EFiled: Dec 22 2020 02:43PM EST
Filing ID 66205747
Case Number 214,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERRY REED, Defendant Below- Appellant, v. STATE OF DELAWARE, Plaintiff Below- Appellee.	)))))))))))	No. 214, 2020 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE ID No. 1809015387

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

OPENING BRIEF

COLLINS & ASSOCIATES

Patrick J. Collins, ID No. 4692
8 East 13th Street
Wilmington, DE 19801
(302) 655-4600

Attorney for Appellant

Dated: December 22, 2020

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NATURE OF THE PROCEEDINGS

Arrest, indictment, and pretrial matters

This case pertains to the homicide of Isaac Hatton on September 25, 2018. Two days after the incident, police arrested Appellant Jerry Reed on charges of Murder First Degree and Possession of a Firearm During Commission of a Felony (PFDCF).[1] In a separate arrest warrant also approved on September 27, 2018, police charged Mr. Reed with Possession of a Firearm by a Person Prohibited (PFBPP).[2]

On November 5, 2018, a grand jury indicted Mr. Reed and his codefendant, Traevon Dixon.[3] The indictment charged:

I. Murder First Degree (with Dixon)
II. Conspiracy First Degree (with Dixon)
III. PFBPP (as to Dixon)
IV. PFBPP (as to Mr. Reed)
V. PFDCF (with Dixon)[4]

Throughout the proceedings, Mr. Reed was represented by Ronald Phillips, Esquire, and Julianne Murray, Esquire (trial counsel). The case proceeded on track towards trial. On May 29, 2019, the trial judge granted a motion to sever the defendants for separate trials.[5] In the same order, the Court granted a motion to

[1] A13.
[2] A18.
[3] A60-62.
[4] *Id.*
[5] A5; D.I. 41.

sever the PFBPP charge.[6] The judge scheduled a jury trial to begin on January 13, 2020.[7]

On September 25, 2019, Dixon pled guilty to Murder Second Degree and PFDCF.[8] The plea included an agreement by Dixon to testify against Mr. Reed at trial.[9] At Mr. Reed's final case review on January 6, 2020, Mr. Reed rejected a plea to Murder Second Degree and PFDCF, with a *nolo contendere* resolution to the PFDCF charge.[10] There was no agreement as to sentencing recommendation. The plea would have also resolved the severed PFBPP count.[11] The judge engaged in a detailed colloquy with Mr. Reed to confirm his decision to reject the plea offer.[12]

Plea agreement and efforts to withdraw the plea

On January 13, 2020, Mr. Reed entered a plea rather than go to trial. He pled guilty to the lesser offense of Manslaughter and pled *nolo contendere* to the PDFCF charge.[13] As part of the plea, the State entered a *nolle prosequi* on the severed PFBPP case.[14]

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[6] *Id.*
[7] *Id.*
[8] *State v. Dixon*, ID No. 1809015332, D.I. 81.
[9] A128.
[10] A64-65.
[11] A69.
[12] A65-73.
[13] A88-89.
[14] A88; ID No. 1809014725, D.I. 63.

The judge conducted a thorough colloquy with Mr. Reed. Mr. Reed stated he was satisfied with his counsels' representation.[15] He affirmatively waived his trial and appeal rights.[16] Based on Mr. Reed's answers, the judge found that Mr. Reed entered his pleas knowingly, voluntarily, and intelligently.[17] The plea called for open sentencing; the judge ordered a presentence investigation.[18]

The Memorandum Opinion and Order on appeal states that Mr. Reed wrote to the judge eight days after the entry of the plea, seeking to withdraw it.[19] The judge forwarded the letter to defense counsel.[20] The record contains a letter from Mr. Reed to the Court dated January 21, 2020, but not docketed until February 18, 2020.[21] In the letter, Mr. Reed requested to withdraw his plea. Moreover, prior to sentencing, Mr. Reed filed a form letter to his counsel asking him to file a motion to withdraw the plea.[22] Mr. Reed filed another Motion to Withdraw from Plea Agreement and handwrote the date as February ___, 2020.[23] The motion was not docketed until March 2, 2020, however – two days after sentencing.

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[15] A80.
[16] A81-82.
[17] A84.
[18] *Id.*
[19] *State v. Reed*, 2020 WL 3002963 at *1 (Del. Super. June 4, 2020).
[20] *Id.*
[21] A100. Given the date of the letter, this is likely the document referred to in the Memorandum Opinion and Order. The judge's letter to counsel was not docketed, nor is it in the possession of defense counsel.
[22] A90.
[23] A156-159.

Sentencing and post-sentencing filings

The Court sentenced Mr. Reed on February 28, 2020. The Court imposed an aggregate of 20 years of unsuspended Level V time, followed by Level IV and Level III.[24]

Mr. Reed filed three *pro se* motions. He filed the aforementioned Motion to Withdraw from Plea Agreement, which was drafted in February but not docketed until March 2, 2020.[25] On March 31, 2020, Mr. Reed filed a Motion for Postconviction Relief.[26] On April 13, 2020, Mr. Reed filed a Motion for Sentence Modification.[27]

The Court did not appoint counsel for Mr. Reed's Motion for Postconviction Relief, finding that as no request was made by Mr. Reed, he had waived the right to request counsel.[28] The Court did expand the record by ordering an affidavit from trial counsel.[29] Counsel filed a joint affidavit on May 14, 2020.[30]

On June 4, 2020, the judge issued a Memorandum Opinion and Order as to all three filings, denying them all.[31]

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[24] A148-151.
[25] A156-159.
[26] A160-164.
[27] A165-168.
[28] *State v. Reed*, 2020 WL 3002963 at *3 (Del. Super. June 4, 2020).
[29] *Id.*
[30] A169-172.
[31] *State v. Reed*, 2020 WL 3002963 (Del. Super. June 4, 2020); Exhibit A.

Mr. Reed filed a timely *pro se* Notice of Appeal.[32] The undersigned attorney was appointed to represent Mr. Reed. This is Mr. Reed's Opening Brief.

[32] A9; D.I. 97.

SUMMARY OF ARGUMENT

I. MR. REED'S DUE PROCESS RIGHT TO AUTONOMOUS DETERMINATION OF HIS PLEA WAS VIOLATED WHEN HIS ATTORNEYS REFUSED TO FILE A MOTION TO WITHDRAW THE GUILTY PLEA AND THE JUDGE REFUSED TO CONSIDER HIS TIMELY *PRO SE* MOTION.

After pleading guilty to Manslaughter and *nolo contendere* to PFDCF, Mr. Reed asked his lawyers multiple times before sentencing to move to withdraw his pleas. Trial counsel refused. Mr. Reed also filed a timely motion in letter form to the trial judge asking to withdraw his pleas. The judge refused to consider it because it was not filed by counsel. As such, Mr. Reed was deprived of his autonomous right to determine his plea decision. Moreover, Mr. Reed did not have counsel for a plea withdrawal motion, which this Court, federal courts, and other State courts have held is a critical stage of a criminal proceeding. Due to these errors, Mr. Reed suffered a violation of his due process rights.

Delaware courts have inconsistently handled how motions for plea withdrawal are handled, doubtless due to a tension between Rules 32(d) and 47. Any inconsistency between these rules and their attendant jurisprudence must be resolved in favor of a defendant's right to counsel at all critical stages of his criminal case, which includes a plea withdrawal proceeding.

Because Mr. Reed did not have counsel for his timely-filed plea withdrawal motion, the Superior Court should be reversed.

II. THE SUPERIOR COURT ERRED IN DENYING MR. REED'S MOTION FOR POSTCONVICTION RELIEF BECAUSE MR. REED WAS DEPRIVED OF COUNSEL FOR HIS MOTION TO WITHDRAW HIS GUILTY PLEA.

Because Mr. Reed was not appointed counsel for his plea withdrawal motion, he suffered a complete deprivation of the assistance of counsel at a critical stage in his criminal proceeding. As such, his Motion for Postconviction Relief should have been analyzed under the *Cronic* standard and prejudice should have been presumed. The Court committed legal error in denying the motion after a *Strickland* analysis. The record was inadequately developed for a *Strickland* analysis anyway, primarily because Mr. Reed did not have postconviction counsel.

The Superior Court misapprehended a crucial fact in its Opinion and Order denying postconviction relief. The Court mistakenly determined that Mr. Reed had told his lawyers before sentencing that he no longer wished to withdraw his plea and wanted to proceed to sentencing. This never happened; Mr. Reed assiduously pursued a motion to withdraw his plea prior to sentencing, as confirmed by his attorneys. There is no basis in the record for the Court's factual finding.

Because the Court erred in denying Mr. Reed's Motion for Postconviction Relief, Mr. Reed seeks reversal of that decision.

STATEMENT OF FACTS

Investigation leading to arrests of Mr. Reed and Dixon

On the night of September 26, 2018, Delaware State Police were dispatched to a boat ramp area near Portsville Road in Laurel due to reports of a deceased male on the shoreline.[33] Police identified the decedent as Isaac Hatton, who was found with two bullet wounds.[34] Hatton had been reported missing by his grandmother the previous day.[35] Police also found shell casings and live bullets at the scene.[36] All bullets and casings recovered were 9mm caliber.[37]

Police soon learned that Hatton was at the Little Creek Deli in Laurel the night of September 25, 2018.[38] Police retrieved security camera footage from the deli. Hatton was involved with an argument there with "several individuals."[39] The arrest warrant states that "Hatton was having issues with…Traevon Dixon," the codefendant in this case.[40] At the preliminary hearing, the chief investigating officer explained that Dixon had provided information to the police regarding

[33] A27.
[34] *Id.*
[35] A28.
[36] A27.
[37] A39.
[38] A14.
[39] *Id.*
[40] *Id.*

Hatton, resulting in Hatton's incarceration.[41] Hatton stated he planned to put "certain things on social media kind of exposing Mr. Dixon."[42]

After the verbal confrontation at the Little Creek Deli, most of the people got in cars and went to Wexford Village Apartments nearby.[43] The deli footage shows Mr. Reed getting in a car alone, and Mr. Dixon getting in a different car with two other people.[44] After a "commotion" at the apartment complex, everyone got in cars again and headed to the boat ramp off Portsville Road.[45]

After this point, with no further security camera videos, the narrative relies on witnesses and informants. The investigation revealed that a total of seven people went to the boat ramp, including Dixon, Hatton, and Mr. Reed.[46] Witnesses identified both Dixon and Mr. Reed as being armed with handguns.[47]

Traevon Dixon gave a post-*Miranda* statement to police. Dixon confessed to shooting Hatton several times. Dixon stated that Mr. Reed then shot at Hatton as well.[48] As mentioned, Hatton and Dixon were engaged in an argument about Dixon's perceived cooperation that incarcerated Hatton.[49] But the police also

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[41] A32-33.
[42] A33.
[43] A29.
[44] *Id.*
[45] *Id.*
[46] A30.
[47] A31.
[48] A32.
[49] A33.

learned that Hatton owed money to Mr. Reed, which was "a possible motive for – Mr. Reed."[50]

Mr. Reed gave a statement to police as well. He agreed that he was at the deli and the apartment complex but denied being at the boat ramp – a statement directly contradicted by several witnesses.[51] He claimed to have left on his own then returned to assist in the search for Hatton.[52]

Attorney arguments at sentencing

Because neither defendant had a trial, and the Court would not hear Mr. Reed's motion to withdraw his guilty plea, and because Mr. Reed was not appointed counsel for his postconviction motion, the facts of record are sparse after the preliminary hearing. At sentencing, however, the State and defense laid out contrasting descriptions of the evidence that would have been presented at Mr. Reed's trial.

Two weeks before sentencing, defense counsel sent a letter to the Court asking permission to present exhibits at sentencing.[53] Specifically, counsel wanted to present a defense-prepared video, ballistics, autopsy findings, and excerpts of witness statements including, "most importantly," statements of Traevon Dixon.[54]

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[50] A33.
[51] *Id.*
[52] A33.
[53] A90a.
[54] *Id.*

In a handwritten note on the letter, the Court agreed to listen to whatever the defense wanted to present, but asked that counsel be "judicious with all our time."[55] The prosecutor sought an office conference to discuss the sentencing, and the Court scheduled it for February 17, 2020.[56]

At the conference, the prosecutor expressed concern that the sentencing was going to turn into a "mini-trial."[57] Defense counsel discussed the "several versions of events" given by Dixon, the most recent of which can be disputed by a video culled from the security camera footage.[58] Defense counsel did not want to surprise the Court if the sentencing hearing went longer than is typical.[59]

The prosecutor responded that if the defense was going to play Dixon's statements, then the State would play statements from four witnesses identifying Mr. Reed as the shooter.[60] The discussion ended with the parties agreeing to await the presentence report to determine how much more information needed to be presented at sentencing.[61]

At the sentencing hearing on February 28, 2020, both defense attorneys addressed the Court. Ms. Murray explained that Mr. Reed's plea being much later

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[55] *Id.*
[56] A90b.
[57] A92.
[58] A93.
[59] A94-95.
[60] A95.
[61] A96-97.

than Dixon's was a result of the evidence in the two cases being "very different" rather than a non-acceptance of responsibility.[62]

Ms. Murray went on to say that counsel believed there was reasonable doubt that Mr. Reed was the shooter of Hatton.[63] She said that it was difficult to get Mr. Reed to understand that although not the shooter, he could be found guilty "under conspiracy liability" for encouraging a fistfight that led to a killing.[64]

Mr. Phillips spoke next, telling the judge that he had "agonized over the plea versus trial decision, but in this case, my legal mind and my experience trumps my emotions."[65] Mr. Phillips went on to say that the video he was going to show verifies Mr. Reed's account of what happened at the Little Creek Deli and that much or most of what Dixon said is inaccurate.[66] He went on to say that this video shows that Dixon and two other individuals were "gearing up for something." They are shown changing clothes and getting guns, "and Jerry wasn't a part of it. He wasn't even in the parking lot when all of that occurred."[67]

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[62] A106.
[63] A106-107.
[64] A107.
[65] A109.
[66] A110.
[67] *Id.*

Mr. Phillips went on to say that despite Mr. Reed's "consistent denials" that he was the shooter, if convicted "he would be sentenced as if he did possess a firearm, either actually or constructively."[68]

Mr. Phillips stated that Mr. Reed knows he did play a part by setting up a fight, and that he knew that Quandre Winder had threatened Hatton with a gun, so "guns were in play."[69] According to Mr. Phillips, Mr. Reed "admits that he got everybody to go to the boat ramp so Winder and Hatton could fight it out."[70] Mr. Reed struggled with the "reasonable foreseeability aspect" and that is why he "agonized so much over taking this plea."[71]

Mr. Phillips next described codefendant Dixon's statements as a "convenient spin" designed to implicate Mr. Reed. When confronted with new facts, Dixon changed his story to minimize his involvement and "mak[e] Jerry the bad guy."[72] Mr. Phillips said that according to the video, Winder and Hatton were in a dispute at the deli, then Dixon sent a person named Jerry Hopkins to get a gun. Then Dixon and Winder changed to dark clothing.[73] The point, according to Mr. Phillips,

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[68] A110-111.
[69] A111.
[70] *Id.*
[71] *Id.*
[72] A112.
[73] A113.

is that Mr. Reed was not present when any of that occurred.[74] Mr. Reed's role was encouraging Winder and Hatton to go to the boat ramp to "fight it out."[75]

According to defense counsel, it is known that Dixon shot at Hatton at least four times. The next morning, while others were getting rid of the gun, Dixon went to the police to implicate Mr. Reed.[76]

Mr. Reed spoke, first apologizing to the family of his friend Isaac, whom he described as "like a little brother."[77] He regretted instigating the fight between Isaac and Quandre and said he did not know there was going to be guns involved.[78] Mr. Reed again denied having a gun or shooting Isaac Hatton.[79] He wanted to go to trial to "prove my innocence because I know I didn't shoot Isaac."[80] He explained, "it was only supposed to be a one-on-one fight, not a shooting or a killing."[81]

Nevertheless, Mr. Reed pled guilty because, "my lawyers had to explain to me and convince me that if I went to trial that I could be found guilty just because I was there and encouraging [sic] the fight to go on."[82]

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[74] *Id.*
[75] A114.
[76] *Id.*
[77] A117.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] A118.
[82] A117-118

The prosecutor presented a different view of the case. She stated that Dixon shot Hatton at the direction of Mr. Reed and in fear of him because both Dixon and Hatton owed Mr. Reed money.[83] Dixon's gun jammed, and Mr. Reed stepped in and also shot Hatton.[84] The prosecutor went on to describe Mr. Reed's persistence in directing Hatton to fight Quandre Winder at a secluded location with no cameras.[85] The prosecutor noted Mr. Reed's vague statements about what happened at the boat ramp and the gaps in his narrative.[86]

The prosecutor pointed out that three other witnesses besides Dixon identified Mr. Reed as the shooter[87] when Dixon "didn't finish what he started."[88] The prosecutor explained there were no ballistics to support "anything other than one gun because we believe that Jerry Reed had a revolver, which is consistent with some of the witness statements."[89]

At the conclusion of the prosecutor's comments, the judge stated, "you made a strong case here today," opining that the facts presented "sound[] a lot like murder one or murder two."[90] The judge noted that the defense wanted him to

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[83] A129.
[84] *Id.*
[85] A130-131.
[86] A131.
[87] A133.
[88] A132.
[89] A137.
[90] A136.

"observe the sanctity of the plea" to manslaughter.[91] The prosecutor responded that there was never an agreement as to a recommended sentence and that the range is 7 to 50 years.[92]

Mr. Phillips rose to protest what he considered to be a Murder First Degree argument at a Manslaughter sentencing.[93] After stating, "this was a difficult plea to accept and get through,"[94] Mr. Phillips expressed an opinion that the State's arguments for essentially a murder sentence were "a bit disingenuous."

The judge stated he was a proponent of trials because they provide more information, and in this case the Court was not sure if it will ever be known who did what.[95] Nevertheless, the judge held, "I believe that the evidence would have been beyond a reasonable doubt, Mr. Reed, that you were the shooter in this case."[96] The judge further explained that if Mr. Reed had pled guilty to Murder Second Degree as Dixon did, Mr. Reed would have "gotten more time."[97] But out of respect for the plea, the Court imposed the same sentence upon Mr. Reed as he

[91] A136.
[92] *Id.*
[93] A138.
[94] A139.
[95] A141.
[96] *Id.*
[97] A143.

did upon Mr. Dixon.[98] As such, the Court imposed 20 years of unsuspended prison time.[99]

Mr. Reed's unsuccessful effort to withdraw his plea

On January 21, 2020, well before sentencing, Mr. Reed wrote to the Court requesting to withdraw his plea, although the document was not docketed until February 18, 2020.[100]

In the letter, Mr. Reed states his primary reason for seeking to withdraw his plea is his innocence of the crimes charged.[101] He writes that his attorneys advised him to take the plea because he was going to "lose either way" because he was going up against a justice system that is "set up to go against Black people and minorities" and that he "was going to get found guilty of something."[102] Mr. Reed goes on to complain that witnesses got deals to go against him rather than being charged with crimes themselves.[103]

After complaining about the evidence presented at the preliminary hearing, Mr. Reed states that his attorney had him take the plea because by instigating a

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[98] *Id.*
[99] A144.
[100] A100-103.
[101] A100.
[102] *Id.*
[103] *Id.*

fistfight he recklessly caused the death of the victim. He reiterates several times that he did not have a gun, nor did he shoot anyone.[104]

Mr. Reed goes on to say that he has told his attorney multiple times to move to withdraw the plea, but Mr. Phillips told him that the only way to do so is to "inform Your Honor of all the evidence in my favor and everything going on in my case," so that is why he is sending the letter to the Court.[105] After some repetitive comments, Mr. Reed asks the judge to allow him to present facts proving his innocence "so I am able to withdrawl [sic] from the plea agreement that my attorney honestly should of [sic] never encouraged me to sign and take."[106] Mr. Reed further explains that he now knows new information that he did not know before he took the plea.[107]

Sequentially, the next item of record is a one page form letter dated February 6, 2020, from Mr. Reed to Mr. Phillips asking him to file a motion to withdraw from the plea agreement.[108]

At the February 17, 2020 pre-sentencing office conference requested by the parties, the topic of the plea withdrawal briefly arose:

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[104] A101.
[105] A102.
[106] A103.
[107] *Id.*
[108] A90.

> THE COURT: Alright. Another topic and I'm not sure we need to talk much about this, but we did get a copy of a letter from your client, Mr. Phillips, where he was talking about withdrawing his plea. I've pretty much ignored it thinking that if you feel there is grounds for that we will deal with it.
>
> MR. PHILLIPS: Well, he wants to, but there is no legal ground. We thought there may be. We went and investigated. It just turned out from a legal perspective there's no legal justification to withdraw the plea.
>
> THE COURT: Okay.[109]

On May 27, 2020, the Court was trying to recall this conversation and held a teleconference.[110] After telling counsel that he could not consider the March 2, 2020 *pro se* motion to withdraw the guilty plea except in the context of a motion for postconviction relief,[111] the discussion turned to Mr. Reed's January 21, 2020 letter:

> THE COURT: Now let me just – I want to confirm my recollection of this, either Mr. Phillips or Ms. Murray, you can tell me there was a letter your client filed after he entered his guilty plea on –which was on January 13th, and that letter was on January 21st in which he asked to withdraw his plea. My recollection is we discussed that, and he withdrew that, and we went forward with sentencing. Is my recollection correct on that?
>
> MR. PHILLIPS: I don't recall that specifically. I know when he filed it, and one of the grounds that he identified, he informed us that there might be some other information out there, which I thought if it panned out might be a legal basis to withdraw the guilty plea. As it turned out, that information did not pan out the way we thought it

[109] A97-98.
[110] A175.
[111] *Id.*

> would. So, therefore, we did not have a legal basis to file a motion to withdraw the guilty plea because there was not new evidence that would make the initial plea unknowing, unintelligent, or involuntary.
>
> THE COURT: Right. But, Mr. Phillips, my recollection is that we either – prior to or at the time that I sentenced him, we dealt with this issue and determined there is no basis to withdraw.
>
> MR. PHILLIPS: I put that on the record, yes.
>
> THE COURT: Right. Yeah. Okay. That's what I really want to confirm because it affects how I look at the rest of the case.[112]

Ms. Murray then suggested obtaining a transcript, and said, "so it actually came up in an office conference, and I think it also came up again at sentencing."[113] Then the prosecutor added, "I was just going to say for the record that I do remember Your Honor and defense counsel discussing it at the sentencing. So that was my recollection as well."[114]

It was not discussed at sentencing. The sole discussion on the record of Mr. Reed's effort to withdraw his guilty plea was the brief question and answer on February 17, 2020.[115]

This all leads to the Court's Memorandum Opinion and Order, in which the Court held:

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[112] A175-176.
[113] A177.
[114] A178.
[115] A97-98.

> Eight days after entering his pleas, Reed wrote to me asking to withdraw them. I am not permitted to consider motions from represented defendants. I sent a copy of Reed's letter in which he sought to withdraw his pleas to counsel. **On several occasions, I was advised by defense counsel that Reed did not want to withdraw his plea and wanted to proceed to sentencing. One of the occasions where withdrawal of the pleas was discussed was at Reed's sentencing, and, of course, in his presence.**[116]

The Court went on to hold that "this [plea withdrawal] issue was raised and ultimately withdrawn by defendant prior to his sentencing. He has knowingly waived the claim."[117] Later in the Opinion, the Court held, "the issues raised by Reed concerning withdrawal of his pleas are not new. He raised, then withdrew them, prior to sentencing."[118]

There is no basis in the record for these holdings. In fact, the opposite is true: Mr. Reed assiduously attempted to get counsel to file a motion and he also wrote directly to the judge seeking to withdraw his plea prior to sentencing.

Trial counsels' affidavit in response to Mr. Reed's postconviction motion further explains the reasoning for not filing the motion to withdraw the plea:

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[116] *State v. Reed*, 2020 WL 3002963 at *1 (Del. Super. June 4, 2020)(Emphasis added).
[117] *Id.* at *3.
[118] *Id.*

> Defendant asked counsel to withdraw his guilty plea multiple times, in person and in writing. The execution of the plea was knowing, intelligent, and voluntary. Therefore, counsel believe that the only legal basis for the withdrawal of the plea was based on new evidence, specifically the potential that Jermaiz Hopkins had changed the statement he gave police. Counsel followed up on that information to determine if it had merit. When counsel determined there was no merit, counsel declied [sic] to file the motion because there was no legal basis.[119]

Mr. Reed's Motion for Postconviction Relief

On March 31, 2020, Mr. Reed filed a *pro se* Motion for Postconviction Relief.[120] He alleged his counsel were ineffective for failing to file a motion to withdraw the plea on his behalf.[121] He also alleged that that his plea was coerced by defense counsel, who told him he was going to get found guilty either way because the system is "against Blacks and minorities."[122] He made several other claims which are not relevant to this appeal.

As noted, trial counsel submitted a joint affidavit as requested by the Court.[123] Counsel confirmed that Mr. Reed "asked counsel to withdraw his guilty plea multiple times, in person and in writing."[124] Trial counsel believed that the "only potential legal basis for a withdrawal of the plea was based on new

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[119] A169.
[120] A160-164. Mr. Reed also filed a Motion for Sentence Modification on April 13, 2020. A165-167. The Court's denial of that motion is not a subject of this appeal.
[121] A163.
[122] *Id.*
[123] A169-171.
[124] A169.

evidence," specifically mentioning the statement of a witness.[125] Once that did not pan out, counsel would not file the motion "because there was no legal basis."[126]

Counsel denied they coerced Mr. Reed to take a plea, and described the advice given to Mr. Reed.[127] Counsel did not directly address Mr. Reed's allegation that they told him he would "lose trial either way," due to bias against Blacks and minorities. They did, however, aver that they advised him about the "probable makeup of the jury pool."[128] Counsel went on to explain that they advised Mr. Reed to take the plea, but that the decision was his to make.[129]

On June 4, 2020, the Court issued a Memorandum Opinion and Order denying all Mr. Reed's motions.[130]

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[125] *Id.*
[126] *Id.*
[127] A169.
[128] *Id.*
[129] A170.
[130] *State v. Reed*, 2020 WL 3002963 (Del. Super. June 4, 2020); Exhibit A.

ARGUMENT

I. MR. REED'S DUE PROCESS RIGHT TO AUTONOMOUS DETERMINATION OF HIS PLEA WAS VIOLATED WHEN HIS ATTORNEYS REFUSED TO FILE A MOTION TO WITHDRAW THE GUILTY PLEA AND THE JUDGE REFUSED TO CONSIDER HIS TIMELY *PRO SE* MOTION.

A. Question Presented

Whether Mr. Reed's fundamental due process rights were affected when his attorneys refused to file a pre-sentencing motion to withdraw a guilty plea at his request, and whether the Superior Court erred in refusing to consider Mr. Reed's *pro se* Motion to Withdraw Guilty Plea. This issue was preserved during a pre-sentencing office conference where defense counsel confirmed they were not going to file Mr. Reed's *pro se* motion[131] that was forwarded to them by the Court.[132] Counsel also confirmed that they refused to file the motion at a subsequent office teleconference on May 27, 2020.[133] Finally, in an affidavit, trial counsel confirmed that Mr. Reed had asked them multiple times in writing and in person to withdraw his guilty plea, but they would not do so as there was no legal basis.[134] As such,

[131] A100-103.
[132] A97. As noted, the forwarding letter from the Court to counsel was not docketed nor is it in the possession of defense counsel.
[133] A176.
[134] A169.

although not advocated for by his attorneys, Mr. Reed's many efforts to withdraw his plea were preserved for the record.[135]

B. Standard and Scope of Review

This claim presents a constitutional question, which is reviewed *de novo*.[136] As this Court explained in *Taylor v. State*, the defendant's right to control his plea decision, even when represented by counsel, is a structural claim under the Sixth Amendment to the United States Constitution.[137] As such, although his attorneys failed to raise this claim below, this is a structural error not subject to harmless error review.[138]

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[135] *See, Holland v. State*, 158 A.3d 452, 465-468 (Del. 2017)(rejecting State's plain error argument and finding the claim of vindictive prosecution was preserved by the defendant's own written and oral arguments without the assistance of counsel); *Taylor v. State*, 213 A.2d 560, 567 (Del. 2019)(considering an appeal of a *pro se* application to withdraw GBMI plea where counsel would not file it and the Court would not consider it).

[136] *Cooke v. State*, 977 A.2d 803, 840 (Del. 2009).

[137] 213 A.3d 560, 567 (Del. 2019).

[138] *McCoy v. Louisiana*, 138 S.Ct. 1500, 1510-11 (2018)("violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural;' when present, such error is not subject to harmless error review.").

C. Merits of Argument

Applicable legal precepts

Autonomy in the plea decision is a fundamental right of the defendant that endures, with conditions, until sentencing

A criminal defendant has the Sixth Amendment fundamental right to self-determine the most basic decisions about his case. One of those fundamental decisions is the right to plead guilty or not guilty.[139] In *Cooke v. State*, this Court found that trial counsel's decision to override the defendant's unilateral decision to plead not guilty and instead pursue a GBMI verdict "deprived Cooke of his constitutional right to make fundamental decisions regarding his case."[140] As this Court explained, "Cooke's fundamental right to enter a plea of not guilty was effectively negated by the conflicting objective of his defense attorneys to have the jury find him guilty but mentally ill."[141]

Under similar circumstances, the United States Supreme Court affirmed these principles recently in *McCoy v. Louisiana*.[142] In a capital case, the judge permitted McCoy's lawyers to tell the jury he was guilty of triple murder in an

[139] *Cooke* at 841-842.
[140] *Id.* at 842.
[141] *Id.* at 843.
[142] 138 S.Ct. 1500 (2018).

effort to spare him execution. McCoy testified and presented an alibi defense that was "difficult to fathom."[143] The jury returned a death sentence.

The *McCoy* Court reaffirmed the principles present in *Cooke*: although the defense lawyer manages the trial, decides what arguments to pursue, and what objections to raise, some other decisions are reserved for the client. That short but important list includes the right to plead guilty or not guilty.[144] Counsel cannot undermine the defendant's right to make these fundamental decisions by ignoring the defendant's choice.[145]

Superior Court rules provide a mechanism for changing a plea to not guilty

Superior Court Rule 32(d) provides:

> If a motion for withdrawal of a plea of guilty or nolo contendere is made before imposition or suspension of sentence or disposition without entry of a judgment of conviction, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason.[146]

The rule is in harmony with this Court's jurisprudence that a criminal conviction becomes final at the time of sentencing.[147] Motions to withdraw guilty

[143] *McCoy* at 1507.
[144] *Id.* at 1508.
[145] *Cooke* at 842.
[146] Super. Ct. Crim. R. 32(d)
[147] *Jackson v. State,* 654 A.2d 829, 831-832 (Del. 1995).

pleas are directed to the discretion of the trial court.[148] The judge is guided by five factors first articulated in *State v. Friend*,[149] and affirmed by this Court:[150]

> (a) Was there a procedural defect in taking the plea;
>
> (b) Did the defendant knowingly and voluntarily consent to the plea agreement;
>
> (c) Does the defendant presently have a basis to assert legal innocence;
>
> (d) Did the defendant have adequate legal counsel throughout the proceedings; and
>
> (e) Does granting the motion prejudice the State or unduly inconvenience the Court.[151]

This Court has further articulated, "these factors are not factors to be balanced; indeed, some of the factors of themselves may justify relief."[152]

Motions to withdraw guilty pleas are handled inconsistently in Delaware

In Delaware, a defendant's *pro se* filing when he or she is represented by counsel is, generally, a nullity.[153] In the plea withdrawal context, that sometimes (but not always) means that if the attorney does not file the defendant's motion, it does not need to be considered at all. In *Windsor v. State*, this Court affirmed the

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[148] *Brown v. State*, 250 A.2d 503, 504 (Del. 1969).
[149] 1994 WL 234120 at *1-2 (Del. Super. May 12, 1994).
[150] *Friend v. State*, 1996 WL 526005 (Del. Aug. 16, 1996).
[151] *State v. Friend*, 1994 WL 234120 at *2 (Del. Super. May 12, 1994).
[152] *Scarborough v. State*, 938 A.2d 644, 649 (Del. 2007).
[153] *Chavous v. State*, 953 A.2d 282, 286 (Del. 2008); Super. Ct. Crim. R. 47.

Superior Court's refusal to consider a last-minute application to withdraw a plea because counsel did not file it on his behalf. Windsor claimed that he was made promises regarding sentencing that went unfulfilled.[154] This Court noted that when counsel refused to file his motion, Windsor did not apply under Rule 47 to participate with counsel in portions of his defense.[155]

More recently, this Court issued a decision articulating the same legal principle. After pleading guilty to assault and weapons charges, John Trotter filed a *pro se* motion to withdraw his plea. He had many complaints about his counsel and claimed he was coerced into the plea.[156] He also argued the Superior Court erred in refusing to provide new counsel for him, based on the many problems he had with his attorney.[157]

This Court held that the Superior Court did not err in denying the *pro se* motion, nor in refusing to appoint new counsel for Trotter.[158] Moreover, this Court held that Trotter was bound by his representations during the plea colloquy and on the plea paperwork.[159]

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[154] *Windsor v. State,* 2014 WL 4264915 at *3 (Del. Aug, 28, 2014).
[155] *Id.*; Super. Ct. Crim. R. 47.
[156] *Trotter v. State,* 2018 WL 6167322 at *1 (Del. Nov. 21, 2018).
[157] *Id.* at *2.
[158] *Id.* at *3.
[159] *Id., citing Somerville v. State,* 703 A.2d 629, 632 (Del. 1997).

On the other hand, defendants who move to withdraw their guilty plea in Superior Court are routinely appointed new counsel for that purpose, especially when claims of coercion or ineffective assistance pertain. In *State v. Pringle*, the Superior Court judge explained,

> As a general rule when this Court receives a motion to withdraw a guilty plea, it is shared with counsel in advance and sometimes new counsel is appointed. Usually that happens, however, where the defendant complains that he or she did not receive effective assistance of counsel.[160]

The common procedure in the Superior Court is to allow counsel to file the motion to withdraw the guilty plea and to withdraw as counsel, so new counsel can be appointed to litigate the motion. In *Lane v. State*, when the defendant moved to withdraw his guilty plea at a sentencing hearing, "rather than proceeding with the scheduled sentencing, the Superior Court appointed conflict counsel to assist Lane in pursuing his motion to withdraw his guilty pleas."[161]

Leo Maddox took a plea to weapons charges, then sought to withdraw it and be appointed a new lawyer because he claimed his attorney was ineffective and that his plea was involuntary. This Court noted, "the Superior Court denied the motion after a hearing *where Maddox was represented by new counsel*."[162]

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[160] 2011 WL 6000834 at *4 (Del. Super. Nov. 17, 2011).
[161] *Lane v. State*, 2006 WL 3703683 at *2 (Del. Dec. 18, 2006).
[162] *Maddox v. State*, 2012 WL 385600 at *1 (Del. Feb. 6, 2012)(Emphasis added).

The same procedure occurred in *State v. Barksdale*, where the defendant was dissatisfied with counsel's representation and sought to withdraw his plea:

> Mr. Barksdale's first discontent with his guilty plea was exhibited on May 15, 2015, when he filed a *pro se* motion and letter seeking to withdraw it. Those filings were referred to Mr. Collins. Mr. Collins, after consultation with Mr. Barksdale (and at Mr. Barksdale and of certain of his family members' insistence), filed the pending Motion to Withdraw Guilty Plea on Mr. Barksdale's behalf on May 28, 2015. Mr. Collins also filed a motion to withdraw as counsel; that was granted and Michael C. Heyden, Esquire, was appointed to represent Mr. Barksdale. After giving both parties an opportunity to supplement their filings on the motion to withdraw, the Court heard argument on August 24, 2015.[163]

In *Scarborough v. State*, the defendant stated he wanted to withdraw his guilty plea because he claimed that his lawyer told him that the State would be requesting probation, not habitual sentencing. There were conditions attached to the nonhabitual outcome, such as cooperation with law enforcement.[164] The trial court appointed new defense counsel to litigate the motion to withdraw Scarborough's plea.[165]

In *State v. Bonaparte*,[166] the defendant pled to a lesser-included offense of Rape Third Degree. Before sentencing, his court-appointed attorney indicated to the judge that Bonaparte had issues with him and wanted to withdraw his plea:

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[163] *State v. Barksdale*, 2015 WL 5676895 at *3 (Del. Super. Sept. 14, 2015);
[164] *Scarborough v. State*, 938 A.2d 644, 648 (Del. 2007).
[165] *Id.*
[166] 2012 WL 6945113 (Del. Super. Sept.17, 2012).

> He asked that new counsel be appointed, and one was. After several weeks that counsel asked to withdraw and a new attorney was appointed. After a number of months, uncertainty, and some prodding, a motion to withdraw the guilty plea was finally filed on December 9, 2011. The State responded and plea counsel has submitted an affidavit in response to the motion. Bonaparte's current counsel has replied to both.[167]

In *Jones v. State*, the defendant filed a *pro se* motion to withdraw his plea to assault and rape charges, claiming his attorney had provided ineffective assistance during the plea proceedings.[168] This Court noted, "new counsel was appointed for Jones and an evidentiary hearing was scheduled on the motion. After considering the evidence, the Superior Court denied Jones' motion to withdraw his plea and, thereafter, imposed sentence."[169]

In *White v. State*, the State agreed that it was error for the judge to refuse to appoint counsel for the defendant, who moved *pro se* to withdraw his guilty plea. This Court held:

> The State has filed an answering brief in this appeal in which, with commendable candor, it concedes error with respect to the Superior Court's refusal to appoint counsel at the time White sought to withdraw his guilty plea. **We accept the State's confession of error and agree that the defendant was entitled to the appointment of counsel at the plea withdrawal hearing because it occurred prior to sentencing at a critical stage of the criminal process.**[170]

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[167] *State v. Bonaparte*, 2012 WL 6945113 at *1 (Del. Super. Sept. 17, 2012).
[168] *Jones v. State*, 2009 WL 2142497 (Del. July 20, 2009).
[169] *Id*. at *2.
[170] *White v. State*, 2000 WL 368313 at *1 (Del. Mar. 23, 2000)(Emphasis added).

This Court remanded for a hearing, citing to federal cases in holding that "at least absent unusual circumstances, a hearing on a motion to withdraw a guilty plea is sufficiently important in a federal criminal prosecution that the Sixth Amendment requires the presence of counsel."[171] This Court also cited *United States v. Sanchez-Barreto*,[172] a First Circuit case in which the defendant was not appointed counsel for his plea withdrawal hearing. The *Sanchez-Barreto* Court held, "a plea withdrawal hearing is a 'critical stage' in the criminal proceeding," thereby implicating the Sixth Amendments guarantee of the right to effective counsel.[173]

Despite the many cases in which *pro se* plea withdrawal motions result in new counsel being appointed, and despite this Court's holding in *White v. State*, this Court has also affirmed the Superior Court's refusal to appoint new counsel for a defendant seeking to withdraw a plea. For example, in *Mills v. State*, the defendant wrote to the plea judge asking to withdraw his plea and to give him a new attorney, because he believed his attorney took advantage of his learning disability.[174] The judge refused both requests and proceeded to sentencing. At

[171] *United States v. Crowley*, 529 F.2d 1066, 1069 (3d Cir. 1976)(nevertheless holding in this case that the absence of counsel was harmless beyond a reasonable doubt).
[172] 93 F.3d 17 (1st Cir. 1996).
[173] *Id.* at 20.
[174] *Mills v. State*, 2016 WL 97494 (Del. Jan. 6, 2016).

sentencing, Mills made the same complaints about his plea and his lawyer; the judge rejected them again and imposed sentence.[175]

Most States hold that a defendant should have counsel for a plea withdrawal motion

The United States Supreme Court has held that the Sixth Amendment right to counsel attaches in every critical stage in a criminal prosecution.[176] But the Supreme Court has not specifically decided whether a plea withdrawal motion is a critical stage. As noted, *White v. State* holds that in Delaware, a plea withdrawal hearing is a critical stage and counsel must be appointed. Most other State courts also agree that a presentence plea withdrawal motion is a critical stage which requires that the defendant have counsel.[177]

Mr. Reed's due process rights were violated because his motion to withdraw his plea was never presented nor heard by the Court

Mr. Reed maintained his autonomous right over his plea decision until sentencing. The only difference his plea made was that this right was cabined by

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[175] *Id.* at *1.
[176] *Coleman v. Alabama*, 399 U.S. 1, 9 (1967)(holding that a preliminary hearing is a critical stage within the meaning of *Powell v. Alabama*, 287 U.S. 45 (1932).
[177] *See, e.g., Fortson v. State*, 532 S.E. 2d 102, 103-104 (Ga. 2000); *State v. Obley*, 798 N.W. 2d 151 (Neb. Ct. App. 2011); *Humphrey v. State*, 110 So.3d 396 (Ala. Crim. App 2012); *Dorsey v. Commonwealth*, 2018 WL 5732478 (Ky. November 1, 2018); *People v. Caputo*, 82 N.Y.S. 3d 457 (N.Y. App. Div. 2018); *Smith v. State*, 249 So. 3d 1284 (Fla. Dist. Ct. App. 2018); *State v. Taylor*, 33 N.E. 123 (Ohio Ct. App. 2015); *State v. Prado*, 299 Kan. 1251 (Kan. 2014); *State v. Quy Dinh Nguyen*, 179 Wash. App. 271 (Wash. Ct. App. 2013); *People v. Young*, 355 Ill. App.3d 317 (Ill. App. Ct. 2005).

the requirement that a plea may be withdrawn for "any fair and just reason."[178] The fair and just reason standard is illuminated by the five-factor analysis adopted by this Court. Trial counsel improperly denied Mr. Reed's due process rights by refusing to file the motion.

Both of Mr. Reed's attorneys seem to have been unaware of the five factors that must be considered – or that just one factor may justify withdrawal of the plea. The record amply reflects that defense counsel thought the plea could only be withdrawn upon a showing of actual innocence. Obviously, this is not so. Our jurisprudence clearly states five factors require consideration.

Although the plea procedure was free from defect and the consent to the plea was knowing, intelligent, and voluntary, two factors clearly justified filing the motion. The first is that Mr. Reed alleged that he did not have adequate counsel throughout the proceedings. He alleged his counsel told him he was going to lose either way because of prejudice in the justice system and he would get found guilty of something. He alleged that his lawyers told him he would be found guilty because he instigated a fistfight. Mr. Reed alleged that his attorneys coerced him into the plea.

Whether true or not, these allegations should have immediately caused counsel to file Mr. Reed's motion and seek to withdraw as counsel so that other

[178] Super Ct. Crim. R. 32(d).

counsel could be appointed, as has been done so many times in Superior Court and approved by this Court. As *White* makes clear, a plea withdrawal motion is a critical stage for which the defendant is entitled to conflict-free counsel. Trial counsel can hardly be expected to advocate against their own representation of the client while maintaining loyalty to the client. That is why the Superior Court routinely appoints new counsel in plea withdrawal scenarios.

Mr. Reed also had a basis to assert legal innocence. One need only review the sentencing transcript to confirm. Ms. Murray told the Court that she still believed there was reasonable doubt of Mr. Reed's guilt.[179] Mr. Phillips told the Court that he had "agonized over the plea vs. trial decision…"[180] Then, in an unusual sentencing hearing, counsel described all the weaknesses of the State's case, the unreliability of the witnesses, and the culpability of uncharged actors. Whether Mr. Reed's assertions of innocence would have resonated with a jury is of no significance. According to his own attorneys, his assertions had merit, providing a fair and just reason to withdraw his plea.

Because of his attorneys' apparent misapprehension of relevant law, Mr. Reed's motion was never filed nor heard. His Sixth Amendment right to due process in the autonomy of his plea decision was violated.

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[179] A106-107.
[180] A107.

The Superior Court erred in refusing to consider or appoint counsel for Mr. Reed's timely-filed request to withdraw his plea. The Court's first error was a misapprehension of fact. The Court found, "on several occasions, I was advised by defense counsel that Reed did not want to withdraw his plea and wanted to proceed to sentencing."[181] As discussed previously, the record reflects that none of that occurred. The judge also found that plea withdrawal was discussed at Mr. Reed's sentencing.[182] That did not happen either. As such, the Court's holding as to Mr. Reed's plea withdrawal efforts – "he raised, then withdrew, them prior to sentencing"[183] – was error requiring reversal.

Upon receiving Mr. Reed's timely request to withdraw the plea, the judge properly forwarded it to defense counsel. However, upon learning prior to sentencing that counsel was refusing to file, the Court should have appointed counsel for Mr. Reed, just as Superior Court judges did in the cases previously discussed: *Pringle, Lane, Maddox, Barksdale, Scarborough, Bonaparte,* and *Jones.* The judge should have followed this Court's guidance in *White*: a defendant must have counsel for a plea withdrawal hearing "because it occurred prior to sentencing at a critical stage of the criminal process."[184] Because the judge failed to appoint

[181] *State v. Reed*, 2020 WL 3002963 at *1 (Del. Super. June 4, 2020).
[182] *Id.*
[183] *Id.* at *3.
[184] *White v. State*, 2000 WL 368313 at *1 (Del. Mar. 23, 2000).

counsel when it became clear before sentencing that trial counsel was not going to file, Mr. Reed's due process rights were violated.

The Court decided it could not hear a motion from a represented defendant,[185] relying on Superior Court Criminal Rule 47 and this Court's recent decision in *Jones v. State*.[186] In *Jones*, this Court held that a *pro se* motion for a sentence reduction was a legal nullity because it was filed within the 30-day appeal period, when Jones was still represented by counsel.[187] As such, a later sentence modification filed by counsel was the first actual motion and should not have been denied as repetitive.

Certainly, there is tension between Rules 47 and 32(d) and tension between this Court's holdings in *White* and *Jones*. The anomaly is easily resolved. Motions to withdraw a plea prior to sentencing are recognized in Delaware, in the federal courts, and in the State courts as a critical stage in the criminal process for which the defendant must have counsel. Motions for sentence reduction have no constitutional dimension. Motions based on a Sixth Amendment right of autonomy in the plea decision do have constitutional standing. As such, the trial judge erred in applying *Jones* rather than applying *White* and a legion of other jurisprudence. Counsel should have been appointed and the motion should have been heard.

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[185] *State v. Reed*, 2020 WL 3002963 at *1 (Del. Super. June 4, 2020).
[186] 2020 WL 2280509 (Del. May 7, 2020).
[187] *Id.* at *3.

Any conflict between Rule 47 and Rule 32(d) must be resolved in favor of a defendant's constitutional rights. If not, a defendant has no means of asserting that he or she wishes to withdraw a plea. As this Court observed in *Taylor v. State,* "Taylor was caught between his counsel who would not withdraw his plea, and a court rule that allowed the court to ignore *pro se* filings when the accused has counsel."[188] So too here.

Because neither defense counsel nor the Court gave Mr. Reed the opportunity to present his motion to withdraw guilty plea, Mr. Reed's convictions and sentence should be vacated and this case should be remanded for a hearing on the motion. Because plea withdrawal motions are a critical stage in the criminal process, Mr. Reed should be appointed counsel for his motion.

[188] 213 A.3d 560, 563 (Del. 2019).

II. THE SUPERIOR COURT ERRED IN DENYING MR. REED'S MOTION FOR POSTCONVICTION RELIEF BECAUSE MR. REED WAS DEPRIVED OF COUNSEL FOR HIS MOTION TO WITHDRAW HIS GUILTY PLEA.

A. Question Presented

Whether the Superior Court erred in denying Mr. Reed's Motion for Postconviction Relief when Mr. Reed's counsel refused to file his motion to withdraw his guilty pleas. This issue was preserved when Mr. Reed filed a *pro se* Motion for Postconviction Relief on March 23, 2020.[189]

B. Standard and Scope of Review

This Court reviews a Superior Court's denial of postconviction relief for abuse of discretion. A *de novo* standard of review is applied to legal and constitutional questions.[190]

C. Merits of Argument

Applicable legal precepts

Generally, ineffective assistance of counsel claims are assessed using the two-prong standard articulated in *Strickland v. Washington*.[191] The petitioner must prove that counsel's performance fell below an objective standard of reasonableness.[192] And the petitioner must also demonstrate that but for counsel's

[189] A160-164.
[190] *Ploof v. State*, 75 A.3d 840, 851 (Del. 2013).
[191] 466 U.S. 668 (1984).
[192] *Id.* at 688.

deficient performance, there is a reasonable probability that the result of the proceeding would have been different.[193]

In certain situations, however, the *Strickland* standard does not apply. When there has been a denial of counsel in a critical stage of the trial process, or when the case is not subject to a meaningful adversarial process, prejudice is presumed.[194] The assistance of counsel is a basic constitutional right that is not subject to harmless error review.[195] For example, in *Cooke v. State*, this Court held that Cooke did not have the assistance of counsel for his chosen objective of obtaining a not guilty verdict. This conduct was held to be "inherently prejudicial" and did not require a separate showing of prejudice."[196]

Mr. Reed was denied counsel for his pre-sentencing motion to withdraw his guilty plea

On many occasions, both orally and in writing, Mr. Reed asked his counsel to file his pre-sentencing motion to withdraw his guilty pleas.[197] Trial counsel refused to do so. Because a plea withdrawal is a critical stage of the criminal process,[198] Mr. Reed was entitled to the assistance of competent counsel. He did

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[193] *Id.* at 694.
[194] *U.S. v. Cronic*, 466 U.S. 648, 659 (1984).
[195] *Cooke v. State*, 977 A.2d 803, 850 (Del. 2009).
[196] *Id.*
[197] A169.
[198] *White v. State*, 2000 WL 368313 at *1 (Del. Mar. 23, 2000)(defendant was entitled to the appointment of counsel at the plea withdrawal hearing because it occurred prior to sentencing at a critical stage of the criminal process).

not have counsel. Therefore, prejudice is presumed, and Mr. Reed is entitled to postconviction relief.

As in *Cooke*, trial counsel's ineffectiveness did not arise out of a lack of good faith. Rather, trial counsel repeatedly misunderstood Rule 32(d) and all the jurisprudence establishing the five factors that inform the phrase "any fair and just reason."[199] Counsel believed that they could only file the motion if they could produce evidence of actual innocence.[200] Moreover, counsel failed to appreciate that a plea withdrawal is a critical stage of the criminal process in which a defendant is entitled to counsel. Finally, counsel does not appear to have understood that Mr. Reed maintained autonomy over his plea decision until the time of sentencing.

Even if trial counsel believed Mr. Reed's motion lacked merit, they should have filed it anyway and moved to withdraw so newly-appointed counsel could litigate the motion. This is especially true because Mr. Reed alleged in his *pro se* motion that he did not have adequate counsel and made specific allegations against his attorneys. Failure to do so caused prejudice to Mr. Reed: the motion for which he was constitutionally entitled to have the assistance of counsel was never filed nor heard.

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[199] Super. Ct. Crim. R. 32(d).
[200] A169, A97-98, A176.

The Superior Court committed legal error by failing to appoint counsel for Mr. Reed's timely filed motion to withdraw his guilty plea

As noted previously, the judge misapprehended crucial facts related to Mr. Reed's pre-sentencing motion. The Court erroneously found that defense counsel had informed the Court that Mr. Reed did not want to withdraw his plea and wanted to proceed to sentencing.[201] The judge also mistakenly recalled that the plea withdrawal issue was discussed at the sentencing hearing.[202] It was not.

Whether or not due to these factual misapprehensions, the trial judge erred as a matter of law by failing to appoint counsel for Mr. Reed's timely-filed motion. This error occurred prior to sentencing when trial counsel made clear they were not filing the motion.[203]

When the case reached the postconviction stage, the Court again erred as a matter of law by applying *Strickland* rather than *Cronic*.[204] By failing to appoint counsel for Mr. Reed at the time of his plea withdrawal motion, the Court deprived Mr. Reed of his constitutionally-guaranteed right to counsel at a critical stage of the criminal process. As such, any analysis of trial counsel's performance under *Strickland* is not germane.

The Court's analysis of the plea withdrawal application ignored the fact that

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[201] *State v. Reed*, 2020 WL 3002963 at *1 (Del. Super. June 4, 2020).
[202] *Id.*
[203] A97-98.
[204] *State v. Reed*, 2020 WL 3002963 at *4 (Del. Super. June 4, 2020).

the "any fair and just reason" rule encompasses more factors than whether the plea hearing went appropriately. But that was the only factor the Court used in its analysis.[205] This may be because the Court mistakenly believed Mr. Reed's claim was waived. Or perhaps it was because there was a scant record developed on Mr. Reed's postconviction motion due to Mr. Reed not having counsel. Regardless, the Court's opinion that Mr. Reed was guilty[206] and that counsel represented him effectively are insufficient to decide whether Mr. Reed had a legitimate basis to withdraw his pleas.

Mr. Reed was entitled to the appointment of counsel to litigate his plea withdrawal motion to develop a factual record. For example, Mr. Reed alleged his plea felt coerced because the system is "set up to go against Black people and minorities."[207] Trial counsels' affidavit avers that counsel advised Mr. Reed about "the probable makeup of the jury pool."[208] But the Court found it "incredible that counsel would so starkly express the view described by defendant."[209] Because Mr. Reed did not have counsel for his plea withdrawal motion, such factual questions were never resolved.

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[205] *Id.* at *3-4.
[206] *State v. Reed*, 2020 WL 3002963 at *3 (Del. Super. June 4, 2020); *See also*, A141 ("I believe that the evidence would have been beyond a reasonable doubt, Mr. Reed, that you were the shooter in this case.").
[207] A100.
[208] A169.
[209] *State v. Reed*, 2020 WL 3002963 at *4 (Del. Super. June 4, 2020).

Because Mr. Reed was deprived of the counsel for his plea withdrawal motion, the Court erred in analyzing his postconviction motion through the lens of *Strickland* and should have presumed prejudice instead. Undoubtedly this legal error was due in part to the Court's factual misapprehension that Mr. Reed had told his lawyers he did not want to withdraw his plea and wanted to proceed to sentencing. Due to these compound errors, the decision of the Superior Court should be reversed.

CONCLUSION

For the foregoing reasons, Appellant Jerry Reed respectfully requests that this Court reverse the judgment of the Superior Court.

COLLINS & ASSOCIATES

/s/ Patrick J. Collins
Patrick J. Collins, ID No. 4692
8 East 13th Street
Wilmington, DE 19801
(302) 655-4600

Attorney for Appellant

Dated: December 22, 2020