judge Barron from the post-conviction proceedings. He appealed both the denial of the post-conviction motion and the denial of the recusal motion to this Court, which consolidated the appeals. *Stevenson-4*, A-1265. On appeal, however, he ineffectively litigated the recusal-bias issue as it related to the conviction. A-1147, A-1249. He never argued that, as a structural error, a judicial bias claim requires no showing of prejudice. *See* Section B above.

The failure to raise a meritorious issue on direct appeal is prejudicial when the omitted issue is "clearly stronger" than those presented and generates a reasonable probability of a different appellate outcome. *Ploof*, 75 A.3d at 831-32

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[16] At the most recent Rule 61 evidentiary hearing in 2011, the judge disallowed factual development of this claim, or any other claim related to the 1996 guilt-or-innocence trial. A-2989.

[17] Mr. Ramunno was replaced by Jerome Capone and Michael Heyden in June 2002, during the remanded Rule 61 proceedings.

(*citing Fautenberry v. Mitchell*, 515 F.3d 614, 641-42 (6th Cir. 2008)); *see, e.g.*, *Payne v. Stansberry*, 760 F.3d 10 (D.C. Cir. 2014) (appellate counsel ineffective in failing to seek plain error review of instruction that jury must find defendant guilty even if government failed to prove any element; reasonable probability that outcome would have been different); *Loher v. Thomas*, 23 F. Supp. 2d 1182 (D. Haw. 2014) (appellate counsel ineffective for not asserting trial court error in interference with decision whether to testify; structural error and prejudice presumed).

Because this Court held in Mr. Stevenson's case that the judge had exhibited bias and partiality, a finding of structural error would have required a new trial of guilt as well as penalty. Therefore, there is a reasonable probability that the omission of the meritorious structural error argument prejudiced Mr. Stevenson by depriving him of full relief on appeal.

2. Failure to Establish Prejudice

Furthermore, even if the analysis did require a discussion of prejudice, Mr. Ramunno's argument included no such discussion respecting the guilt-innocence phase, but focused solely on sentencing. Counsel addressed the guilt phase only in a brief, elliptical paragraph that never argued a reasonable probability of a different outcome, as *Strickland* requires:

> Not only is the death sentence in question in this case all other rulings by the court are in issue at this time. Including but not limited to his decision not to sever the case, not to grant Stevenson's motion for continuance, the court's instruction to the jury on accomplice liability denied the Rule 61, denied the Motion and Recuse and numerous other rulings in the case. The whole sentence and trial is tainted with the recent disclosure that the trial judge specially requested the trial. (Sic).

A-1261.

An appellate attorney's inadequate presentation – and not only omission – of an argument can deprive a defendant of effective assistance. For example, in *Patrick v. State*, 562 S.E.2d 609, 611 (S.C. 2002), appellate counsel only "devoted three short paragraphs" to a meritorious issue. This deficiency prejudiced the defense because the issue would have won on appeal under the applicable precedent. *Id.* at 612; *see also Dunn v. Cook*, 791 P.2d 873, 875 (Utah 1990) (appellate counsel ineffectively briefed four issues on appeal).

In Mr. Stevenson's case, counsel made only a short reference to the guilt phase and no reference to the governing prejudice test. As in *Dunn* and *Patrick*, the deficiency prejudiced his client, causing this Court to overlook an otherwise meritorious claim. There was a reasonable probability that this Court would, if presented with an adequate argument, have found that judicial bias equally affected

the guilt-innocence phase and required a new trial. *See Showers v. Beard*, 635 F.3d 625 (3rd Cir. 2011) (appellate counsel ineffective for failing to argue trial ineffectiveness in failing to prepare and present rebuttal testimony).

F. The Lower Court Misapplied Procedural Bars of Rules 61(i)(2) and 61(i)(4).

Mr. Stevenson raised a judicial bias claim on direct appeal and both a bias claim and related trial ineffectiveness claim in his first Rule 61 motion, which Judge Barron denied. A-1158, A-4382-86, A-4390-94, A-4425. After this Court remanded for a new sentencing trial and reconsideration of the guilt-phase Rule 61 claims before a new judge, Judge Herlihy mistakenly ruled that Mr. Stevenson had abandoned the claims. *Stevenson*-5, A-1326. Mr. Stevenson raised them again in the second Rule 61 proceedings that followed his 2005 resentencing. This time, Judge Vaughn (who succeeded Judge Herlihy to draft the opinion), did not address the merits, but erroneously found the claims procedurally barred under Superior Court Rules 61(i)(2) and 61(i)(4). O-15.

1. The Court Erroneously Applied the 61(i)(2) Bar.

Rule 61(i)(2) bars claims "not asserted in a prior post-conviction proceeding." The record refutes the bar's application in this case.

As discussed above, this Court ordered a new penalty trial in 2001 on the basis of judicial bias and the appearance of partiality. It did not determine whether the same bias required a new guilt-innocence trial, but remanded for redetermination of the guilt-phase Rule 61 claims by a new judge. When first assigned, Judge Herlihy advised counsel that all the original guilt phase claims would remain in issue unless withdrawn in writing. A-1275. Mr. Stevenson never withdrew any claims. In fact, he personally wrote to the court requesting review of this claim. A-1278. Furthermore, the opinion denying relief expressly noted that in Mr. Stevenson's "amended and restated motion for post-conviction relief on September 7, 2001," he argued that "trial counsel failed to file a motion to recuse the trial judge" and "the trial judge should have recused himself from the case." *See Stevenson*-5, A-1341-42, 1345-46. Nevertheless, in the same opinion, the same judge ruled that the claim had been abandoned. A-1353.

Addressing this issue in the second Rule 61 decision in 2014 (at issue in the current appeal), the lower court perpetuated the earlier error by invoking Rule 61(i)(2) "to the extent that the instant postconviction motion raises issues from the 1996 trial that were not raised in the defendant's first postconviction motion." O-15. In fact, Mr. Stevenson raised the issue in his original direct appeal and Rule 61

petition and has unsuccessfully attempted to secure relief on the merits of the guilt-phase argument ever since. The lower court's application of the (i)(2) bar was error.

In any event, even if the (i)(2) bar applies, Mr. Stevenson satisfies the miscarriage of justice exception in Rule 61(i)(5). As discussed above ("Jurisdiction"), (i)(5) precludes the application of the procedural bar in (i)(2) to a "colorable 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." *Bailey*, 588 A.2d at 1129.

Here, first, the claim that the judge displayed obvious bias that deprived Mr. Stevenson of his due process right to a fair trial, and constituted structural error, establishes more than a colorable claim of a constitutional violation. U.S. Const. Amend. XIV; *Tumey*, 273 U.S. 510. Furthermore, Mr. Stevenson's trial before a partial tribunal prejudiced his defense. As in *State v. Crawford*, No. CR.A. IN88-02-1007R2, 2005 WL 2841652 at * 1 (Del. Super. Ct. 2005), the colorable claim of a due process violation meets the (i)(5) exception to the (i)(2) bar.

Second, trial and appellate counsel's deficient performance deprived Mr. Stevenson of his Sixth Amendment and Due Process rights to effective assistance at trial and on appeal. U.S. Const. Amend. VI, XIV; Del. Const., §§ 1, 7. As in *Louis v. State*, 2008 WL 601630 at *2 (Del. Super. Ct. 2008), the ineffective assistance claims satisfy the (i)(5) exception as well.

2. The Lower Court Misapplied the Rule 61(i)(4) Bar.

Rule 61(i)(4) bars review of claims "formerly adjudicated" unless reconsideration is warranted in the "interest of justice." In invoking this bar (O-15), the lower court did not state what "former adjudication" it had in mind. It may have viewed the claim as barred by this Court's decision in *Stevenson-4*, A-1265, in which the Court vacated the death sentence and remanded for a new penalty trial on the basis of Judge Barron's bias, but not for a new guilt trial. As discussed in section I.B above, this Court did not actually rule on the guilt phase bias claim, but remanded for further consideration of the Rule 61 claims, which included the ineffectiveness and bias claims. The claim was therefore not "formerly adjudicated" by this Court. *See Wright v. State*, 91 A.3d 972, 986 (Del. 2014) (claim raised in previous appeal, but not then addressed by this Court, not barred by (i)(4)). If, alternatively, the lower court viewed the claim as barred by

the first Rule 61 decision in 1999, that decision was vacated in *Stevenson*-4. The (i)(4) bar therefore did not apply.

In any case, even if (i)(4) applied, the "interests of justice" require that this Court reach the merits. The right to "a fair trial in a fair tribunal" is one of the most fundamental requirements of due process. *Murchison*, 349 U.S. at 136. Moreover, counsel's failure to pursue recusal at trial and on appeal was tantamount to the uninformed waiver of the right to a fair trial. The claims therefore deserve interest-of-justice review.

This Court should reach the merits, reverse the denial of post-conviction relief, and grant Mr. Stevenson a new trial of his guilt or innocence before an unbiased tribunal.

II. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE 1996 TRIAL.

Question Presented

Whether the lower court erred in applying the Rule 61(i)(4) and (i)(2) bars to the claim that counsel were ineffective at the guilt phase of Appellant's 1996 trial? (Preserved at A-2608).

Standard of Review

See Standard of Review in Claim I.

Merits of Argument

Mr. Stevenson was represented at his 1996 trial by counsel who failed to reasonably investigate, develop, and present exculpatory evidence from available witnesses whose testimony exculpated Mr. Stevenson and presented facts at odds with the State's theory of the case. Accordingly, he was denied his right to the effective assistance of counsel. U.S. Const. Am. VI, XIV; Del. Const. §§ 4, 7. This Court should reach the merits because the lower court misapplied the Rule 61(i)(4) and (i)(2) bars, and failed to hold an evidentiary hearing.

The State's case was that Mr. Stevenson was involved in a conspiracy to kill Mr. Heath, in which Mr. Manley was the shooter, and Mr. Stevenson drove the

getaway car. Tr. 11/12/96, 74-75, A-980. The defense argued in closing that Mr. Stevenson did not participate in the crime. Tr. 11/12/96, 104 A-987. However, because counsel failed to investigate available evidence, the jury never heard evidence that the driver was white, which would have exculpated Appellant, who is black.

Three witnesses who were never interviewed by counsel, Carol Schweda Trzepacz, Marlene Farmer Ijames, and Jessica Wing, described the assailants to the police as white. Ms. Trzepacz saw a "white male seated on the passenger side of a dark vehicle . . . she was sure it was a white male . . . she remembers this because it kind of startled her when she saw him move." A-63, Statement of Trzepacz. Ms. Ijames saw a white male walk away from the victim, get into the driver's side, and drive away. *See* A-61, Statement of Ijames. Jessica Wing saw white hands on the wheel, indicating that the driver was white. *See* A-59, Statement of Wing. A fourth witness, Valerie Era Mossinger, Ms. Trzepacz's roommate, said Ms. Trzepacz saw a white assailant in the vehicle. A-58, Statement of Mossinger. Counsel were provided these police reports prior to trial but failed to interview any of the witnesses. Tr. 2/6/03, 46-48, A-1308. Additionally, three other witnesses were also available to testify to support the defense's argument that the State had

not met its burden. As described below, Lance Thompson, Phillip Hudson and Debra Norris could have provided testimony at odds with the State's theory of the case.[18]

Longstanding professional norms require that an attorney make reasonable efforts to investigate a case, in order to provide minimally competent representation under the Sixth Amendment. Under *Strickland*, *Williams*, *Wiggins*, and *Rompilla*, trial counsel's failure to conduct a constitutionally adequate investigation constitutes ineffective assistance of counsel. Counsel's duty to investigate includes the duty to interview witnesses who would be able to provide testimony helpful to the defense. Effective counsel would have recognized the importance of interviewing witnesses who cast doubt on the State's theory and could provide exculpatory testimony that they saw a person with an entirely different racial make-up than the defendant at the scene.

Appellant's attorneys did not discuss the need to interview these witnesses. Tr. 2/6/03, 62, A-1312. Counsel knew, or should have known about them because

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[18] At the 2011 evidentiary hearing, Petitioner was denied the opportunity to develop the facts on this claim, and with all other claims that related to the 1996 trial. *See* Tr. 12/12/11, 7-9, A-2989-2990.

they gave statements to the police that were turned over to defense counsel. A-1308. Counsel testified that "we should have called them if we did not." Tr. 2/6/03, 47, A-1308. The witnesses' testimony would have strongly supported counsel's defense that the State misidentified Mr. Stevenson as the perpetrator of the offense. Tr. 2/6/03, 75 (Winslow), A-1315.[19] Counsel's failure to investigate and secure the presence of these witnesses fell far below prevailing professional norms.

Counsel's performance "undermine[s] confidence in the outcome" of Appellant's 1996 guilt phase of trial, because there is a reasonable probability that, had counsel presented the testimony of the witnesses described above, Appellant would not have been convicted. *Strickland*, 466 U.S. at 694. The State argued that Mr. Stevenson was culpable because he allegedly drove the getaway car. "If somebody drives the car to the scene . . . if he drives the man who shot Kristopher Heath away from the scene, he is guilty of murder in the first degree . . ." Tr.

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[19] Counsel argued in closing that "He wasn't there at Cavaliers that morning, he did not participate in any murder of Kristopher Heath, and he was not an accomplice to that crime." Tr. 11/12/96, 104, A-987. Counsel further argued that Mr. Stevenson lacked the requisite intent to cause the death of Kristopher Heath. *Id.*

11/12/96, 72, A-979. The State relied heavily on the testimony of Michael Chandler, who saw two black men slouching in their car at Cavalier Apartments around the time of the crime. Tr. 10/31/96, 40-43, A-763-764. From this, the State argued that there were "two black males" in the car. Tr. 11/12/96 at 76, A-980. No evidence was presented at trial that the assailant was white.

The jury that convicted Appellant never heard evidence contradicting the State's theory that Mr. Stevenson was the getaway driver. Counsel called only four witnesses at trial, one state's witness, and three family members who said he was peaceful. Tr. 11/7/96, 41-100, A-911-925. Had counsel performed effectively, and investigated and presented the testimony of the witnesses described above, the defense would have supported their defense that Appellant was not in the getaway car because he was not a white man. Moreover, counsel could have undermined the State's evidence to further establish reasonable doubt.[20]

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[20] Available evidence would have enabled counsel to cross-examine two State's witnesses and undermine their identification of the race of the assailant. Had counsel followed up on the notation in his files, he could have cross-examined Lance Thompson to establish that he was uncertain whether the assailant was black. *See* A-2609, Am. R. 61 Pt'n, 69 n. 25; Lee's Notes re: Thompson. Similarly, had counsel followed up on the police report of State's witness Phillip Hudson, Mr. Hudson would have recognized Mr. Manley in the courtroom and would have identified him as the assailant he saw running past after shots were fired. *See* A-4218,

Counsel's failure to present the testimony of Ms. Mossinger, Ms. Schweda Trzepacz, Ms. Ijames, Ms. Wing, Mr. Hudson, Mr. Thompson, and Ms. Norris, caused Appellant prejudice. Prejudice is proved where, as here, "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Hinton v. Alabama,* 134 S.Ct. 1081, 1089 (2014). Accordingly, Appellant was prejudiced by trial counsel's failures.

The lower court did not reach the merits of the claim, and instead found it was procedurally barred under Rule 61(i)(4) and (i)(2). O-15. "Interest of justice" review is nevertheless warranted because (1) the prior decision clearly erred in its analysis, and (2) the equitable concern of preventing injustice trumps the application of the Rule 61(i)(4) bar. The lower court alternatively barred the claim under Rule 61(i)(2). This ruling misapplied the bar because the claim was not previously raised by Appellant. To the extent that the Rule 61(i)(2) bar applies, Appellant nonetheless meets the exception in Rule 61(i)(5), because he states more

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Declaration of Phillip Hudson (2/11/08). A third witness who testified at the 2005 penalty retrial, Debra Norris, gave a statement that was turned over to counsel, and would have testified to seeing the shooter run in a direction opposite to what other witnesses testified to. *See* A-2611. Am. R. 61 Pt'n, 71 n.28.

than colorable claims of a constitutional violation. At the very least, Appellant is entitled to an evidentiary hearing.

III. THE 1996 JURY INSTRUCTIONS DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR JURY AND TO DUE PROCESS.

Questions Presented

Whether (1) Appellant's rights to a fair jury and due process were violated at the 1996 trial when the court delivered erroneous instructions regarding reasonable doubt, prior inconsistent statements, and accomplice liability; (2) trial counsel's failure to object was ineffective; (3) appellate counsel ineffectively challenged the instructions; and (4) the lower court erred in barring the claim from review under Rule 61(i)(4) and (i)(2)? (Preserved at A-2585).

Standard of Review

See Standard of Review in Claim I.

Merits of Argument

In this case, first, the court's instruction on accomplice liability was in error under *Claudio v. State*, 585 A.2d 1278, 1282 (Del. 1991), because it 1) was ambiguous about which of Mr. Manley's acts Mr. Stevenson intended to aid, and 2) instructed the jury it need not be unanimous as to who was the principal and who

was the accomplice. Tr. 11/12/96, 117, 132, A-991, A-994. Second, the jury was not properly instructed on reasonable doubt.[21] Unlike *Mills*, which instructed the jury that it must be "firmly convinced" of guilt, here the jury was instructed that it was not required to prove guilt to a "certainty," which was "rarely possible." Tr. 11/12/96, 152-53, A-999-1000. The instruction did not meet the required standard of proof beyond a reasonable doubt, violating Appellant's right to Due Process. *In re Winship*, 397 U.S. 358, 364 (1970). Third, the court erred in instructing the jury that it could base its conviction upon the prior inconsistent statement of witness Mario Cruz, depriving Appellant of his right to a fair trial under the Sixth Amendment and according to Delaware law. Tr. 11/12/96, 149, A-999. *See* 11. Del. C. § 3507(a); *Crawford v. Washington*, 541 U.S. 36 (2004); *Acosta v. State*, 417 A.2d 373, 378 (Del. 1980).[22]

Jury instructions are grounds for reversal if they were not reasonably informative and did not allow the jury to perform its duty intelligently in returning a verdict, in violation of Due Process. *Probst v. State*, 547 A.2d 114, 119 (Del.

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[21] "Taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." *Mills v. State*, 732 A.2d 845, 850 (Del. 1999),

[22] *See also Blake v. State*, 3 A.3d 1077, 1083 (Del. 2010) (citing to *Johnson v. State*, 338 A.2d 124, 127 (Del. 1975); *Huggins v. State*, 337 A.2d 28, 29 (Del. 1975).

1988); *Polsky v. Patton*, 890 F.2d 647, 650 (3d Cir. 1989).[23] The trial court's instructions as to the guilt phase violated Appellant's right to Due Process and right to a fair jury. U.S. Const. amend. VI, XIV; Del. Const., Art. 1, §7. ; Del. Const., Art. 1, §7.

Trial counsel's unreasonable failure to object to the instructions was ineffective. There is a reasonable probability that with proper instructions, the jury would have found Appellant innocent of capital murder. Likewise, appellate counsel was ineffective because he 1) inadequately challenged the accomplice liability instruction, and 2) failed to challenge the instructions on reasonable doubt and the use of prior inconsistent statements. A-1066. There is a reasonable probability of a different outcome had he appealed effectively. Trial counsel and appellate counsel were ineffective. U.S. Const. amend. VI, XIV

The lower court did not reach the merits, and instead misapplied the procedural bars in Rule 61(i)(4) and 61(i)(2).[24] O-15. The "interests of justice" are

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[23] Petitioner is entitled to a "correct statement of the substance of the law." *Miller v. State*, 224 A.2d 592 (Del. 1966).

[24] The Superior Court ruled that petitioner could not present evidence on this claim, or any other claim related to the 1996 trial in the 2011 evidentiary hearing. *See* Tr. 12/12/11, 7-9, A-2989-2990.

implicated by Appellant's claims so that 61(i)(4) does not apply, and Appellant establishes more than colorable claims of constitutional violations—violations under the Due Process clause and Sixth Amendment—for purposes of the miscarriage of justice exception to (i)(2) in (i)(5). This Court should grant a new trial or else remand for an evidentiary hearing.

IV. IMPROPER PROSECUTORIAL REMARKS DEPRIVED APPELLANT OF A FAIR TRIAL.

Questions Presented

Whether (1) Appellant's right to a fair trial in 1996 was violated by the prosecution's inflammatory, prejudicial and improper remarks to the jury; (2) trial counsel were ineffective; (3) appellate counsel ineffectively raised the issue on direct appeal; and (4) the lower court erred in applying the Rule 61(i)(4) and (i)(2) procedural bars? (Preserved at A-2605).

Standard of Review

See Standard of Review in Claim I.

Merits of Argument

The prosecutor here made five improper arguments: 1) he improperly shifted the burden of proof to the defendant by questioning why the defense did not present alibi witness Delphine Brown; 2) he argued the defendant was trying to dupe the jury when he filed a suppression motion; 3) he appealed to the jury's sympathy for the victim in order to attain conviction; 4) he improperly vouched for

an expert's credibility; and 5) he demeaned the defense theory as "silly" and "ludicrous."[25]

The constitutional guarantee to due process implies the right to a fair trial free from inflammatory and improper prosecutorial closing argument. U.S. Const. Am. XIV; Del. Stat. Art. 1, § 7; *Govan v. State*, 655 A.2d 307, *5 (Del. 1994). Prosecutors must "refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States*, 295 U.S. 78, 88 (1935). Accordingly, they must "refrain from legally objectionable tactics calculated to arouse the prejudices of the jury." *Hughes v. State*, 437 A.2d 559, 566 (Del. 1981).

Improper prosecutorial remarks that were not objected to at trial require reversal when they prejudice the accused's right to a fair trial.[26] *Brokenbrough v. State*, 522 A.2d 851, 860 (Del. 1987). In assessing prejudice, this Court considers: (1) the centrality of the issue affected by the alleged remark; (2) the weight of the evidence underlying the conviction; and (3) the steps taken by the court to mitigate the effects of the alleged error. *Id.* Here, all three factors under *Brokenbrough*

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[25] *See* Tr. 11/12/96, 47, 77, 109-24, A-973, A-981, A-989-992.
[26] Some remarks were objected to and should be reviewed *de novo*. *Eley v. State*, 11 A.3d 226, at *3 (Del. 2010).

were implicated by the State's improper prosecutorial remarks. The expert's credibility was an issue for the jury to resolve, and the defense is not required to prove or present an alibi, both of which are central issues. The State's case against Mr. Stevenson was weak, and the court took no curative steps to mitigate the effect on the jury.[27] Mr. Stevenson was deprived of his due process right to a fair trial.

Trial counsel's unreasonable failure to object to three of the five improper prosecutorial remarks was ineffective.[28] There is a reasonable probability that had counsel objected, the jury would have not have made their determination of Mr. Stevenson's guilt on the basis of emotion,[29] and that, on appeal, the claim would not have been subjected to less favorable plain error review. *Williams v. State*, 803 A.2d 927, 928 (Del. 2002). Likewise, appellate counsel was ineffective because he raised a general and vague challenge to improper prosecutorial remarks. A-1059. Had counsel effectively appealed the claim, and raised the omitted challenges, there is a reasonable probability that Mr. Stevenson's conviction would have been

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[27] *Ross v. State*, 482 A.2d 727, 743 (Del. 1984); *Boatson*, 457 A.2d 738, 743 (Del. 1983).

[28] At Petitioner's most recent hearing in 2011, the court ruled that Petitioner could not present evidence on this claim, or any other claim related to the 1996 trial. *See* Tr. 12/12/11, 7-9, A-2989-2990.

[29] *See U.S. v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989).

reversed on appeal.[30] Appellant was deprived of the effective assistance of counsel. U.S. Const. Am. VI, XIV; Del. Const. Art. 1, § 7.

The lower court found the claim procedurally barred under Rule 61(i)(4) and (i)(2). O-15. The "interests of justice" are implicated by Appellant's claims so that 61(i)(4) does not apply,[31] and Appellant establishes more than colorable claims of constitutional violations—violations under the Due Process clause, Sixth and Fourteenth Amendments— for purposes of the miscarriage of justice exception in (i)(5). This Court should reach the merits of Appellant's claims, or remand for an evidentiary hearing.

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[30] Appellate counsel's failure to assert that the argument invoking the jury's duty to do justice for the victim Kristopher Heath was objected to at trial, resulted in the 1998 Delaware Supreme Court applying plain error review to deny relief. *Stevenson-2*, A-1117.

[31] To the extent that the lower court was referring to the 1998 direct appeal decision, there was no prior adjudication, and these claims should not be subject to the Rule 61(i)(4) bar.

V. APPELLANT SHOULD BE RESENTENCED TO LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE.

Question Presented

Whether, as required by *Rauf v. State*, 145 A.3d 430 (Del. 2016), and *Powell v. State*, ___ A.3d ___, No. 310,2016, 2016 WL 7243546 (Del. Dec. 15, 2016), this Court should resentence Mr. Stevenson to life imprisonment? (Preserved at A-4450).

Standard of Review

Questions of law are reviewed *de novo*. *See* Standard of Review in Claim I.

Merits of Argument

Mr. Stevenson was sentenced to death under the same statute this Court declared unconstitutional in *Rauf*, a ruling it applied retroactively in *Powell*. The Court has already noted that "Stevenson's death sentence, as well as the sentences of all death-sentenced prisoners in Delaware, will be vacated. Stevenson will be sentenced to life in prison." A-4448.

In *Powell*, this Court ordered that "Powell's death sentence must be vacated and he must be sentenced" to life imprisonment without the possibility of parole. *Powell*, at *1, *5. Similarly, if this Court denies Mr. Stevenson the relief requested

in Points I-IV, it should vacate his death sentence and resentence him to life imprisonment without parole, or remand for resentencing.

CONCLUSION

For the reasons and authorities cited and discussed above, Mr. Stevenson requests that this Court vacate his judgments of conviction and sentences, including his sentence of death, and grant a new trial. In the alternative, the Court should remand for an evidentiary hearing on these claims.

Respectfully submitted,

/s/ Herbert W. Mondros
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