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Case Number 449,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

VINCENT STALLINGS,	:	
	:	
Defendant-Below,	:	**No. 449, 2018**
Appellant,	:	
	:	**Court Below: Superior Court of the**
v.	:	**State of Delaware in and for New**
	:	**Castle County**
STATE OF DELAWARE,	:	
Plaintiff-Below,	:	**Case Below No. 1209008698A**
Appellee.	:	
	:	

APPELLANT'S OPENING BRIEF

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Dated: November 26, 2018

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NATURE OF PROCEEDINGS

Mr. Stallings was arrested on September 13, 2012 and later indicted for the following offenses: two counts of Murder First Degree; four counts of Possession of a Firearm During the Commission of a Felony ("PFDCF"); and one count each of Attempted Robbery First Degree, Robbery First Degree, Conspiracy Second Degree, and Possession of a Deadly Weapon By a Person Prohibited ("PDWPP"). (Appendix 1,[1] Docket Entry 62[2]). On January 21, 2014, Mr. Stallings was re-indicted for additional counts of Robbery First Degree, PFDCF, Wearing a Disguise During the Commission of a Felony, Conspiracy Second Degree, and Possession, Purchase, Own, or Control a Firearm By a Person Prohibited by Prior Violent Convictions of Use, Possession or Sale of Drugs. (DE36).

On June 20, 2014, Mr. Stallings entered a guilty plea to one count each of Murder First Degree, Robbery First Degree and PFDCF. (DE27, 57). Defense counsel filed a motion to withdraw guilty plea on August 13, 2014, and on August 20, 2014, Mr. Stallings filed a *pro se* motion to withdraw guilty plea. (DE64). Both motions were provisionally denied on August 25, 2014. (DE 65). Prior to

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[1] Hereinafter referred to as (A_).

[2] The Superior Court Docket Sheets for Case No. 1209008698A are attached as A1-26 and assigned DE #.

sentencing on December 19, 2014, the court again denied Mr. Stallings' motion to withdraw guilty plea. (DE79; A214-15).

Mr. Stallings filed a notice of appeal on January 6, 2015. (DE81). Defense counsel filed a brief and motion to withdraw as counsel pursuant to Rule 26(c) on April 7, 2015. (A228). The judgment of the Superior Court was affirmed by this Court on June 30, 2015. (DE84; A227, 246-50).

On December 9, 2015, Mr. Stallings filed a *pro se* motion for postconviction relief. (DE85). On June 12, 2017, Mr. Stallings filed an Amended Motion for Postconviction Relief.[3] (DE116). Defense counsel jointly filed affidavits in response to Mr. Stallings' allegations of ineffective assistance of counsel on August 15, 2017 and March 27, 2018. (DE124, 138). The State filed a response on October 18, 2017, and Mr. Stallings filed a reply on November 22, 2017. (DE130, 133). Oral argument was held on April 30, 2018. (DE139).

On July 31, 2018, the court issued a Memorandum Opinion[4] denying the Amended Motion. (DE140). Mr. Stallings filed a timely notice of appeal on August 30, 2018. (DE141). This is Mr. Stallings' Opening Brief on Appeal.

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[3] Mr. Stallings' Amended Motion and Volumes I and II of the Appendix were filed under seal. (DE116, 120, 121). On November 9, 2017, the Superior Court unsealed the Amended Motion and Volume I of the Appendix. (DE132).

[4] Hereinafter referred to as ("Denial at __") (attached as Exhibit A).

SUMMARY OF ARGUMENT

1. The Superior Court erred in finding Mr. Stallings' claim of trial court error procedurally barred, as Mr. Stallings demonstrated cause for relief and prejudice from violation of movant's rights. The court also erred in finding no trial court error, as there was a serious procedural defect in the plea process.

2. The Superior Court erred in finding no ineffective assistance of counsel in regard to Mr. Stallings' plea, as defense counsels' performance was objectively unreasonable throughout the proceedings which caused Mr. Stallings to unknowingly and unintelligently enter a guilty plea.

3. The Superior Court erred in finding no violation of Mr. Stallings' constitutional right to self-represent, as Mr. Stallings made a clear and unequivocal request to proceed *pro se* that was not withdrawn and was denied by the trial court without review or hearing. The court also erred in finding no ineffectiveness, as defense counsel failed to protect Mr. Stallings' right to self-represent despite having knowledge of Mr. Stallings' requests to proceed *pro se*.

4. The Superior Court erred in finding defense counsel was not ineffective on direct appeal, as defense counsel filed a non-merits brief when there were non-frivolous issues to raise.

STATEMENT OF FACTS

On September 11, 2012, two individuals, one wearing a white mask and one wearing a black mask, unsuccessfully attempted to rob an HMS truck plaza in Newark, Delaware. (A168). A third individual assisted as a get-a-way driver. (*Id.*). Co-defendants Andre Palmer[5] and Vanisha Carson[6] provided statements to law enforcement admitting to being the individual in the white mask and the driver respectively. (A29, 35).

A few hours later, on September 12, 2012, a 711 convenience store in Newark, Delaware was robbed. (A168). Surveillance video showed Ms. Carson entering the store as a lookout. (A108, 168). Two individuals subsequently entered, one wearing a white mask and one wearing black mask. (A107, 168). The individual in the black mask pointed a firearm at the store clerk, while the individual in the white mask stole money and cigars. (*Id.*). As the masked individuals were leaving, the person in the black mask turned and fired one shot, fatally striking the 711 clerk, Mr. Mohammed Ullah,[7] in the chest. (*Id.*). Mr.

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[5] Mr. Stallings' Amended Motion used code names in place of witness identifying information pursuant to the January 30, 2013 Protective Order. However, this Opening Brief will use the names of individuals specifically identified in the Superior Court's denial order. (*See* Denial at 3).

[6] *See supra* n.5.

[7] *Id.*

Palmer admitted to being the individual in the white mask and alleged Mr. Stallings was the individual in the black mask. (A29, 168).

On September 13, 2012, Mr. Stallings was arrested on charges related to the September 11 and September 12, 2012 incidents. (A2). Mr. Palmer and Ms. Carson provided proffers implicating Mr. Stallings in the September 2012 offenses and in an prior robbery that occurred on April 1, 2012 at the same HMS truck plaza. (DE29; A113-15, 144-45). Thirteen months later on January 21, 2014, Mr. Stallings was re-indicted on charges related to the April 1, 2012 robbery. (DE36; A125-32).

Four days before jury selection, Mr. Stallings pleaded guilty to one count each of Murder First Degree, Robbery First Degree and PFDCF. (DE59; A162, 164). Mr. Stallings' June 20, 2014 plea agreement identified the counts to which he pleaded guilty as Counts I, XI and VII of the indictment. (A162, 164). During the plea colloquy, the State identified the counts to which Mr. Stallings was pleading guilty as Counts I, II and VII of the indictment. (A165). The offenses Mr. Stallings was questioned about during the plea colloquy were Murder First Degree, committed on September 12, 2012, and Robbery First Degree and PFDCF, both committed on April 1, 2012. (A166).

During the plea colloquy, defense counsel informed the court he had

reviewed the evidence with Mr. Stallings, explaining what was shown on the surveillance videos from the April 2012 robbery and September 2012 homicide. (A168). Defense counsel noted "mixed DNA" was found on the black mask, and Mr. Stallings' fiancé had "supplied somewhat of an alibi," both of which would have been part of defense counsels' trial strategy. (A168-69).

Within seventeen days of pleading guilty,[8] Mr. Stallings expressed his desire to withdraw the guilty plea. On August 13, 2014, defense counsel filed a motion to withdraw the guilty plea. (A172). On August 20, 2014, Mr. Stallings submitted a *pro se* motion to withdraw his guilty plea, alleging defense counsel had established "a conflict in matters of personal opinion and lack of due diligence." (A177-79). Mr. Stallings asserted he only pleaded guilty because he was induced by defense counsels' "unwillingness to bring to bear the skill and knowledge required in challenging the case of the prosecution". (A178-79).

On August 20, 2014, Mr. Stallings filed *pro se* motions for an evidentiary hearing and for substitute counsel. (DE64). In requesting an evidentiary hearing, Mr. Stallings alleged "the plea was entered under inducement of the belief that counsel's actions would not benefit him in going to trial." (A181). In requesting

[8] The exact date is unclear, but it was no more than seventeen days following the plea colloquy. (A172).

substitute counsel, Mr. Stallings noted he was exercising his "6th Amendment right to counsel, conflict free counsel, at critical stages." (A183).

On August 25, 2014, the court provisionally denied the motions to withdraw guilty plea "without prejudice to defense counsel's immediately ordering a transcript of the guilty plea colloquy and, within two weeks of receiving the transcript, filing a renewed motion with specific claims and the factual basis for them." (A185). Mr. Stallings was permitted to make one additional filing at that time, after which the State would have two weeks to respond. (*Id.*). The Prothonotary was instructed to reject any other reply from Mr. Stallings. (*Id.*).

On September 2, 2014, Mr. Stallings filed a motion to proceed *pro se* and requested the court schedule "the required hearing." (DE66; A189). The motion was denied without review on September 12, 2014, along with prior motions for substitute counsel, an evidentiary hearing, and transcripts, on the basis that they were "out of order" with the terms of the August 25, 2014 order. (A191-92). On October 5 and 14, 2014, Mr. Stallings wrote to defense counsel requesting withdrawal from the case. (A203, 206). Mr. Stallings noted his first request had been made orally on September 1, 2014. (*Id.*).

On September 18, 2014, Mr. Stallings filed a *pro se* motion to appoint an expert to review the psychology of the plea and a letter to the court regarding

"plea withdraw[a]l/ineffective counsel/*pro se* motions pending on docket." (A193-99). Mr. Stallings alleged he had been without counsel since August 1, 2014 due to "existing conflict", and defense counsel had "made it clear, he will take no further action on [his] behalf." (DE68; A195). The court denied Mr. Stallings' September 18, 2014 filing without review. (DE69; A200).

The court ordered a transcript be made of Mr. Stallings' plea colloquy after defense counsel failed to and noted that Mr. Stallings' "out-of-order" filings would continue to be denied without review. (A201-02). Defense counsel advised that they could not submit a renewed pleading in support of Mr. Stallings' request to withdraw the plea. (DE74; A207). Mr. Stallings submitted a *pro se* supplemental motion to withdraw the plea on October 17, 2014, noting the court had forced him to proceed *pro se* on the motion to withdraw guilty plea yet had never granted him leave to proceed *pro se* pursuant to *Faretta v. California*. (DE73; A208-12). The State untimely filed a response in opposition. (DE77; A214).

On December 19, 2014 immediately prior to sentencing, the court stated:

> The Court is satisfied that the supplemental motion to withdraw adds very little, if anything, to the original motion. And the transcript of the plea colloquy tends to confirm that the plea was knowing, voluntary and intelligent. Accordingly, the Court is standing by its original denial of the motion to withdraw guilty plea, and the

supplemental motion is denied. (A214-15).

During sentencing, defense counsel noted Mr. Stallings wanted to address the court on the motion to withdraw, but as he was proceeding *pro se*, was unsure of the procedure. (A218). The court responded that oral argument would not be held. (A219). The court noted that defense counsels' appeal should deal with any defects in the plea colloquy, the entry of the plea after the colloquy and the denial of the motion to withdraw the guilty plea. (A223). However, defense counsel filed a Rule 26(c) motion to withdraw on direct appeal, alleging there were no arguably appealable issues. (A226, 231-44).

ARGUMENT I. THE SUPERIOR COURT ERRED BY DENYING MR. STALLINGS' POSTCONVICTION CLAIM OF TRIAL COURT ERROR IN THE PLEA PROCESS.

QUESTION PRESENTED

Did the Superior Court err in finding Mr. Stallings' postconviction claim of trial court error to be procedurally barred and non-meritorious? This issue was preserved as it was raised in the Amended Motion and Reply Brief. (A275-87, 355-62).

SCOPE OF REVIEW

Questions of law are reviewed *de novo*.[9] Claims alleging a constitutional violation are reviewed *de novo*.[10]

MERITS OF THE ARGUMENT

The Superior Court erred by denying Mr. Stallings' postconviction claim of trial court error in the taking of Mr. Stallings' guilty plea. (Denial at 8-9, 18). The court concluded that all claims of trial court error are procedurally barred under Delaware Superior Court Rule of Criminal Procedural 61(i)(3). (Denial at 8, 25-26). Although Rule 61(i)(3) bars grounds for relief not asserted in the proceedings leading to the judgment of conviction, the rule affords exception if the movant

[9] *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).
[10] *Hall v. State*, 788 A.2d 118, 123 (Del. 2001).

shows cause for relief from the procedural default and prejudice from violation of his rights.[11] The Superior Court erred in concluding Mr. Stallings had not pleaded facts sufficient to overcome this bar. (Denial at 9, 25-26).

A. The Superior Court erred in finding this claim procedurally barred.

The court contends that the "threshold issue is whether [t]rial [c]ounsel's failure to raise the defect in the plea, either during the colloquy or in support of Stallings' bid to withdraw the plea, amounted to ineffective assistance of counsel." (Denial at 9). The court concludes the answer is no. (Denial at 14). However, the court is mistaken that "[t]rial [c]ounsel's alleged ineffectiveness is the only argument Stallings raises in support of his contention that there is cause for relief from the procedural default" and that defense counsel was not ineffective. (Denial at 9, 14).

As Mr. Stallings explained, he could not raise the claim earlier for several reasons, the first being his unawareness of the errors until the postconviction stage. (A277-78, A355-57). Secondly, Mr. Stallings was impeded in his ability to raise appellate issues by defense counsels' continued representation of him on direct appeal. (A277).

Mr. Stallings' request to self-represent was made prior to sentencing.

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

(A189-90). The court's failure to hold a *Faretta* hearing unconstitutionally forced defense counsel upon Mr. Stallings for the remainder of court proceedings, including direct appeal.[12] This impeded Mr. Stallings' ability to raise appellate issues. (A277).

Moreover, the court erred in finding defense counsels' failure to raise the defect in the plea, either during the colloquy or in support of Mr. Stallings' bid to withdraw the plea, was not ineffective. As Mr. Stallings explained, having negotiated the plea, defense counsel should have detected the errors with the guilty plea during the plea colloquy or at the very latest, prior to sentencing. However, even on direct appeal, a diligent review of Mr. Stallings' case for arguably appealable issues would have revealed the errors, especially since the court highlighted appellate issues during sentencing. (A275).

The court contends "Stallings maintains [t]rial [c]ounsel's failure to properly inform him of the charges to which he was pleading, failure to correct the defect in the [c]ourt's colloquy, and failure to raise the defect as a basis supporting Stallings' motion to withdraw his plea amounted to ineffective assistance of counsel and constituted cause excusing the failure to raise these issues in the

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[12] *Faretta v. California*, 422 U. S. 806, 807, 835 (1975); *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

proceedings leading up to his judgment of conviction." (Denial at 13). The court misunderstands Mr. Stallings' claim.

This alleged ineffectiveness, along with other identified instances of deficient performance, provide an independent basis for withdrawal of the plea.[13] However, as Mr. Stallings' articulated, it is defense counsels' ineffectiveness in regard to not identifying the errors with the plea colloquy prior to and/or during Mr. Stallings' direct appeal, thereby causing Mr. Stallings' lack of awareness of the issue, as well as the court's unconstitutional imposition of defense counsel on Mr. Stallings that cumulatively establishes cause for the procedural default.

Accordingly, Mr. Stallings has demonstrated cause for relief from the procedural default and prejudice from violation of his rights, overcoming the procedural bar of Rule 61(i)(3).[14]

B. The Superior Court erred in finding no serious procedural defect.

Given the alleged procedural bar, the Superior Court did not expressly decide whether the trial court erred in the taking of Mr. Stallings' plea. However the court did conclude, in the context of whether defense counsel was ineffective for failing to identify the procedural errors and raise them during the motion to

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[13] *See* Claim II of Amended Motion at A288-320; *see infra* Claim II at 19-35.

[14] *See generally Blackwell v. State*, 736 A.2d 971 (Del. 1999).

withdraw guilty plea, that the procedural defect was not serious and therefore, defense counsel was not ineffective. (Denial 18). However, the court confuses Mr. Stallings' claim of court error with his claim of ineffective assistance of counsel, which encompasses a far greater scope of deficient performance that justifies the withdrawal of Mr. Stallings' guilty plea under Rule 61.[15]

As Mr. Stallings explained in Claim II of the Amended Motion and Reply, defense counsels' ineffectiveness throughout the entirety of the Superior Court proceedings, predating the plea colloquy, separately rendered Mr. Stallings' plea unknowingly and unintelligently entered, distinct from the trial court's error. (A228-320). These assertions are entirely unrelated to Mr. Stallings' first claim of trial court error and whether Mr. Stallings is able to overcome the procedural bar of Rule 61(i)(3).

Although the Superior Court correctly summarizes the defects with the guilty plea and plea colloquy, the court erroneous finds the procedural defect not serious. (Denial at 11). During the plea colloquy, the State misinformed the court and defense of the relevant count numbers, and the court engaged in a colloquy with Mr. Stallings on a group of charges that did not accurately reflect the counts listed on the signed plea agreement and for which he was ultimately sentenced.

[15] *See infra* Claim II at 19-35.

(A162, 164-66). Pursuant to Delaware Superior Court Criminal Rule 11(c), a guilty plea shall not be accepted by the court unless the defendant "understands the nature of the charge."[16] Additionally, the court must personally address the defendant in open court and "inform [him] of and determine that [he] understands . . . the nature of the charge to which the plea is offered"[17] prior to accepting a guilty plea. This did not occur in Mr. Stallings' case.

The court could not possibly have made certain that Mr. Stallings understood "the nature of the charge to which the plea [was] offered" when even the court was misinformed as to which charges he was pleading guilty. With such confusion and lack of unanimity, Mr. Stallings could not reasonably have known to what charges he was admitting guilt nor could he know which counts of the indictment were being resolved.[18] Accordingly, the errors that occurred during the plea colloquy amounted to a fundamental procedural defect[19] rendering the guilty plea unknowing and unintelligent.

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[16] Del. Super. Ct. Crim. R. 11(c); *Patterson v. State*, 684 A.2d 1234, 1237-38 (Del. 1996) (noting that the defendant understands the "nature of the charge to which the plea is offered").

[17] *Id.*

[18] *Patterson*, 684 A.2d at 1237-38 ("Rule 11 deficiency coupled with the ill-formed understanding of the sentencing consequences" deprived the defendant of the "opportunity to make an effective and intelligent acknowledgment of the consequences of his plea".).

[19] *See Patterson*, 684 A.2d at 1239.

Although Mr. Stallings did not plead guilty to the same offense, the Superior Court finds it sufficient that he pleaded guilty to the same violation of law. Yet the court does not explain the legal basis for requiring a signed guilty plea form *or* accurate plea colloquy, but not both. Despite acknowledging that "inconsistencies between the sentence listed on the plea forms and the sentence the defendant faced" constitute a serious procedural defect,[20] the court fails to explain how this differs from inconsistencies between the charges listed on the plea forms and for which the defendant was sentenced and the charges upon which the court questioned the defendant.

As Mr. Stallings' guilty plea was not knowing or intelligent, it was obtained in violation of his constitutional due process right pursuant to the Fourteenth Amendment of the United States Constitution. The United States Supreme Court has deemed it erroneous to accept a defendant's guilty plea in the absence of an "affirmative showing that it was intelligent and voluntary."[21] The principle has since been upheld by the Supreme Court.

In *Brady* v. United States, the Supreme Court held that "waivers of constitutional rights . . . must be knowing, intelligent acts done with sufficient

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[20] Denial at 16 (citing *Patterson*, 684 A.2d at 1238-39).
[21] *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

awareness of the relevant circumstances and likely consequences."[22] In *Henderson v. Morgan*, the Supreme Court found a defendant's guilty plea to be invalid, because he was not informed of an element of the offense to which he pleaded guilty.[23] Third Circuit Court of Appeals, relying on *Boykin* and its progeny, has noted that requiring a guilty plea to be knowing, voluntary, and intelligent works to ensure that the guilty plea complies with constitutional safeguards.[24]

In light of the aforementioned, the Superior Court erred in concluding this was not a serious procedural defect and that neither the trial court nor defense counsel erred in relation to the plea. Given the serious procedural defect in Mr. Stallings' plea process, his guilty plea must be withdrawn.[25] To find otherwise

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[22] *Brady v. United States*, 397 U.S. 742, 748 n.6 (1970).

[23] *Henderson v. Morgan*, 426 U.S. 637, 650 (1976).

[24] *See Jamison v. Klem*, 544 F.3d 266, 274 (3d Cir. 2008); *United States v. Schweitzer*, 454 F.3d 197, 202 (3d. Cir. 2006); *Heiser v. Ryan*, 951 F.2d 559, 561 (3d Cir. 1991) (quoting *Brady*, 397 U.S. 742).

[25] *See Patterson*, 684 A2d at 1239 ("[I]f there is a serious procedural defect in the plea process or if it clearly appears that the defendant did not knowingly or voluntarily consent to the plea agreement, a sufficient basis exists for withdrawal of the plea notwithstanding whether there is a basis for a claim of factual innocence or whether there is prejudice to the State."); *see also See United States v. Ward*, 518 F.3d 75, 81, n.8 (1st Cir. 2008) (citing *Boykin*, 395 U.S. at 242) (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969)) (superseded by statute on other grounds) ("[I]f a defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and is therefore void.").

would violated Mr. Stallings' constitutional right to due process pursuant to the Fourteenth Amendment of the United States Constitution and Article I, § 7 of the Delaware Constitution.[26]

[26] Del. Const. art. I, § 7; *Moore v. Hall*, 62 A.3d 1203, 1208 (Del. 2013) (finding the phrase "due process of law" as found in the Fourteenth Amendment and the phrase "law of the land" as found in Article I, § 7 of the Delaware Constitution are synonymous); *Hammond v. State*, 569 A.2d 81, 87 (Del. 1989).

ARGUMENT II. THE SUPERIOR COURT ERRED IN DENYING MR. STALLINGS' POSTCONVICTION CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WHICH RENDERED THE GUILTY PLEA UNKNOWING AND UNINTELLIGENT.

QUESTION PRESENTED

Did the Superior Court err in finding Mr. Stallings' postconviction claim of ineffective assistance of counsel to be non-meritorious? This issue was preserved as it was raised in the Amended Motion and the Reply Brief. (A288-320, 363-73).

SCOPE OF REVIEW

Questions of law are reviewed *de novo*.[27] Claims of a constitutional violation are reviewed *de novo*.[28]

MERITS OF THE ARGUMENT

The Superior Court erred by denying Mr. Stallings' postconviction claim that he is entitled to the withdrawal of his guilty plea under Rule 61, because the plea was not knowingly or intelligently entered with the effective assistance of counsel. (Denial at 14-18). Mr. Stallings' claim was not properly analyzed by the Superior Court and was denied on the basis of erroneous factual and legal conclusions.

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[27] *Dawson*, 673 A.2d at 1190.
[28] *Hall*, 788 A.2d at 123.

A. The Superior Court erred in finding no ineffectiveness in regard to Mr. Stallings' guilty plea.

As Mr. Stallings explained in his filings, defense counsel rendered ineffective assistance of counsel throughout the Superior Court proceedings, prior to and including the court's acceptance of the guilty plea, which collectively caused Mr. Stallings to enter into the guilty plea unintelligently and unknowingly. (A288-320, 364-73). Only one of these instances of deficient performance was defense counsels' failure to effectively communicate to Mr. Stallings the charges to which he was pleading guilty and failure to ensure the court conducted a proper plea colloquy that conformed to the conditions of the signed plea agreement.[29] (A290).

In addition to failing to ensure a proper plea colloquy was conducted, defense counsel only informed Mr. Stallings of the *charges* to which he was pleading guilty, not the *offenses*. (A290). Given the errors that subsequently followed, it is clear Mr. Stallings could not have been aware of which charges he was pleading guilty to and the nature of those offenses, when the State, the court and defense counsel lacked uniformity on this issue.[30]

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[29] *See supra* at 14-18.

[30] This Court has held that attorneys must ensure defendants are clearly informed of the precise scope of the plea offer and agreement and that the charges to which the defendant is pleading guilty and those that are being *nolle pross'd*

However, rather than considering the cumulative prejudice from this error in conjunction with the additional instances of deficient performance identified by Mr. Stallings, the Superior Court only considered whether defense counsels' alleged ineffectiveness was sufficient to overcome the procedural bar of Rule 61(i)(3) found applicable to Claim I's allegation of trial court error. As such, the court failed to fully and properly consider Mr. Stallings' claim of cumulative ineffective assistance of counsel.

B. The court erred in finding defense counsels' failure to investigate cell phone records not deficient.

Mr. Stallings' Amended Motion articulated in great detail how inspection of Mr. Stallings', Mr. Palmer's and Ms. Carson's cell phone records by defense counsel would have bolstered Mr. Stallings' alibi defense and impeached his co-defendants' statements. (A294-307). However, the court concluded that because trial counsel made a strategic decision to not use Mr. Stallings' alibi witness, Mr. Stallings' fiancé, then counsels' strategic decision is entitled to deference. The court also found that the evidence against Mr. Stallings was overwhelming, and therefore Mr. Stalling cannot demonstrate a reasonable probability of a different outcome. (Denial at 29-30). The court's conclusions are erroneous for several

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must be identified during the plea colloquy by both title and number. (*See Patterson*, 684 A.2d at 1239).

reasons.

The court found, based on defense counsels' joint affidavit, that defense counsel made a strategic decision to not use Mr. Stallings' fiancé as an alibi witness; yet defense counsels' affidavit squarely contradicts statements made to the court during Mr. Stallings' plea colloquy. Defense counsel specifically stated during the plea colloquy that Mr. Stallings' trial strategy would have relied on the alibi provided by Mr. Stallings' fiancé. (A168-69). The file from the private investigator hired by defense counsel also contains a witness list compiled shortly before trial was scheduled to begin that listed Mr. Stallings' fiancé as a defense witness for both the guilt and penalty phases. (A365 n. 46; A404). If the Superior Court made a credibility determination between defense counsels' conflicting assertions, then the court made this determination without explanation or sufficient basis. Similarly, the court likewise erred if it failed to consider this crucial discrepancy in defense counsels' statements.

Most notably, the court mistakenly assumes that defense counsel made a strategic decision to not investigate the cell phone records. The court also erroneously assumes that the cell phone evidence was entirely dependent on the testimony of Mr. Stallings' fiancé when the phone records were actually of independent value. The court finds no concrete allegations of prejudice and

describes the evidence as being of only "marginal" value. (Denial 30). However, this conclusion fails to fully consider the comprehensive information provided by Mr. Stallings.

As explained to the court, the record confirms that Mr. Stallings and his fiancé shared a cell phone and that he asserted he was at their residence on the night of September 11, 2012 when his fiancé received a call. (A54-56, 297-302). The call detail record for Mr. Stallings' cell phone confirms that this phone call was received at 10:15:16pm on September 11, 2012 and lasted for 24:55 minutes, ending at 10:40:11pm. (A61, 63, 76). Mr. Stallings' fiancé informed law enforcement on at least two separate occasions that on September 11, 2012, she went to sleep between 10:30pm and 11:00pm, and Mr. Stallings, who had been with her the entire day, was at their residence when she went to sleep. (A46-47, 50, 52). As she would have been awake at 10:40pm that night, she would have been with Mr. Stallings at the time of the attempted robbery at the HMS truck stop, which occurred at 9:43pm. (A297 n.84). Conversely, Mr. Stallings' co-defendants alleged that he had been with them for approximately one hour before the attempted robbery.

Significantly, a review of the cell sites for Mr. Palmer's phone records indicates that by 10:45pm on September 11, 2012, Mr. Palmer was in the vicinity

of the apartment at which he and Ms. Carson had been residing. (A81). Mr. Palmer asserted in his proffer that after the 9:43pm attempted robbery at the HMS truck plaza, he returned to that residence with both Ms. Carson and Mr. Stallings. Yet, Mr. Palmer's residence was approximately 22-26 minutes from Mr. Stallings' residence, and Mr. Stallings contended that both his fiancé and the individual who called her could confirm he was there during their 10:15pm phone call that did not end until 10:40pm. The records confirm that this phone call used a cell site approximately three minutes from Mr. Stallings' residence. (A61, 63, 76).

Even more significantly, the cell phone records reveal that Mr. Stallings placed a 50 second phone call to Mr. Palmer at 12:26:54am on September 12, 2012. (A277-81). However, based on the co-defendants' statements, Mr. Stallings and Mr. Palmer were together at that time, either at Mr. Palmer's residence planning the 711 robbery or on foot en route to the 711. (A29, 36-38). Mr. Stallings had no reason to call Mr. Palmer when they were allegedly together preparing to commit a robbery.

Additionally, both co-defendants alleged they picked Mr. Stallings up between 8:00pm and 9:15pm on September 11, 2012 and that he was with them until after the 711 robbery and homicide. (A28-29, 34, 41). Yet because Mr. Stallings' fiancé used their cell phone until 10:40pm, Mr. Stallings could only

phone Mr. Palmer at 12:26:54am if he returned home after committing the attempted robbery at the HMS truck plaza, waited until his fiancé finished using their cell phone, waited until she fell asleep, and then taken the phone and left to commit the 711 robbery and homicide. (A47-48). This significantly conflicts with the State's time-line of events and the co-defendants' proffers.

Three phone calls were also placed from Mr. Stallings' phone at 9:14:36pm, 9:15:36pm and 9:38:38pm, all using a cell site approximately three minutes from Mr. Stallings' residence. (A76). The HMS truck plaza attempted robbery occurred at 9:43pm and the driving distance between the two locations was approximately 17 minutes, making it unlikely that Mr. Stallings had enough time to travel to the truck plaza. Additionally, Mr. Stallings' cell records indicate that he placed a phone call at 1:16am on September 12, 2012 using a cell site approximately three minutes from his home. (A77). Given the time-line of events, as pieced together from the 711 surveillance video and the co-defendants' proffers, it is unlikely that Mr. Stallings could have returned to his residence in time to place the 1:16am phone call.

Cumulatively, this evidence had significant impeachment value, as it directly disputes many of the co-defendants' statements, as well as exculpatory value, as it makes it nearly impossible for Mr. Stallings to have traveled between

the various locations on the alleged crime spree while still in the vicinity of the corresponding cell towers when specific phone calls were placed and/or received.

As both co-defendants agreed to testify against Mr. Stallings in exchange for a benefit from the State, defense counsels' failure to obtain easily accessible impeachment information is highly prejudicial. Mr. Stallings advised the court on several occasions that he only pleaded guilty because defense counsel erroneously informed him that the State's evidence against him was strong and he had no defense. (A181, 196, 208-12). In light of the significant impeachment and exculpatory information that defense counsel negligently failed to obtain, the court's conclusion that Mr. Stallings would still have pleaded guilty even without counsels' errors is entirely unsupported by the factual record. (Denial at 30-31).

Given the beneficial information counsel never investigated, defense counsels' advice to plead guilty was uninformed and violated Mr. Stallings' Sixth Amendment right to "informed advice after 'appropriate investigation'".[31] (A303-07). Defense counsel unreasonably limited their investigation and failed to exercise "reasonable professional judgment" in determining the scope and areas of investigation that were essential to providing Mr. Stallings with competent

[31] *MacDonald v. State*, 778 A.2d 1064, 1075 (Del. 2001) (quoting ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2 (3d ed. 1999)).

defense counsel.[32]

At the time defense counsel chose not to investigate the cell phone records of Mr. Stallings and his co-defendants, counsel knew or should have known that the State already had or would soon be investigating the records and cell sites used by all three defendants on the night of the crimes. (A30-32, 42-44, 44-48, 119, 159). Defense counsel also knew or should have known that Mr. Stallings and his fiancé believed the phone records for their shared cell phone would confirm the phone had been at their residence on the night in question. (A47-48, 65). Defense counsel also knew or should have known from Mr. Stallings' personal statements, and confirmed by his cell phone records, that a witness could confirm he and his fiancé were at their residence at 10:15pm on the night of September 11, 2012.

A defendant's own statements and actions are critical to determining the reasonableness of defense counsel's investigation decisions, as an attorney's "actions are usually based quite properly, on informed strategic choices made by

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[32] *Jacobs v. Horn*, 395 F.3d 92, 102 (3d Cir. 2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003) ("In the context of ineffective assistance based on counsel's failure to investigate, the court must determine whether counsel exercised 'reasonable professional judgment.'"); *see also Strickland v. Washington*, 466 U.S. 668, 690-91 (1984) ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.").

the defendant and on information provided by the defendant."[33] In this situation, both Mr. Stallings and the discovery provided by the State provided defense counsel with more than enough information to make them aware that the phone records were an avenue of investigation essential to providing Mr. Stallings with the informed advice he needed to intelligently and knowingly decide whether to plead guilty or proceed to trial.

In light of the aforementioned, the Superior Court clearly erred in concluding that defense counsel made a reasonable strategic decision[34] and that Mr. Stallings failed to demonstrate prejudice.

C. The court erred in finding defense counsels' failure to investigate the authenticity of the 711 surveillance video reasonable.

As Mr. Stallings explained to the court, defense counsel were informed by a forensic video expert that the 711 surveillance video provided by the State had gone through "some enhancement or resaving process", and "incorrect video handling" had resulted in "manufactured frames" which "could just as easily

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[33] *Strickland*, 466 U.S. at 691; *see also Riley v. State*, 585 A.2d 719, 727 (Del. 1990) (quoting *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1984)) ("Effective representation by counsel depends upon 'adequate investigation and pre-trial preparation.'").

[34] *See Rolan v. Vaughn*, 445 F.3 671, 682 (3d Cir. 2006) (citing *United States v. Kauffman,* 109 F.3d 186, 190 (3d Cir. 1997)) (finding that defense counsel's decision to not present a self-defense claim was not entitled to the normal deference afforded to strategic choices, as it was uninformed).

[have] caused missing frames." (A122-24, 150-156, 307-08). Defense counsel was further advised that unless they obtained the original unaltered video, it would be impossible to enhance it for investigative purposes. (A122). Yet defense counsel failed to request the original unenhanced video from the State.

The court determined that ending the investigation was objectively reasonable, because defense counsel decided challenging the authenticity of the video was unlikely to succeed and therefore chose not to spend further resources on the issue. (Denial at 32-33). The court mischaracterizes the factual record.

Communications show that defense counsel decided to hire the forensic video expert to show the video had been altered or tampered with in support of a motion to suppress but changed their mind after learning there would be a small additional fee. (A150, 152). Counsel informed the expert that the cost/benefit of the task would be "frowned upon" by the Department of Justice since the "data wasn't as useful as first perceived to be." (A151-52). However, the Department of Justice is unrelated to funding the representation of indigent criminal defendants, and halting a reasonable avenue of investigation beneficial to Mr. Stallings' defense on such a basis is objectively unreasonable.

Defense counsel contacted a forensic video expert to determine if the video could be exculpatory for Mr. Stallings. Despite learning that the video could very

easily contain missing frames due to mishandling, defense counsel stopped pursuing this issue simply because the cost was slightly higher than expected. In addition to its exculpatory value, the video was a key piece of the State's evidence in the 711 robbery and homicide, and defense counsel had a nonfrivolous basis for challenging its admissibility.

Under Delaware Rule of Evidence 901, "[t]he requirement of authentication or identification" for each piece of evidence is a "condition precedent to admissibility" and is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[35] "The proponent carries the burden of 'authenticating the evidence by eliminating the possibility of misidentification or adulteration as a matter of reasonable probability.' This burden is met, among other ways, by having a witness with knowledge visually identify the evidence or by establishing a chain of custody that traces the evidence's continuous whereabouts, thereby demonstrating the identify and integrity of the evidence."[36]

As such, the State would have been required to either produce the original unenhanced video, prove that the video provided to the defense was in fact a

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[35] D.R.E. 901(a).

[36] *Randall v. State*, 2006 WL 2434912, at *4 (Del. 2006).

duplicate of the original unenhanced video, or prove in the alternative that the original unenhanced video had been destroyed, none of which the State would have been able to do.[37] As such, defense counsel had a legitimate argument that the video was inadmissible, and the record reveals no objectively reasonable basis for abandoning the issue in a capital murder case. Defense counsels' unreasonable action on this issue prejudiced Mr. Stallings' ability to received the informed advice necessary to making a knowing and intelligent decision regarding the guilty plea.

Accordingly, the court erred in finding this allegation of ineffective assistance of counsel non-meritorious.[38]

D. The court erred in finding defense counsels' response to the untimely re-indictment strategic and objectively reasonable.

The Superior Court concludes that defense counsels' "decision to move to

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[37] *See* D.R.E. §§§ 1002, 1003, 1004.

[38] The court also contends it is "mere speculation that the original [video] existed, somehow was lost in the chain of custody, and theoretically could have contained exculpatory information." (Denial at 33). The court's conclusion is illogical, as there must be an original video if the subsequent video was altered. Moreover, police reports and testimony from the proof positive hearing indicate that it was law enforcement who enhanced, and ultimately mishandled, the video. (A66, 112, 115-118). The State was also unable to provide postconviction counsel with the original unenhanced surveillance video upon request. (A309). If the original video cannot be located, now or then, it has obviously been lost, either by the State or by law enforcement acting on behalf of the State.

sever the charges, rather than to move to dismiss under Rule 48, objectively was reasonable because the motion to sever had a higher likelihood of success." (Denial at 35). The court mischaracterizes the record.

The State waited over thirteen months to charge Mr. Stallings with offenses related to the April 1, 2012 HMS truck plaza robbery, despite being aware of it at the time of Mr. Stallings' arrest. (DE26, 36; A67-72, 114). Although the court contends Mr. Stallings was not prejudiced by the failure to pursue dismissal of the re-indicted charges, defense counsels' communications show they believed this case to be more detrimental to Mr. Stallings' defense than the murder case. (A133-34). Defense counsel also noted the need for dismissal or severance as there was insufficient time for investigation and preparation. (A133). The Superior Court ignores defense counsels' own statements.

Moreover, the court's contention that defense counsel strategically chose to pursue a motion to sever over a motion to dismiss is unsupported. Rather, the record shows defense counsel filed a motion to dismiss but after confusing the counts of the re-indictment, failed to request dismissal of the newly indicted charges on the basis of the State's unnecessary delay[39] in bringing charges.

Defense counsels' February 21, 2014 motion to dismiss five counts of the

[39] *See* Del. Super. Ct. Crim. R. 48(b).

re-indictment requested dismissal of charges that all related to the September 2012 offenses and was based on the supposed failure of the State to "allege all 'essential elements' of the charged conduct", which was factually inaccurate. (A136-138). However, in correspondence with the court regarding the motion to dismiss, defense counsel referenced the "newly indicted charges" and contended that "no investigation ha[d] been undertaken since [their] client was, in fact, not charged." (A144).

Furthermore, in reply to the State's response, defense counsel argued that the defense had not been placed on notice of the September 12, 2012 robbery, stating" "[i]t is clear that the statement's [sic] of the co-conspirator's [sic] originally supplied defense told of an attempted robbery, however, the State chose not to indict Stallings on those charges. Approximately 14 months later a reindictment not citing a location or victim, appears. It is only in the State's response that defense is clearly told what and where the attempted robbery occurred." (A145).

In light of the aforementioned, defense counsel was clearly referring to the April 2012 robbery charges but confused them with the September 12, 2012 attempted robbery charges. Accordingly, the Superior Court's conclusion that defense counsel made a strategic and reasonable decision to pursue a motion to

sever over a motion to dismiss is plainly refuted.

E. The court erroneously failed to consider cumulative prejudice.

As Mr. Stallings explained to the court, the aforementioned claims of ineffectiveness demonstrate that defense counsel rendered ineffective assistance of counsel throughout the proceedings, and but for defense counsels' errors, which resulted in Mr. Stallings receiving uninformed advice, Mr. Stallings would not have pleaded guilty and would have proceeded to trial.[40] (A318-320). The court failed to assess the cumulative impact of defense counsels' deficient performance on Mr. Stallings' decision to plead guilty,[41] instead considering the prejudice of each error as a stand-alone claim.

As a result of defense counsels' ineffectiveness, Mr. Stallings was denied the informed advice to which he was constitutionally entitled and which he needed

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[40] *See, e.g., Rolan*, 445 F.3d at 683 (finding that the defendant suffered prejudice as a result of counsel's unreasonable failure to investigate a potential witness, as the witness's testimony would have bolstered a self-defense claim and undermined the prosecution's theory of the case); *Moore v. Sec'y Pa. Dep't of Corr.*, 457 F. App'x. 170, 182 (3d. Cir. 2012) (finding defendant was prejudiced by counsel's failure to investigate a potential witness, as counsel could have used the information to impeach or undermine the testimony of two of the State's witnesses and refute the testimony of another State witness alleging the defendant had participated in the crime); *MacDonald*, 778 A.2d at 1075.

[41] This Court has held that the cumulative impact of errors or deficiencies can render a plea unknowing or involuntary. (*Patterson*, 684 A.2d at 1239).

to make a knowing and intelligent decision to plead guilty.[42] Because Mr. Stallings was denied his right to the effective assistance of counsel pursuant to the Sixth Amendment of the United States Constitution and Article 1, § 7 of the Delaware Constitution[43] prior to entering the guilty plea, and counsels' ineffectiveness directly impacted Mr. Stallings' basis for accepting the plea, the validity of the guilty plea is undermined and the plea must be withdrawn.[44] As the court misunderstood Mr. Stallings' claim and failed to properly consider his argument, both factually and legally, the court erred in denying Mr. Stallings' claim of ineffective assistance of counsel.

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[42] *MacDonald*, 778 A.2d at 1075 (quoting ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2 (3d ed. 1999)) (holding a defendant has a Sixth Amendment right to "informed advice after 'appropriate investigation'").

[43] *Strickland*, 466 U.S. at 686 ("[T]he right to counsel is the right to the effective assistance of counsel.") (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970)); Del. Const. art. I, § 7; *see also Potter v. State*, 547 A.2d 595, 600 (Del. 1988).

[44] The standard for demonstrating prejudice is not a "stringent" one, as a defendant "need not show that counsel's deficient performance 'more likely than not altered the outcome in the case'-rather, he must show only 'a probability sufficient to undermine confidence in the outcome'". (*Strickland*, 466 U.S. 693-94; *Jacobs*, 395 F.3d at 105 (quoting *Jermyn v. Horn*, 266 F.3d 257, 282 (3d Cir. 2001) (quoting *Baker v. Barbo*, 177 F.3d 149, 154 (3d Cir. 1999))).

ARGUMENT III. THE SUPERIOR COURT ERRED IN FINDING NO VIOLATION OF MR. STALLINGS' SIXTH AMENDMENT RIGHT TO SELF-REPRESENT.

QUESTION PRESENTED

Did the Superior Court err in finding Mr. Stallings' postconviction claim of ineffective assistance of counsel and trial court error to be without merit and procedurally barred? This issue was preserved as it was raised in the Amended Motion and the Reply Brief. (A321-35, 374-86).

SCOPE OF REVIEW

Questions of law are reviewed *de novo*.[45] Claims of a constitutional violation are reviewed *de novo*.[46]

MERITS OF THE ARGUMENT

The Superior Court erred by denying Mr. Stallings' postconviction claim that the trial court violated his Sixth Amendment right to self-represent and that defense counsel was ineffective for failing to protect his constitutional right.

A. The Superior Court erred in finding Mr. Stallings' claim procedurally barred.

The court concluded that Mr. Stallings' claim of trial court error is procedurally barred under Rule 61(i)(3). (Denial at 8, 20). However, as a result of

[45] *Dawson*, 673 A.2d at 1190.
[46] *Hall*, 788 A.2d at 123.

the underlying court error, Mr. Stallings was denied the effective assistance of counsel on direct appeal, which prevented him from raising this claim in an earlier proceeding. (A321).

Prior to direct appeal, Mr. Stallings requested substitute counsel and when that request was denied, he requested to proceed *pro se*, citing the deterioration of the attorney-client relationship which had left him without the aid of counsel. (A183). Mr. Stallings also wrote to one of his defense counsel and specifically requested that he remove himself from the case. (A203, 206). All of Mr. Stallings' requests were ignored.

Accordingly, defense counsel was unconstitutionally forced on Mr. Stallings for the duration of his proceedings, including direct appeal. Unsurprisingly, this impeded Mr. Stallings' ability to argue the Sixth Amendment violation on direct appeal. The underlying court error caused the alleged procedural default. Thus, Mr. Stallings has demonstrated cause for relief from the procedural default and prejudice from violation of his right, and his claim of court error is not procedurally barred. Because the Superior Court concluded there was no court error, the court found Rule 61(i)(3)'s bar applicable. (Denial at 20). For the below-mentioned reasons, the court erred in finding no court error.

B. The Superior Court erred in finding Mr. Stallings withdrew his request to self-represent.

Although the court correctly notes that "a trial court's failure to hold a hearing on a defendant's plain request to proceed *pro se* constitutes legal error, and trial counsel's failure to take steps in response to a clear and unequivocal invocation could well constitute ineffective assistance of counsel", the court erroneously finds that Mr. Stallings only made one request to proceed *pro se* and later withdrew it. (Denial at 20). The court's conclusion is refuted by the record.

Mr. Stallings initially requested substitute counsel and once that motion was denied without review, he filed a request to proceed *pro se*. (A183, 189). The September 2, 2014 request to proceed *pro se* specifically requested a hearing[47] (DE66; A189). This request was denied without review on September 12, 2014. (A191-92).

Once the court denied Mr. Stallings' request to self-represent, Mr. Stallings turned to defense counsel in an attempt to exercise his constitutional right.[48]

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[47] The courts have held that held that once a defendant clearly and unequivocally asserts his right to proceed *pro se*, the trial court must proceed with a hearing to determine if the defendant knowingly, voluntarily, and intelligently waived his right to counsel. (*Faretta,* 422 U.S. at 807; *Smith v. State*, 996 A.2d 786, 790 (Del. 2010) (citing *Watson v. State*, 564 A.2d 1107, 1109 (Del. 1989)).

[48] It is also well settled that a defendant has the constitutional right to proceed without counsel at all critical stages when he voluntarily, knowingly and

(A203, 206). As the Superior Court even acknowledges, Mr. Stallings at least twice requested that defense counsel withdraw from his case. (Denial at 22). Yet the court concludes that Mr. Stallings' request to proceed *pro se* was not clear and was withdrawn, because subsequent *pro se* filings also referenced his desire for substitute counsel.[49] (Denial at 23-25). However the court's own time-line establishes that Mr. Stallings' references to substitute counsel only occurred *after* the trial court denied his clear and unambiguous request to proceed *pro se*. (Denial at 21; A191-200, 208-12).

The court critically fails to consider that Mr. Stallings' request to proceed *pro se* was expressly denied by the trial court and without minimal consideration, let alone a *Faretta* hearing.[50] (A191-92). Because Mr. Stallings "clearly and unequivocally" asserted his right to proceed *pro se*, the trial court was required to

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intelligently elects to do so." (*Faretta*, 422 U. S. at 835; *Edwards*, 451 U.S. at 482; *Stigars v. State*, 674 A.2d 477, 479 (Del. 1996) (citing *Hooks v. State*, 416 A.2d 189, 197 (Del. 1980); *Snowden v. State*, 672 A.2d 1017 (Del. 1996)) ("The right to represent oneself in a criminal proceeding is fundamental. It is protected by the Sixth Amendment to the United States Constitution and by Article I, § 7 of the Delaware Constitution.").

[49] *C.f. Buhl v. Cooksey*, 233 F.3d 783, 795 (3d Cir. 2000) (noting that a defendant need not continually reassert his right to proceed *pro se* once the right has been invoked).

[50] The trial judge must "make a thorough inquiry and . . . take all steps necessary to insure the fullest protection of this constitutional right." (*United States v. Salemo*, 61 F.3d 214, 219 (3d Cir. 1995) (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 722 (1948))).

proceed with a hearing to determine if he had knowingly, voluntarily, and intelligently waived his right to counsel.[51] Even if Mr. Stallings later appeared to vacillate on his decision, he certainly did not do so during the ten days that elapsed between the filing of his request to self-represent and the trial court's denial. (Denial at 23; A189-92; DE66-67). Moreover, though the court's factual conclusions are belied by the record, assuming accurate, the trial court appeared to unduly defer ruling on Mr. Stallings' firm request to represent himself in the hope that he would change his mind. [52]

The Superior Court also denied Mr. Stallings' claim that the trial court imposed hybrid representation on him by forcing him to proceed *pro se* on the motion to withdraw guilty plea. (Denial at 24). The court concluded that Mr. Stallings was not *required* to proceed *pro se* on the motion to withdraw guilty plea but was simply *permitted* to do so. This is unsupported by the record.

After filing a perfunctory motion to withdraw guilty plea, defense counsel made clear that they would take no further action for Mr. Stallings on this matter. (A171-74, 201-03, 206-07). Defense counsel even failed to order a transcript of

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[51] *Faretta*, 422 U.S. at 807; *Smith*, 996 A.2d at 790 (citing *Watson*, 564 A.2d at 1109).

[52] *Brown v. Wainwright*, 665 F.2d 607, 612 (5th Cir. 1982) ("[A] trial court may not unduly defer on a firm request by defendant to represent himself in the hopes the defendant may change his mind.").

the plea colloquy. During sentencing, defense counsel informed the court that Mr. Stallings wished to speak in support of his motion to withdraw guilty plea, but as he "was proceeding *pro se* on the motion to withdraw", was unsure of the procedure. (A218).

The record clearly shows that defense counsel refused to assist Mr. Stallings in his effort to withdraw the guilty plea and because the court refused to grant Mr. Stallings "conflict-free counsel" as first requested, Mr. Stallings was forced to proceed *pro se* on the motion. The trial court did not bestow upon Mr. Stallings the gift of self-representation; rather, the actions of the court and defense counsel compelled Mr. Stallings to waive his right to counsel on a specific issue without confirming he was competent to do so or that the decision was voluntary, intelligent and knowing.

In both respects, the trial court violated Mr. Stallings' constitutional right to self-represent, as did defense counsel by neglecting to protect Mr. Stallings' Sixth Amendment right to waive counsel. The Third Circuit Court of Appeals has held that "[t]o invoke his Sixth Amendment right under *Faretta* a defendant does not need to recite some talismanic formula hoping to open the eyes and ears of the court to his request. Insofar as the desire to proceed *pro se* is concerned, petitioner must do no more than state his request, either orally or in writing,

unambiguously to the court so that no reasonable person can say that the request was not made."[53] That is precisely what Mr. Stallings did.

Accordingly, the Superior Court's finding that Mr. Stallings' request was unclear and equivocal is unsupported by the record and case law. Therefore, the trial court violated Mr. Stallings' right to self-represent pursuant to the Sixth Amendment of the United States Constitution and Article 1, § 7 of the Delaware Constitution.[54] Likewise, defense counsel violated Mr. Stallings' right to the effective assistance of counsel pursuant to the Sixth Amendment of the United States Constitution and Article 1, § 7 of the Delaware Constitution by failing to protect Mr. Stallings' constitutional right to self-represent despite having knowledge of Mr. Stallings' requests to proceed *pro se*.[55]

Because Mr. Stallings was unconstitutionally forced to proceed with defense counsel at three critical stages of the criminal proceedings—the motion to

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[53] *United States v. Peppers*, 302 F.3d 120, 133 (3d Cir. 2002) (citing *Dorman v. Wainwright*, 798 F.2d 1358, 1366 (11th Cir. 1986)).

[54] Article 1, § 7 of the Delaware Constitution states in relevant part that "[i]n all criminal prosecutions, the accused have a right to be heard by himself or herself and his or her counsel." *See also Hooks*, 416 A.2d at 197.

[55] *See* ABA Standards for Criminal Justice: The Defense Function, Standard 4-3.6, Prompt Action to Protect the Accused (3d ed. 1993) ("Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights").

withdraw guilty plea, sentencing and direct appeal—he was prejudiced by this structural error[56], and in the event this Court does not grant Mr. Stallings' request for withdrawal of the guilty plea, the case should be remanded for a new hearing on the motion to withdraw guilty plea, a new sentencing hearing and a new direct appeal so that Mr. Stallings may proceed *pro se*.[57]

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[56] *McKaskle v. Wiggins*, 465 U.S. 168, 177, n.8 (1984); *see also Williams v. State*, 56 A.3d 1053 (Del. 2012).

[57] A violation of the *Faretta* requirements must result in a reversal of the conviction and a remand for new proceedings. (*Faretta*, 422 U.S. at 807; *United States v. Griswold*, 525 F. App'x 111, 113 (3d Cir. 2013); *United States v. Booker,* 684 F.3d 421 (3d Cir. 2012); *United States v. Stubbs,* 281 F.3d 109 (3d Cir. 2002); *Peppers*, 302 F.3d at 137.

ARGUMENT IV. THE SUPERIOR COURT ERRED IN CONCLUDING THAT DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE CLAIMS OF TRIAL COURT ERROR ON DIRECT APPEAL.

QUESTION PRESENTED

Did the Superior Court err in finding Mr. Stallings' postconviction claim of ineffective assistance of counsel on direct appeal non-meritorious? This issue was preserved as it was raised in the Amended Motion and the Reply Brief. (A336-40, 355-56, 375, 384-86).

SCOPE OF REVIEW

Questions of law are reviewed *de novo*.[58] Claims of a constitutional violation are reviewed *de novo*.[59]

MERITS OF THE ARGUMENT

The Superior Court erred by denying Mr. Stallings' postconviction claim that defense counsel was ineffective for failing to raise the aforementioned claims of trial court error on direct appeal. The court concluded that because the underlying claims were without merit, defense counsel was not ineffective for failing to present them on direct appeal. (Denial at 14, 25).

However, for the reasons outlined above,[60] there was a serious procedural

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[58] *Dawson*, 673 A.2d at 1190.
[59] *Hall*, 788 A.2d at 123.
[60] *See supra* Claim I at 10-18; Claim III at 36-43.

defect in the plea process, and the trial court therefore erred in the accepting of Mr. Stallings' guilty plea. Additionally, the trial court erred in failing to hold a *Faretta* hearing on Mr. Stallings' clear and unequivocal request to self-represent. As the underlying claims are meritorious, and given the Superior Court's contention that the claims are now procedurally barred for failure to raise them on direct appeal, defense counsel was ineffective for filing a Rule 26(c) non-merits brief on appeal when there were nonfrivolous appellate issues to be raised.[61]

[61] *See Neal v. State*, 80 A.3d 935, 946 (Del. 2013) (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (noting "it is only necessary for [a defendant] to show that a reasonably competent attorney would have found one nonfrivolous issue warranting a merits brief").

CONCLUSION

WHEREFORE, based on the foregoing, Mr. Stallings respectfully requests that this Court grant the withdrawal of his guilty plea and remand for trial.

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