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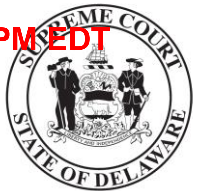

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID D. STEVENSON,	)	
	)	
Defendant-Below,	)	
Appellant,	)	No. 287, 2014
	)	
v.	)	On Appeal from the
	)	Superior Court of the
STATE OF DELAWARE,	)	State of Delaware
	)	
Plaintiff-Below,	)	
Appellee.	)	

STATE'S AMENDED ANSWERING BRIEF

STATE OF DELAWARE
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Dated: May 26, 2017

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NATURE AND STAGE OF PROCEEDINGS

In November 1996, a New Castle County jury found David Stevenson and Michael Manley guilty of first degree murder and related charges and recommended a sentence of death. The Superior Court sentenced both defendants to death. Stevenson appealed his convictions and sentences arguing that the 1) the prosecutor committed misconduct in closing arguments; 2) the trial judge should have recused himself; and 3) the trial court erred by: a) denying severance of his trial from that of his co-defendant; b) denying Stevenson's last minute request for a continuance to obtain new counsel; c) failing to give a limiting instruction regarding Stevenson's Macy's theft charges; and d) giving an incorrect accomplice liability instruction to the jury.[1] This Court affirmed Stevenson convictions and sentences on appeal.[2] The Superior Court denied Stevenson's ensuing motion for postconviction relief, but this Court reversed and remanded the case for a new penalty hearing and reconsideration of the postconviction claims with a new judge.[3]

The newly assigned judge and Stevenson agreed that Stevenson would file an amended postconviction motion that incorporated any prior postconviction claims

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[1] *Stevenson v. State*, 709 A.2d 619, 623 (Del. 1998).

[2] *Id.* at 622.

[3] *Stevenson v. State*, 782 A.2d 249 (Del. 2001).

as well as new claims, and note any withdrawn claims.[4] In his amended and restated motion, dated September 7, 2001, Stevenson argued that: 1) trial counsel was ineffective for failing to: a) file a motion to recuse the trial judge; b) interview and call witnesses to support his defense; c) present exculpatory or alibi evidence, despite objections from his family; d) object to inflammatory trial evidence; e) file motions to exclude or limit evidence at Stevenson's direction; f) adequately prepare for trial and present evidence that damaged Stevenson; and g) allow Stevenson to represent himself. Stevenson also argued that: 2) there was insufficient evidence to support his conviction; 3) the trial judge erred by: a) failing to suppress all evidence from his seizure because it was illegal; b) allowing evidence of Stevenson's other bad acts without a proper limiting instruction; c) denying severance of co-defendant's trial; d) denying Stevenson a continuance to obtain private counsel; e) mistakenly interpreting the law of accomplice liability and failing to provide the jury with a specific unanimity instruction; and 4) failing to recuse himself.[5]

At the subsequent evidentiary hearings on February 22, 2002 and February 6, 2003,[6] Stevenson presented the testimony of several witnesses, including one of his

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[4] *State v. Stevenson*, 2003 WL 23511875, at *1, *8 (Del. Super. Oct. 2, 2003); *see also* A1276-77: 8/7/01 letter from Court to Counsel re: Amend. Postconviction Motion).

[5] *Id.* at *8-9.

[6] Stevenson obtained new counsel in between hearing dates. *Id.* at *2-3.

two trial attorneys, and "potential" witnesses to events at the time of the murder that trial counsel had not called at trial.[7] On March 13, 2003, Stevenson filed a post-evidentiary hearing brief arguing three claims: 1) his former appellate counsel was ineffective on direct appeal for failing to raise issues regarding the trial court's failure to incorporate an instruction based on *Chance*[8] and 11 *Del. C.* § 274; 2) his trial attorneys were ineffective for failing to interview and call witnesses from the police reports who could have supported his defense; and 3) Delaware's death penalty statute was unconstitutional for numerous reasons.[9] The Superior Court deemed the claims not briefed after the evidentiary hearings waived, and only addressed the briefed claims.[10]

On October 2, 2003, the Superior Court, in a lengthy opinion, denied Stevenson's postconviction motion, and this Court affirmed.[11] After Stevenson's new penalty hearing in 2005, a second jury recommended a death sentence, and the Superior Court subsequently sentenced Stevenson to death. This Court affirmed the

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[7] *Id.* at *2.

[8] *Chance v. State*, 685 A.2d 351 (Del. 1996).

[9] *Stevenson*, 2003 WL 23511875, at *10.

[10] *Id.* at *13.

[11] *Stevenson*, 2003 WL 23511875; *Stevenson v. State*, 2004 WL 771657 (Del. Apr. 7, 2004).

sentence,[12] and the United States Supreme Court denied certiorari review in 2007.[13]

On November 28, 2007, Stevenson again moved for postconviction relief. After several amendments, lengthy evidentiary hearings, and additional briefing by the parties, the Superior Court denied relief on April 30, 2014.[14] Stevenson filed a timely appeal and opening brief. The State filed an answering brief, to which Stevenson responded with a reply brief. Thereafter, the case was stayed pending this Court's decisions in *Rauf v. State*[15] and *Powell v. State*.[16] On March 13, 2017, Stevenson filed an amended opening brief. This is the State's amended answering brief.

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[12] *Stevenson v. State*, 918 A.2d 321 (Del. 2007).

[13] *Stevenson v. Delaware*, 550 U.S. 971 (2007).

[14] *State v. Stevenson*, 2014 WL 2538497 (Del. Apr. 30, 2014).

[15] 145 A.3d 430 (Del. 2016).

[16] 153 A.3d 69, (Del. 2016).

SUMMARY OF ARGUMENT

1. Denied. The Superior Court properly denied the claim of judicial bias as procedurally barred by Criminal Rule 61(i)(2) and (i)(4) and found that the interests of justice did not require review. The claim is also barred under 61(i)(1). Judicial recusal is constitutionally required only in "rare instances" and Stevenson has failed to show such a rare instance here. Stevenson cannot overcome his procedural bars.

2. Denied. Stevenson's allegation that his 1996 trial counsel failed to reasonably develop and present exculpatory evidence from available witnesses is time barred under Criminal Rule 61(i)(1) and the Superior Court appropriately determined it was foreclosed under 61(i)(2) and (4). The claim was adjudicated in Stevenson's first postconviction action. Stevenson has presented nothing new warranting reconsideration.

3. Denied. Stevenson's assertion that the trial court erroneously instructed the jury in the 1996 trial on reasonable doubt, the use of prior inconsistent statements, and accomplice liability, is procedurally barred, as is his related ineffective assistance of counsel claim. Superior Court correctly found the claims procedurally barred under Rule 61(i)(2) and (i)(4). These claims are time barred under Rule 61(i)(1). Stevenson has not shown error in the jury instructions and, therefore, he cannot substantiate an ineffective assistance of counsel claim.

4. Denied. Stevenson's contention that the prosecutors in the 1996 trial made errors in the closing arguments is procedurally barred and unavailing. Stevenson's cursory arguments are barred by Rule 61(i)(1) as untimely. Because Stevenson presented a similar claim on direct appeal from his convictions, any repeated argument is barred by Rule 61(i)(4) and any new claims are barred under Rule 61(i)(3). The Superior Court appropriately found that all such claims were procedurally defaulted under 61(i)(2). All related ineffective assistance of counsel claims fail. The claims of prosecutorial misconduct are meritless.

5. Admitted. This Court should vacate Stevenson's sentence of death and remand the case to the Superior Court with directions to resentence Stevenson to imprisonment for the remainder of his natural life without the benefit of probation, parole or any other reduction of sentence in accordance with 11 *Del. C.* § 4209(a).

STATEMENT OF FACTS[17]

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.

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[17] These facts are taken directly from *Stevenson v. State*, 918 A.2d 321, 324-25 (Del. 2007).

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. The Superior Court properly denied as procedurally barred Stevenson's claims of judicial bias and associated claim ineffective assistance of related his 1996 trial.[18]

Question Presented

Whether Stevenson's claims of judicial bias and related ineffective assistance of counsel errors from his 1996 trial are untimely and procedurally barred.

Standard of Review

This Court reviews a denial of a postconviction relief motion for abuse of discretion.[19] Legal or constitutional questions are reviewed *de novo.*[20]

Merits of the Argument

Stevenson argues the 1996 trial judge's bias against him violated his constitutional rights and that counsel was ineffective for failing to seek the trial judge's recusal and thereafter failing to adequately appeal the issue. (Corr. Am. Op.

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[18] On appeal, Stevenson has failed to raise two independent claims with related ineffective assistance of counsel claims regarding his 1996 trial that he presented to the Superior Court in his second postconviction motion. Here, he has failed to argue that: 1) his right to a fair trial was violated because he was tried jointly with his co-defendant; and 2) his right to a fair trial and due process were violated because the State presented evidence of his other crimes and his statement about them to the jury. *See Stevenson* 2014 WL 2538497, at *5. Stevenson has therefore waived these two issues on appeal. Del. Supr. Ct. R. 8; *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

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

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

Brf. at 13). The Superior Court correctly found Stevenson's claims barred by Criminal Rule 61.

a. *Procedural Bars*

In considering Stevenson's motion for postconviction relief, the Superior Court was required to first determine whether Stevenson had met the procedural requirements of Superior Court Criminal Rule 61 before considering the merits of his claims.[21]

Rule 61(i)(1) prohibits the courts from considering a motion for postconviction relief unless it is filed within the applicable time limitation.[22] Rule 61(i)(2) prohibits the filing of repetitive motions for postconviction relief.[23] Rule 61(i)(3) provides that "any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is

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[21] *Ayers v. State*, 802 A.2d 278, 281 (Del. 2002). *See also Maxion v. State*, 686 A.2d 148, 150 (Del. 1996); *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990). All references to Rule 61 refer to the rule in place at the time Reyes' original postconviction motion was filed in 2004. *See Collins v. State*, 2015 WL 4717524, at *1 (Del. Aug. 6, 2015) (holding, *inter alia*, that the version of Rule 61 in effect at the time of filing of the Rule 61 motion controlled the Court's analysis of the claims).

[22] Del. Super. Ct. Crim. R. 61(i)(1). Stevenson initially filed his second postconviction motion in November 2007. The law in place at the time provided that Stevenson had to file for postconviction within a year after his conviction was final or, if he was asserting a retroactively applicable right that was newly recognized after the judgment of conviction became final, within a year after the right is first recognized by this Court or the United States Supreme Court.

[23] Del. Super. Ct. Crim. R. 61(i)(2).

thereafter barred, unless the movant shows (A) cause for relief from the procedural default, and (B) prejudice from the violation of movant's rights.[24] Rule 61(i)(4) provides that any claim that has been formerly adjudicated is thereafter barred unless reconsideration of the claim is warranted in the interest of justice.[25] Rule 61(i)(5) provides that any claim barred by Rule 61(i)(1), (2) or (3) may nonetheless be considered if the claim is jurisdictional or presents "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."[26]

a. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, Stevenson must satisfy the two-prong standard of *Strickland v. Washington*,[27] which requires that he prove that trial counsel's performance was objectively unreasonable and that he was prejudiced as a result.[28] Under the first prong, judicial scrutiny is "highly deferential."[29] Courts must ignore the "distorting effects of hindsight" and proceed

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[24] Del. Super. Ct. Crim. R. 61(i)(3).

[25] Del. Super. Ct. Crim. R. 61(i)(4).

[26] Del. Super. Ct. Crim. R. 61(i)(5).

[27] 466 U.S. 668 (1984).

[28] *Id.* at 688, 694.

[29] *Id.* at 689.

with a "strong presumption" that counsel's conduct was reasonable.[30] "[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."[31]

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."[32] "[N]ot every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding."[33] 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."[34]

b. Stevenson's Procedurally Defaulted Judicial Bias Claim

Stevenson presented his claim of judicial bias to this Court on his direct appeal from the 1996 trial. The Court rejected the claim under a plain error standard, finding that the record did not support recusal, and noting that Stevenson did not

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[30] *Id.*

[31] *Id.* at 690.

[32] *Id.* at 693.

[33] *Id.*

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

support his claim with any evidence of the trial judge's bias or prejudice stemming from an extrajudicial source to require recusal.[35]

Stevenson fully litigated this issue on direct appeal following his conviction,[36] and again raised it in his first postconviction motion, where this Court concluded "in view of the trial judge's personal and independent role in the imposition of the death penalty under Delaware law, … we are obligated to invalidate the imposition of capital punishment in both cases and remand for a new penalty hearing."[37] Thereafter, because Stevenson failed to adequately brief the judicial recusal issue in his amended and restated first postconviction motion,[38] the Superior Court found the claim abandoned.[39] When Stevenson again raised the claim in his second postconviction motion, the Superior Court correctly found the claim procedurally

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[35] *Stevenson*, 709 A.2d at 635.

[36] *Stevenson*, 709 A.2d at 635.

[37] *Stevenson*, 782 A.2d at 251.

[38] Stevenson raised the claim that the trial judge should have recused himself from the case in his first conviction motion but thereafter failed to brief the issue. *Stevenson*, 2003 WL 23511875, at *14. Failure to brief an issue constitutes waiver of the argument on appeal. *See Murphy*, 632 A.2d at 1152.

[39] *State v. Stevenson*, 2003 WL 23511875, at *13.

barred under 61(i)(2) and (i)(4), and that the interests of justice did not require review.[40] The claim is also barred under Rule 61(i)(1) as untimely.[41]

Stevenson's attempt to re-litigate the claim under the guise of ineffective assistance of trial counsel is untenable.[42] Stevenson concedes in his brief that trial counsel did not receive the letter from the judge requesting assignment of the case. (Corr. Am. Op. Brf. at 14). Counsel cannot now be blamed for failure to request recusal on an issue of which they were unaware. Further, counsel raised the issue on direct appeal, and again on appeal after remand. This Court found an appearance of impropriety requiring a new penalty hearing with a different judge and asked the successor judge to consider the postconviction claims related to the guilt phase of trial.[43] Appellate counsel cannot be faulted for failing to "effectively" raise the claim.

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[40] *Stevenson*, 2014 WL 2538497, at *6.

[41] 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).

[42] *See Skinner v. State*, 607 A.2d 1170, 1172-73 (Del. 1992) (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).

[43] *See Stevenson*, 782 A.2d at 261 ("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 the matter. …"

Stevenson argues that the trial judge had a bias that amounted to structural error. He is incorrect. Structural error is error so serious that it "'deprives[s] defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'"[44] Due process guarantees "an absence of actual bias" on the part of a judge.[45] When this Court remanded Stevenson's case for a new judge to preside over a new penalty hearing and Stevenson's first postconviction motion, the Court found no actual bias, stating:

> [W]e 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 our decision in the direct appeal found no error with respect to the claims there asserted.[46]

In *Caperton v. A.T. Massey Coal Co.,* the United States Supreme Court concluded that whether judicial bias rises to a constitutionally untenable level is grounded in the "maxim that '[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.'"[47] In determining whether bias meets the objective standard due

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[44] *Neder v. United States*, 527 U.S. 1, 8-9 (1999) (citing *Rose v. Clark*, 478 U.S. 570, 579 (1986)).

[45] *In re Murchison,* 349 U.S. 133, 136 (1955); *see also Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016).

[46] *Stevenson,* 782 A.2d at 261.

[47] 556 U.S. 868, 876 (2009) (quoting *The Federalist Papers No. 10*, at 59 (James Madison) (J. Cooke ed.1961).

process requires, "the Court has asked whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the 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.'"[48] Implementing that high standard, the United States Supreme Court has found judicial recusal constitutionally required only in "rare instances."[49] Examples of such extreme facts include when the judge had a "financial interest in the outcome of a case," "in the criminal contempt context, where a judge was challenged because of a conflict arising from his participation in an earlier proceeding" suggesting he had a strong interest in the outcome,[50] or "a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign."[51] Other types of bias, such as "[p]ersonal

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[48] *Id.* at 883–84 (quoting *Withrow v. Larkin,* 421 U.S. 35, 47 (1975)).

[49] *Id.* at 890.

[50] Here, *Caperton* discussed *In re Murchison*, 349 U.S. 133 (1955), where the same judge had who had sat as the one-man grand jury before which witnesses testified and thereafter presided over a contempt hearing over those witnesses, finding them in contempt for their behavior before him at the grand jury was unconstitutionally biased. "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations." *Murchison*, 349 U.S. at 137; *see Caperton*, 556 U.S. at 880. *Murchison* noted that that the disqualifying criteria "cannot be defined with precision. Circumstances and relationships must be considered." *Caperton*, 556 U.S. at 880 (citing *Murchison*, 349 U.S. at 136).

[51] *Id.* at 876-81, 884, 887.

bias or prejudice, ... 'would not be [a] sufficient basis for imposing a constitutional requirement under the Due Process Clause.'"[52]

Therefore, Stevenson cannot simply allege structural error and obtain relief. He must allege a type of bias that would actually implicate his due process rights, such as bias based on a "direct, personal, substantial pecuniary interest," in order to constitute such error.[53] Stevenson has failed to establish such a rare instance.

Nevertheless, Stevenson argues that the trial judge's bias deprived him of due process and therefore, his claim should be considered under Rule 61(i)(5). Stevenson cites *Williams v. Pennsylvania*,[54] to support his argument that the Superior Court erred in ruling his claims procedurally defaulted. *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

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[52] *Caperton,* 556 U.S. at 877 (quoting *Aetna Life Ins. Co. v. Lavoie,* 475 U.S 813 (1986)).

[53] *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *see also Caperton,* 556 U.S. at 876–77.

[54] 136 S. Ct. 1899 (2016).

petitioner's] case [that] gave rise to an unacceptable risk of actual bias."[55] *Williams* is factually distinguishable and of no assistance to Stevenson.[56] Unlike *Williams*, Stevenson'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 more than twenty years after Stevenson's trial, and has not been made retroactive on collateral review, there is no reason to now reconsider Stevenson's judicial recusal claim on this basis.

Stevenson's bald assertions that the trial judge's adverse rulings before and during trial prejudiced him (Op. Brf. at 21) are unavailing. First, when this Court affirmed the denial of Stevenson's first postconviction motion, it found that Stevenson failed to show prejudice.[57] Second, Stevenson's discontent with the trial

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[55] *Id.* at 1908.

[56] Other state cases cited by Stevenson are also factually different. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) (trial judge was also trustee of university having an interest in the litigation); *Parenteau v. Jacobsen*, 586 N.E.2d 15, 18-19 (Mass. 1992) (judge thought Jacobsen "was one of the biggest liars [he'd] seen in a long time" and under two part test, essentially admitted that he should have disqualified himself, but did not; *State v. Sawyer*, 305 P.3d 608, 614 (Kan. 2013) (court found definitive on judge's duty to recuse: that he had already judged himself unable to rule impartially in the earlier prosecution of Sawyer for assault and battery); *Maharaj v. State*, 684 So.2d 726, 728 (Fla. 1996) (judge who presided over evidentiary hearing was supervising attorney of the assistant state attorneys who prosecuted Maharaj).

[57] *Stevenson*, 782 A.2d at 261.

judge's rulings is not a valid basis for the judge's disqualification.[58] "[I]t should be self [-] evident that adverse rulings in themselves do not create judicial partiality .... [o]therwise, 'there would be almost no limit to disqualification motions and the way would be opened to a return to judge shopping."[59] Stevenson failed to point to any *new* evidence or anything in the record beyond adverse evidentiary rulings in support of his claim. The Superior Court properly found that he failed to demonstrate that this claim merited reconsideration in the interests of justice.[60]

To the extent Stevenson argues that appellate and postconviction counsel incompetently argued judicial recusal in postconviction litigation, such claims are procedurally barred and meritless. (Corr. Op. Brf. at 27 – 29). On Stevenson's direct appeal, this Court rejected the judicial recusal claim, finding that the record did not support recusal.[61] While Stevenson would like to place the blame on the shoulders of counsel, the reality is that his judicial recusal claim fails because the record does not support it, regardless of how he refines his claim.[62]

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[58] *Gattis v. State*, 955 A.2d 1276, 1286 (Del. 2008) (citing *In re Wittrock*, 649 A.2d 1053, 1054 (Del. 1994)).

[59] *In re Matter of West,* 1987 WL 18824 (Del. Ch.1987) (citing *U.S. v. Schwartz,* 535 F.2d 160, 165 (2d Cir.1976).

[60] *Stevenson*, 2014 WL 2538497, at *6.

[61] *Stevenson*, 709 A.2d at 635.

[62] *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).

II. The Superior Court properly denied as procedurally barred Stevenson's claim that he was denied effective assistance of counsel at his 1996 trial.

Question Presented

Whether the Superior Court appropriately found Stevenson's claim that he was denied effective assistance of counsel at trial procedurally barred.

Standard of Review

This Court reviews a denial of a postconviction relief motion for abuse of discretion.[63] Legal or constitutional questions are reviewed *de novo.*[64]

Merits of the Argument

Stevenson alleges that his 1996 trial counsel failed to "reasonably investigate, develop, and present exculpatory evidence from available witnesses." (Corr. Op. Brf. at 34). This claim is time barred under Criminal Rule 61(i)(1). Further, the claim was adjudicated in Stevenson's 2003 postconviction action, and, as the Superior Court determined, is therefore foreclosed under 61(i)(2) and (4).[65] In fact, the claim was the subject, in part, of the evidentiary hearing in 2002 and again in 2003. The Superior Court, after a lengthy discussion, rejected the claim in 2003,

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

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

[65] *Stevenson*, 2014 WL 2538497, at *6.

and this Court affirmed that decision on appeal.[66] Stevenson has not presented any reason for reconsideration of the claim here.

Stevenson specifically argues that counsel never interviewed three witnesses - Carol Schewda Trzepacz, Marlene Farmer Ijames and Jessica Wing - who would have said the assailants were white. (Corr. Op. Brf. at 35). But, Stevenson called Trzepacz, Ijames and Wing at his evidentiary hearing for his first postconviction motion.[67] At that time, the Superior Court noted that Trzepacz told the police that the passenger in the getaway car was white and at the evidentiary hearing, she reiterated that when she "glanced" at the car, the person in it was white or Hispanic.[68] Ijames told police that from her window, she saw a white male with short hair, wearing a dark jacket and light colored pants, walk from the victim into a small dark colored vehicle.[69] At the evidentiary hearings, Ijames said she could not recall seeing anything or telling police any details.[70] Wing told the police, and testified at the evidentiary hearings, that when she looked out of her apartment window, she

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[66] *State v. Stevenson*, 2003 WL 23511875, *28-35 (Del. Super. Ct. Oct. 2, 2003), *aff'd*, 2004 WL 771657 (Del. Apr. 7, 2004).

[67] *Stevenson*, 2003 WL 23511875, at *28-30.

[68] *Id.* at *29-30.

[69] *Id.* at *30.

[70] *Id.*

could not see the vehicle's occupants but noted that she thought the passenger's hands were white.[71]

Wing's physical description of white hands matched Stevenson's hands.[72] Trzepacz's testimony could easily have placed Stevenson in the passenger seat, where the shooter was likely situated. Both Wing and Trzepacz saw a car closely matching the color of Stevenson's car. While Ijames might have been the most helpful, it also hurt Stevenson's case because she saw a dark car and the shooter get into the driver's seat. And the fact remains that the State's case against Stevenson was very strong in the guilt phase.

The Superior Court fully explored Stevenson's ineffectiveness claim during his first postconviction proceeding and determined that it failed. This Court affirmed. Stevenson has presented nothing new. Therefore, Stevenson's claim must still fail both procedurally and on the merits. As the Superior Court found in denying his postconviction relief the first time, Stevenson failed to meet his burden of showing that if any or all the witnesses had testified, there was a probability that the

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[71] *Id.* at *30.

[72] The Court determined that evidence from the first evidentiary hearing showed that Stevenson's hands "are very light in color. The back of his hands are lighter than his facial color." *Id.* at *32. The Court noted "Stevenson's hands could readily be mistaken for those of a Caucasian," stating that the '"white' hands that Wing saw could easily have been Stevenson's." *Id.*

outcome of the guilt phase would have been different.[73] The evidence against Stevenson was overwhelming. Several or all of the witnesses, while perhaps pointing out flaws, might have also added to the strength of the State's case.[74] Stevenson's further assertion that Lance Thompson, Philip Hudson and Debra Norris would have assisted his case, also fails. (Corr. Op. Brf. at 36). Stevenson offers only conjecture as to this allegation and, therefore, having failed to substantiate his claim, does not merit consideration. The Superior Court appropriately found Stevenson's claim procedurally barred under 61(i)(2) and (i)(4).[75]

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[73] *Stevenson*, 2003 WL 23511875, at *43 (citing *Gattis,* 697 A.2d at 1174).

[74] *Stevenson*, 2003 WL 23511875, at *34–35.

[75] *Stevenson*, 2014 WL 2538497, at *6

III. The Superior Court properly denied as procedurally barred Stevenson's claim that his 1996 trial jury instructions were constitutionally erroneous.

Question Presented

Whether the Superior Court appropriately found Stevenson's claim that his trial jury instructions were constitutionally erroneous as procedurally barred.

Standard 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]

Merits of the Argument

Stevenson asserts that the trial court erroneously instructed the jury in the 1996 trial on reasonable doubt, the treatment of prior inconsistent statements, and accomplice liability. Stevenson not only faults the trial court, but trial counsel for failing to object and appellate counsel for failing to successfully challenge the instructions on direct appeal. (Corr. Op. Brf. at 41). He further alleges that the Superior Court erred in finding the claim procedurally barred under Rule 61(i)(2) and (i)(4). (*Id.*). Stevenson is mistaken.

First, these claims are time barred under Rule 61(i)(1). They are also barred under Criminal Rule 61(i)(2), because Stevenson failed to raise them in his first

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

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

postconviction motion. Stevenson's claims regarding prior inconsistent statements and reasonable doubt jury instructions are also barred under Rule 61(i)(3) for failure to raise the claims on direct appeal and the accomplice liability instruction claim is barred under Criminal Rule 61(i)(4) as previously adjudicated in the appeal from his 1996 conviction. Stevenson's ineffective assistance of trial and appellate counsel claims are also procedurally defaulted because he failed to raise the claims in his original postconviction motion. The ineffective assistance of appellate counsel claim for failure to raise the accomplice liability instruction issue is barred under Rule 61(i)(4) because the issue was decided by this Court in the 2003 postconviction action.[78] As to all, the Superior Court properly determined there was no reason to revisit the claims now.[79]

The reasonable doubt instruction given at trial was a pattern instruction routinely used in criminal trials in Delaware. This Court found the pattern instruction was almost identical to the model explanation proposed by the Federal Judicial Center.[80] Furthermore, the United States Supreme Court cited the model instruction favorably in *Victor v. Nebraska*.[81] And this Court reaffirmed its approval

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[78] *See Stevenson*, 2003 WL 23511875 at *14-23.

[79] *Stevenson*, 2014 WL 2538497, at *6.

[80] *Mills v. State*, 732 A.2d 845, 852 (Del. 1999).

[81] 511 U.S. 1, 26 (1994).

of the same language that Stevenson now challenges in *Keyser v. State*,[82] holding that the reasonable doubt instruction accurately stated the law, did not lower the prosecution's burden of proof below that constitutionally required, and did not undermine the jury's ability to perform its duty.[83]

Stevenson's challenge to the jury instruction about prior inconsistent statements of witnesses actually attacks a statutory provision found at 11 *Del. C.* § 3507. Stevenson, again, makes the claim that the court incorrectly instructed that the jury could base its conviction upon Mario Cruz' prior inconsistent statement citing *Crawford v. Washington*.[84] The claim must fail. First, Stevenson offers no argument to support his claim. By failing to brief his claim, Stevenson has waived the issue on appeal.[85] In any case, the claim is meritless. This Court has held regarding a similar claim:

> In *Crawford,* the United States Supreme Court stated: when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. As discussed above, Alicia, the declarant, testified at trial and defense counsel cross-examined her about her earlier written statements. Therefore, the Confrontation Clause placed no constraints on the use of her earlier statements.[86]

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[82] 893 A.2d 956 (Del. 2006).

[83] *Keyser*, 893 A.2d at 960.

[84] 541 U.S. 36 (2004).

[85] *Taylor v. State*, 1992 WL 404268, at *1 (Del. Dec. 17, 1992).

[86] *Miller v. State*, 893 A.2d 937, 953 (Del. 2006) (footnotes and citations omitted).

Mario Cruz testified on October 31, 1996 and trial counsel cross-examined him. Stevenson's claim is meritless and, in any event, *Crawford* does not apply retroactively on collateral review.[87] The Superior Court appropriately determined that this claim is procedurally defaulted and the interests of justice did not require review.

[87] *Whorton v. Bockting,* 549 U.S. 406 (2007).

IV. The Superior Court properly denied as procedurally barred Stevenson's prosecutorial misconduct claims regarding his 1996 trial.

Question Presented

Whether the Superior Court appropriately found as procedurally barred Stevenson's claims of prosecutorial misconduct at his 1996 trial.

Standard of Review

This Court reviews a denial of a postconviction relief motion for abuse of discretion.[88] Legal or constitutional questions are reviewed *de novo.*[89]

Merits of the Argument

Stevenson contends that the prosecutors in the 1996 trial made several errors in the closing and rebuttal arguments. Specifically, Stevenson claims that the prosecutor: 1) improperly shifted the burden of proof to Stevenson by questioning why he did not present alibi witness Delphine Brown; 2) argued that Stevenson was trying to dupe the jury when he filed a suppression motion; 3) appealed to the jury's sympathy for the victim in order to convict Stevenson; 4) improperly vouched for an expert; and 5) demeaned Stevenson's theory as ludicrous. (Corr. Op. Brf. at 45-46). These claims are barred by Criminal Rule 61(i)(1) as untimely. On direct appeal from his convictions, Stevenson presented a similar prosecutorial misconduct

[88] *Swan v. State,* 28 A.3d 362, 382 (Del. 2011) (internal citations omitted).
[89] *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010).

claim. To the extent that those same claims of misconduct were repeated in his postconviction motion (e.g., alleged vouching for State expert - Agent Kinard, and appealing to jury to do justice for the victim),[90] the claims are now foreclosed by Rule 61(i)(4). Any new claims of prosecutorial misconduct are barred under Rule 61(i)(3) because they were not presented on direct appeal. The Superior Court appropriately found that all prosecutorial misconduct trial claims were procedurally defaulted under Rule 61(i)(2) for failure to have raised the claims in Stevenson's first postconviction motion.[91] Stevenson's attempt to allege ineffective assistance of trial and appellate counsel to avoid his procedural bars fails. All the claims of prosecutorial misconduct are meritless. As such, counsel cannot be faulted for failing to have raised them. Stevenson has provided no manifest injustice to merit relief under Criminal Rule 61(i)(5); nor has he suggested any reason for the reconsideration of the previously litigated claims in the interest of justice. Consequently, Superior Court properly dismissed Stevenson's claims of prosecutorial error at the 1996 trial.

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[90] *See Stevenson*, 709 A.2d at 631-32. ("[T]he record in this case does not reflect that the prosecutor's isolated remarks about justice for the victim constituted plain and reversible error."). As to the State's comments that it was not Agent Kinard's job to do anything but to tell the truth, this Court decided that the State was simply appropriately responding to the "remarks by Stevenson's attorney [that] suggested that the FBI agent was not testifying as an objective expert.") *Id.* at 634.

[91] *Stevenson*, 2014 WL 2538497, at *6.

Stevenson has failed to show that the prosecutor's comments in closing regarding Stevenson's failure to have his statement suppressed in his Macy's theft case were anything other than a fair comment on the evidence presented to the jury. The State's theory of the case was that Stevenson wanted to eliminate Heath as a witness at trial. Stevenson had confessed to the thefts, but sought to have his confessions suppressed. The fact that Stevenson was very likely to be convicted of the thefts due to his confessions was relevant to the State's theory of the case. There was no reason, nor has Stevenson provided any, why the prosecutor could not comment on it during closing arguments.

Regarding comments on his alibi defense, Stevenson failed to show that the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process."[92] The prosecutor did not unfairly put matters before the jury that the jury should not have considered.[93] As to the State's comments regarding Stevenson's failure to provide an alibi witness, Delphine Brown (Stevenson's mother), this Court has held that it is proper for the State to comment on a defendant's failure to call an available alibi witness when the defense

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[92] *United States ex rel. Perry v. Mulligan,* 544 F.2d 674, 678 (3d Cir. 1976) (quoting *Donnelly v. De Christoforo,* 416 U.S. 637, 643 (1974)).

[93] *See Daniels v. State*, 859 A.2d 1008, 1011 (Del. 2004) ("Only comments that prejudicially affect the "substantial rights" of the accused compromise the integrity of the verdict and the fairness of the trial." (citations omitted)).

makes no explanation for the available witness's absence.[94] The record is clear that Stevenson's mother was presumptively available as she had been in frequent contact with Stevenson's trial attorneys and she testified at the penalty phase a few days later. After the State's rebuttal closing, the defense attorney objected to the prosecutor's use of the word "justice" and his questioning of Stevenson's failure to call Delphine Brown to testify as an alibi witness. (A993). The Superior Court stated, "I don't think the State overreached in its closing." (A993). Indeed, Stevenson cannot overcome his procedural hurdles in his untimely second postconviction motion to obtain review, because the State did not overreach. And, to the extent that Stevenson objects for the first time that the State committed misconduct in closing by calling his theory "ludicrous," he has cannot show record support for it and has entirely failed to brief the issue, and it is, therefore, waived.[95]

The State's case against Stevenson was strong – an eyewitness gave Stevenson car's tag number to police, Stevenson ran when confronted at the car near his home minutes after the murder, and after his arrest he left a piece of paper in the police car containing Chona's (a Macy's theft witness) name, address and phone

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[94] *Benson v. State*, 636 A.2d 907, 911 (Del. 1994) (citing *Boyer v. State,* 436 A.2d 1118 (Del. 1981); *Miller v. State,* 224 A.2d 592 (Del. 1966); *DeShields v. State,* 534 A.2d 630 (Del. 1987)).

[95] Del. Supr. Ct. R. 8.

number. Consequently, Stevenson's claims of prosecutorial error fail to provide him with relief. The Superior Court properly rejected the claims.

V. Stevenson's death sentence should be vacated and the Superior Court should resentence Stevenson to life in prison without the benefit of probation, parole or any other reduction.

Question Presented

Whether Stevenson should receive the benefit of this Court's holdings in *Rauf v. State* and *Powell v. State*.

Standard of Review

This Court reviews claims alleging the infringement of a constitutionally protected right *de novo*.[96]

Merits of the Argument

This Court, in *Rauf v. State*,[97] 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.[98] Stevenson, 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 sentenced to "imprisonment for the remainder of his natural life without benefit of probation or parole or any other reduction."[99] Because Stevenson is similarly

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

[97] 145 A.3d 430 (Del. 2016).

[98] 153 A.3d 69 (Del. 2016).

[99] *Id.* at 76. *See also State v. Reyes*, 155 A.3d 331, 357 (Del. 2017); *Phillips v.*

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 Stevenson 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).

State, 154 A.3d 1130, 1146 (Del. 2017).

CONCLUSION

The judgment of the Superior Court regarding Stevenson's convictions should be affirmed, and this Court should vacate Stevenson's sentence of death and remand the case to the Superior Court with directions to resentence Stevenson to imprisonment for the remainder of his natural life without the benefit of probation, parole or any other reduction of sentence in accordance with 11 *Del. C.* § 4209(a).

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

DAVID D. STEVENSON,	)	
	)	
Defendant-Below,	)	
Appellant,	)	No. 287, 2014
	)	
v.	)	On Appeal from the
	)	Superior Court of the
STATE OF DELAWARE,	)	State of Delaware
	)	
Plaintiff-Below,	)	
Appellee.	)	

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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 7,131 words, which were counted by Microsoft Word 2016.

Dated: May 26, 2017

/s/ Maria T. Knoll
Signature of filing attorney