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Case Number 214,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERRY REED,	§	
	§	No. 214, 2020
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

On November 5, 2018, a Superior Court grand jury indicted Jerry Reed and his co-defendant, Traevon Dixon, on charges of murder in the first degree, conspiracy in the first degree, possession of a deadly weapon by a person prohibited, and possession of a firearm during the commission of a felony ("PFDCF").[1] Reed later filed a motion to sever his charges from Dixon's, which the Superior Court granted.[2]

On the morning of trial, January 13, 2020, Reed pled guilty to manslaughter, a lesser-included offense, and no contest to PFDCF.[3] As part of the plea deal, the State agreed to *nolle pros* the remaining charges.[4] After a colloquy with Reed, the Superior Court accepted his pleas as knowing, intelligent, and voluntary.[5] The court deferred sentencing for a pre-sentence investigation.[6]

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[1] D.I. 5; A60–62. "D.I. __" refers to item numbers on the Superior Court Criminal Docket in S*tate v. Reed*, ID No. 1809015387, included in the Appendix to Opening Brief at A1–11.

[2] D.I. 20, 41.

[3] D.I. 76; A88.

[4] D.I. 76; A88.

[5] A80–84.

[6] D.I. 76.

Eight days later, Reed wrote a letter to the Superior Court requesting to withdraw his pleas.[7] The court forwarded the letter to Reed's counsel, declining to consider a *pro se* motion from a represented defendant.[8] Reed separately wrote his counsel to request they file a motion to withdraw the pleas.[9] At a pre-sentencing teleconference, Reed's trial counsel explained that they investigated Reed's request but determined there was no legal basis to file the motion.[10]

On February 28, 2020, the Superior Court sentenced Reed: (i) for manslaughter, to 25 years at Level V incarceration, suspended after 15 years for 3 years of decreasing levels of supervision; and (ii) for PFDCF, to 5 years at Level V.[11] Reed did not appeal.[12]

Instead, over the next month and a half, Reed filed three *pro se* motions in the Superior Court: (i) a March 2 motion to withdraw his pleas under Superior Court Criminal Rule 32(d); (ii) a March 31 motion for postconviction relief under Rule 61; and (iii) an April 13 motion for sentence modification under Rule 35

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[7] D.I. 82; A100–03.

[8] *State v. Reed*, 2020 WL 3002963, at *1 (Del. Super. Ct. June 4, 2020) (citing Super. Ct. Crim. R. 47).

[9] D.I. 81; A90.

[10] A176; *see also* A169.

[11] D.I. 84; A148–49.

[12] *See* D.I. 84–87.

(collectively, the "Collateral Motions").[13] The court denied all three in a written opinion dated June 4, 2020.[14]

Reed filed a timely notice of appeal from the denial of the Collateral Motions. He filed an opening brief on December 22, 2020. This is the State's answering brief.

[13] D.I. 85–87; A156–68.

[14] *Reed*, 2020 WL 3002963.

SUMMARY OF ARGUMENT

I. The Appellant's argument is denied. Reed claims that he was denied the right to determine his own plea when the Superior Court declined to entertain his *pro se* plea-withdrawal motion and when his counsel did not file such a motion on his behalf. Reed did not fairly present this issue to the Superior Court in his motion for postconviction relief (or the other Collateral Motions from which he appeals). The alleged defect does not constitute plain error because, if Reed had raised the claim below, Rule 61 would have barred the claim as procedurally defaulted.

II. The Appellant's argument is denied. Reed claims that his counsel was ineffective for failing to file the plea-withdrawal motion and that the Superior Court erred by not reviewing his claim under *Cronic*. *Cronic* does not apply because Reed was not entirely deprived of counsel, nor did his counsel completely fail to test the State's case. When addressing claims similar to Reed's, the federal Courts of Appeals instead applied *Strickland*. Under *Strickland*, Reed's counsel did not render ineffective assistance. Even assuming that his counsel performed deficiently by not filing the motion, Reed suffered no actual prejudice as a result. The Superior Court found Reed's allegations about his counsel's advice to be not credible, and Reed did support his claims of innocence with any specific evidence.

Thus, the Superior Court would have had no fair and just reason to grant a plea-withdrawal motion.

STATEMENT OF FACTS

The Crime

Around 8:30 p.m. on September 25, 2018, Reed and Dixon had a verbal altercation with Isaac Hatton at the Little Creek Deli in Laurel.[15] After the argument, Reed, Dixon, and Hatton traveled to Portsville Pond, where Hatton was shot and killed.[16] The Delaware State Police found Hatton's "bullet-riddled body" in the weeds along the pond.[17] The police arrested Reed and Dixon for Hatton's murder.[18]

The Pleas

In late 2019, Dixon pled guilty to murder in the second degree and PFDCF.[19] The Superior Court imposed an aggregate sentence of 35 years in prison, suspended after 20 years for a period of probation.[20]

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[15] *See Reed*, 2020 WL 3002963, at *1; A129.

[16] *Reed*, 2020 WL 3002963, at *1.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

On January 13, 2020, Reed pled guilty to manslaughter and no contest to PFDCF.[21] The Superior Court engaged him in a plea colloquy.[22] Reed understood the charges to which he was pleading and that he would not have a trial.[23] He understood that by entering the pleas, he was relinquishing his rights to a jury trial, to be found guilty beyond a reasonable doubt, to cross-examine the State's witnesses, to present witnesses in his own defense, and to appeal the verdict.[24] Reed reviewed his case with his counsel, they answered all of his questions, and he was satisfied with their representation.[25] He testified that no one forced him to enter the pleas.[26] The court accepted his pleas as knowing, intelligent, and voluntary and deferred sentencing until February 28.[27]

Second Thoughts

Eight days after he entered the pleas, Reed wrote a letter to the Superior Court requesting to withdraw them.[28] Reed explained his reasons for wanting to

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[21] *Id.*

[22] A80–84.

[23] A80.

[24] A81–82.

[25] A80.

[26] A83–84.

[27] A85.

[28] D.I. 82; A100–03.

withdraw the pleas: (i) that he was innocent or there was insufficient evidence of his guilt; (ii) that his counsel advised him to take the plea because the justice system is prejudiced against minorities and "no matter what [Reed] was going to get found guilty of something"; (iii) that he was denied equal protection under the law because the State entered into cooperation agreements with certain witnesses against him rather than prosecute them; (iv) that an officer committed perjury at the preliminary hearing; (v) that his counsel did not file motions to dismiss; and (vi) that he did not agree he could or should be subject to accomplice liability.[29] Reed further mentioned that he told his counsel "multiple times" that he would like to withdraw from the plea agreement.[30] The court forwarded the letter to Reed's trial counsel, declining to consider a *pro se* motion from a represented defendant.[31]

Reed also wrote his counsel directly about the request.[32] On February 10, he sent his counsel a form notice asking them to file a motion to "withdraw from plea agreement."[33]

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[29] A100–02.

[30] A102.

[31] *State v. Reed*, 2020 WL 3002963, at *1 (Del. Super. Ct. June 4, 2020) (citing Super. Ct. Crim. R. 47).

[32] D.I. 81; A90.

[33] A90.

The Superior Court scheduled a pre-sentencing teleconference for February 17 to discuss the scope of the presentation at the hearing.[34] On the call, the court brought up Reed's letter.[35] The court and Reed's counsel had the following exchange:

> THE COURT: All right. 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 . . . 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 that there may be. We went and investigated. It turned out from a legal perspective there's no legal justification to withdraw the plea.
>
> THE COURT: Okay.[36]

A moment later, the call ended.[37]

Reed's case proceeded to sentencing on February 28, 2020.[38] In their presentation, Reed's counsel said they wrestled over whether to accept the State's plea offer, citing alleged weaknesses in the State's case and difficulties explaining concepts of manslaughter and accomplice liability to Reed.[39] But neither Reed's

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[34] A90a–b.

[35] A97.

[36] A97–98.

[37] A98.

[38] A104–47.

[39] A106–11.

counsel nor the court broached the subject of whether Reed still wanted to withdraw his pleas. The prosecutor briefly mentioned Reed's withdrawal request, as evidence of him not accepting responsibility for the killing.[40] The prosecutor's comment generated no further discussion. For his part, Reed made no mention of wanting to withdraw his pleas, nor did he object to moving forward with sentencing.[41] To the contrary, he explained his reasons for pleading guilty: "I wanted to go to trial and try and prove my innocence because I know I didn't shoot [Hatton]. My lawyers had to explain to me that if I want to trial that I could have been found guilty just because I was there and encouraging the fight to go on."[42] He continued: "I took a plea to manslaughter because now I see that me encouraging a fight . . . was reckless and is one reason that Isaac is gone."[43] The court imposed an aggregate sentence of 30 years in prison, suspended after 20 years for 3 years of decreasing levels of supervision.[44]

[40] A135.

[41] A117–20.

[42] A117–18.

[43] A119.

[44] D.I. 84; A148–49.

Reed did not file a direct appeal.[45] Instead, over the next month and a half, he filed the three Collateral Motions.[46]

The Collateral Motions

On March 2, three days after his sentencing, Reed filed a *pro se* motion to withdraw his pleas under Superior Court Criminal Rule 32(d).[47] He cited eight grounds for relief: (i) insufficient evidence of his guilt; (ii) ballistics evidence suggested there was only one shooter, and Dixon already admitted to firing shots; (iii) the State deprived him of equal protection under the law by entering into cooperation agreements with certain witnesses rather than prosecute them; (iv) his counsel failed to alert him to a lie in the police reports; (v) the physical evidence proved his innocence; (vi) Dixon gave a prior inconsistent statement to the police about whether Reed ordered him to shoot Hatton; (vii) his counsel should not have told him to accept the plea because Dixon already admitted to shooting Hatton; and (viii) his counsel told him that he should plead guilty rather than fight a system that is biased toward convicting minorities.[48]

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[45] *See* D.I. 84–87.

[46] D.I. 85–87; A156–68.

[47] A157–59.

[48] A157–59.

Then, on March 31, Reed filed a motion for postconviction relief under Criminal Rule 61.[49] He alleged seven grounds for relief: (i) that his counsel was ineffective for not filing a motion to withdraw upon Reed's request; (ii) that his counsel coerced his guilty plea by telling Reed "that if [he] go[es] to trial[, he] was going to lose and get found guilty either way because [he] was going up against a system that's already against blacks and minorit[ies] to lose"; (iii) that the State denied him equal protection under the law by entering cooperation agreements with certain witnesses; (iv) that the trial judge was biased against him at sentencing; (v) that the prosecutor brought up his past crimes during sentencing; (vi) that his counsel failed to present evidence of his innocence, including that Dixon made a prior inconsistent statement; and (vii) that the police lied in their reports.[50]

Finally, on April 13, Reed filed a motion for sentence modification under Criminal Rule 35.[51] In support of his request for a reduced sentence, Reed argued that the prosecutor improperly referenced past crimes for which he was never

[49] A160–64.

[50] A163–64.

[51] A165–68.

convicted, that he accepted responsibility, that the presumptive sentence was lower, and that his attorneys advised he would receive a 7- to 10-year sentence.[52]

The Superior Court directed Reed's counsel to file an affidavit responding to his allegations.[53] On the plea-withdrawal issue, they wrote:

> [Reed] asked counsel to withdraw his guilty plea multiple times, in person and in writing. . . . [C]ounsel believed that the only potential legal basis for a withdrawal of the plea was based on new evidence, specifically the potential that [a witness] had changed the statement he gave to police. Counsel followed up on that information to determine if it had merit. When counsel determined there was no merit[,] Counsel decli[n]ed to file the motion because there was no legal basis.[54]

On June 4, 2020, the Superior Court issued a written opinion denying the Collateral Motions.[55] It denied the plea-withdrawal motion for two reasons. First, Reed filed the motion while he was still represented by counsel, and Criminal Rule 47 generally bars represented defendants from filing *pro se* applications.[56] Second, Rule 32(d) permits defendants to file motions to withdraw only before the court imposes the sentence.[57] Because Reed also filed a motion for postconviction

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[52] A166.

[53] D.I. 88.

[54] A169.

[55] *Reed*, 2020 WL 3002963.

[56] *Id.* at *2.

[57] *Id.*

for relief, the court instead considered his substantive claims as part of that motion.[58]

The Superior Court also denied the motion for postconviction relief, including the ineffective-assistance claim for failing to move to withdraw the plea.[59] The court found that Reed's counsel did not perform deficiently because Reed had rescinded his request to withdraw his plea and his counsel "fully complied with their responsibilities to the Court and the defendant."[60] On several occasions, Reed's counsel informed the court that Reed "did not want to withdraw his plea and wanted to proceed to sentencing."[61] It cited Reed's sentencing hearing as one of those occasions.[62] The court added: "Had [Reed] pressed his request to withdraw his pleas prior to sentencing, I would have almost certainly denied it."[63]

Addressing a related claim, whether Reed's counsel coerced his guilty plea, the Superior Court determined Reed's allegation, that his counsel advised he would lose at trial because the criminal justice system is racist, was not credible.[64] His

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[58] *Id.*

[59] *Id.* at *3.

[60] *Id.*

[61] *Id.* at *1.

[62] *Id.*

[63] *Id.* at *3.

[64] *Id.* at *4.

counsel denied the allegation,[65] and the court "f[ou]nd it incredible that counsel would so starkly express the view described by [Reed]."[66] The court instead held Reed to his declaration during the plea colloquy that he was entering the pleas voluntarily.[67]

[65] A169–70.

[66] *Reed*, 2020 WL 3002963, at *4.

[67] *Id.*

ARGUMENT

I. RULE 8 BARS REED'S CLAIM THAT HE WAS DENIED THE RIGHT TO DETERMINE HIS PLEA.

Question Presented

Whether Reed's claim that he was denied the right to decide his own plea, an issue he raises for the first time on postconviction appeal, constitutes plain error and avoids Rule 8's bar against questions not fairly presented below.

Standard and Scope of Review

Ordinarily, this Court reviews the denial of postconviction relief for an abuse of discretion, and it reviews associated legal and constitutional questions *de novo*.[68] The Court generally declines to consider questions on appeal that were not presented to the court below, however, unless plain error requires their review in the interests of justice.[69] To constitute "plain error," the alleged defect "must be so clearly prejudicial to [the defendant's] substantial rights as to jeopardize the very fairness and integrity of the trial process."[70]

[68] *Cabrera v. State*, 173 A.3d 1012, 1018 (Del. 2017).

[69] Supr. Ct. R. 8; *Hoskins v. State*, 102 A.3d 724, 730 (Del. 2014).

[70] *Hoskins*, 102 A.3d at 730.

Merits of Argument

For the first time on postconviction appeal, Reed makes a freestanding claim that he was denied the fundamental right to determine his own plea.[71] Reed chose to plead guilty on January 13, 2020.[72] About eight days after the Superior Court accepted his pleas, he changed his mind. He filed a *pro se* motion to withdraw, which the court declined to hear under Criminal Rule 47.[73] His counsel then declined to file what they determined to be a legally baseless motion.[74] Reed did not object to these decisions before sentencing, at sentencing, or on direct appeal. Instead, he initiated postconviction proceedings—where he also did not assert a freestanding claim that he was denied the fundamental right to choose his own plea.[75] As a consequence, Reed has failed to perfect his claim.

Under Rule 8, "[o]nly questions fairly presented to the trial court may be presented for review" on appeal. The Court generally declines to consider questions not presented in the proceedings below unless plain error requires their

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[71] *See* Opening Br. 24–39. In the Superior Court, Reed made only the related (but different) claim that his counsel was ineffective for not filing the motion to withdraw the pleas. A163. Reed renews that ineffective-assistance claim on this appeal under Argument II of his opening brief. Opening Br. 40–45.

[72] D.I. 76; A88.

[73] *Reed*, 2020 WL 3002963, at *1; A100–03.

[74] A169.

[75] A160–64.

review in the interests of justice.[76] To constitute "plain error," the alleged defect "must be so clearly prejudicial to [the defendant's] substantial rights as to jeopardize the very fairness and integrity of the trial process."[77] Plain error is limited to basic, serious, fundamental, and material defects apparent on the face of the record, which clearly deprive the accused of a substantial right or clearly show manifest injustice.[78]

Reed did not assert this claim in the postconviction proceedings below, nor does he contend that he did. Under Rule 14(b)(vi)(A)(1), the appellant must reference where he preserved each question in the trial court. Reed cites only his requests, before sentencing, to move to withdraw the pleas and his counsel's subsequent confirmations that he made these requests.[79] But Reed does not appeal from his conviction or sentence—he appeals from the denial of the Collateral Motions.[80] Reaching back to the trial proceedings bypasses the Superior Court's role in deciding postconviction claims in the first instance. Absent plain error, Rule 8 forbids it.

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[76] Supr. Ct. R. 8; *Hoskins*, 102 A.3d at 730.

[77] *Hoskins*, 102 A.3d at 730.

[78] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[79] Opening Br. 24–25.

[80] Notice of Appeal 1, June 29, 2020.

Reed's alleged defect does not constitute plain error because, had Reed fairly presented the claim to the Superior Court below, Rule 61 would have procedurally barred it.[81] Rule 61(i)(3) bars consideration of procedurally defaulted claims—*i.e.*, claims not previously raised in the proceedings leading to the conviction—unless the movant shows cause for relief from his default and prejudice from a violation of his rights. The procedural bars also do not apply: (i) to a claim that the court lacked jurisdiction; (ii) if new evidence exists that strongly suggests the movant is actually innocent in fact; or (iii) to a claim that a new, retroactive rule of constitutional law invalidates the movant's conviction.[82]

The Superior Court declined to entertain Reed's *pro se* motion, and his counsel declined to file what they determined would be a legally frivolous motion, but there is no record of Reed subsequently lodging an objection with the court to either decision as a violation of his fundamental rights. Nor did Reed file a direct appeal with this Court, where he could have alleged that the Superior Court's

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[81] *Brown v. State*, 2018 WL 6181657, at *2 (Del. Nov. 26, 2018) ("There is no plain error in this case because even if Brown had properly briefed the issue in the Rule 61 proceedings, his complaint about the field test used by the arresting officer still would have been procedurally barred."); *see also Clark v. State*, 2015 WL 3938230, at *2 (Del. June 25, 2015) ("Clark did not file a direct appeal from his convictions. Therefore, his belated challenge to the Superior Court's denial of his motion to withdraw his guilty plea is procedurally barred by Superior Court Criminal Rule 61(i)(3) . . . .").

[82] Super. Ct. Crim. R. 61(d)(2), (i)(5).

decisions to not hear his *pro se* motion to counsel or appoint new counsel to litigate his motion were abuses of discretion.[83] As a consequence, his claim, if fairly presented, would have been procedurally defaulted.

In connection with his other postconviction claims below, Reed alleged that he did not raise any procedurally defaulted claims because his counsel failed to file the motion to withdraw the pleas on his behalf.[84] Ineffective assistance of counsel can constitute cause for a procedural default, but a mere allegation is insufficient—the claim must be proven.[85] For the reasons stated in response to Argument II, *infra*, Reed fails to establish that he received ineffective assistance of counsel. Moreover, Reed's claim that he was denied a fundamental right at trial does not assert a lack of jurisdiction, cite a new rule of constitutional law, or rely on any new evidence discovered since his conviction. Thus, his freestanding claim that he was denied the fundamental right to determine his own plea would have been

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[83] *See Trotter v. State*, 2018 WL 6167322, at *3 (Del. Nov. 21, 2018); ("The appointment of new counsel is within the discretion of the Superior Court."); *Pringle v. State*, 2013 WL 1087633, at *4 (Del. Mar. 13, 2013) ("We have held that while defendant has no *right* to have his *pro se* motions entertained by the court when he is represented by counsel; it is within the trial court's discretion to entertain the motion.").

[84] A163.

[85] *State v. Cannon*, 2019 WL 2994233, at *8 (Del. Super. Ct. July 9, 2019).

procedurally barred if presented below, and the alleged defect does not constitute plain error on this postconviction appeal.[86]

Of course, Reed is not without recourse. He could, and did, assert the derivative claim that his counsel was ineffective for not filing the plea-withdrawal motion.[87] Ultimately, Reed is not entitled to relief, not because he failed to properly navigate the procedural waters, but because there is no reasonable probability that the Superior Court would have granted the motion if filed.

[86] *See Brown*, 2018 WL 6181657, at *2.

[87] A163; Opening Br. 40–45.

II. REED SUFFERED NO PREJUDICE FROM HIS COUNSEL'S ALLEGED FAILURE TO FILE A PLEA-WITHDRAWAL MOTION.

Question Presented

Whether Reed's counsel rendered ineffective assistance by failing to file a motion to withdraw his guilty and no-contest pleas.

Standard and Scope of Review

This Court reviews the denial of postconviction relief for an abuse of discretion, and it reviews associated legal and constitutional questions *de novo*.[88]

Merits of Argument

Reed contends that his counsel rendered ineffective assistance by refusing to file a plea-withdrawal motion at his request.[89] The Superior Court denied the claim under *Strickland v. Washington*,[90] a two-part test that requires proof of both counsel's deficient performance and resulting prejudice. Reed contends that, because his counsel filed no motion on his behalf, he "did not have counsel" for the plea-withdrawal stage of his proceedings.[91] He therefore argues that the

[88] *Cabrera*, 173 A.3d at 1018.

[89] Opening Br. 41.

[90] 466 U.S. 668 (1984).

[91] Opening Br. 41–42.

Superior Court should have instead applied *United States v. Cronic*,[92] presumed prejudice, and granted him postconviction relief.[93]

Cronic does not apply to Reed's ineffective-assistance claim. Reed alleges only that his counsel committed a discrete error, so a presumption of prejudice is not warranted. The Superior Court therefore correctly applied *Strickland*. Reed's claim falters under that standard because he has not shown that he suffered actual prejudice from the alleged defect in his counsel's performance. Accordingly, the Superior Court did not abuse its discretion by rejecting the claim.

A. *Cronic* does not apply.

Typically, a defendant must satisfy the two-part *Strickland* test in order to prove a claim of ineffective assistance of counsel.[94] The claimant must prove, first, that his counsel's representation was deficient and, second, that he suffered substantial prejudice as a result of counsel's errors.[95] In *Cronic*, however, the United States Supreme Court identified three situations in which *Strickland* does not apply because prejudice is presumed: (i) where there was a complete denial of counsel at a critical stage of the proceedings; (ii) where counsel entirely failed to

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[92] 466 U.S. 648 (1984).

[93] Opening Br. 41–42.

[94] *Cooke v. State*, 977 A.2d 803, 848 (Del. 2009).

[95] *Strickland*, 466 U.S. at 687–88.

subject the prosecution's case to meaningful adversarial testing; and (iii) where counsel was called upon to render assistance under circumstances where competent counsel very likely could not.[96] The difference between *Strickland* and *Cronic* "is not one of degree but of kind."[97] The distinction "hinges on whether the petitioner alleges a defect in the 'proceeding as a whole' or 'at specific points' of the trial."[98]

Counsel's discrete failure to file a plea-withdrawal motion is not the type of complete breakdown that warrants review under *Cronic*. The federal courts appear to agree.

For example, in *Ward v. Jenkins*,[99] the Seventh Circuit analyzed a nearly identical claim under *Strickland*. The habeas petitioner had alleged "that he instructed [his counsel] to file a motion to withdraw his guilty plea, but that [his counsel] disregarded these instructions."[100] The court stated that "if [his counsel] did indeed refuse to heed a direct request, this conduct was deficient" under the

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[96] *Urquhart v. State*, 203 A.3d 719, 729 (Del. 2019); *Cooke*, 977 A.2d at 848.

[97] *Urquhart*, 203 A.3d at 728–29 (internal quotation marks omitted) (citing *Bell v. Cone*, 535 U.S. 685, 697 (2002)).

[98] *Cooke*, 977 A.2d at 849 (citing *Bell*, 535 U.S. at 697).

[99] 613 F.3d 692, 699–701 (7th Cir. 2010).

[100] *Id.* at 699.

first prong of *Strickland*.[101] The record was wanting on this issue, however.[102] Turning to *Strickland's* second prong, the court held that the petitioner demonstrated a reasonable probability that, but for the alleged errors: (i) he would have insisted on going to trial; and (ii) the Wisconsin state court would have granted his motion to withdraw the plea.[103] The petitioner claimed he would have pursued a particular, potentially viable defense, and Wisconsin courts had "consistently articulated a liberal rule" for allowing plea withdrawals, including for "confusion" or misunderstanding the plea.[104] For these reasons, the Seventh Circuit remanded the case for an evidentiary hearing to determine "what exactly transpired between [the petitioner] and [his counsel]."[105]

In *Fisher v. Florida Attorney General*,[106] the Eleventh Circuit applied *Strickland* to a similar claim. The habeas petitioner alleged that his counsel was ineffective for not moving to withdraw his guilty plea after sentencing because the

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[101] *Id.* (citing *Florida v. Nixon*, 543 U.S. 175, 187 (2004), for the rule that a defendant has ultimate authority over fundamental trial decisions, including whether to plead guilty).

[102] *See id.*

[103] *Id.*

[104] *Id.* at 699–701.

[105] *Id.* at 699, 701.

[106] 2018 WL 4846652, at *1–2 (11th Cir. Mar. 29, 2018).

court based its sentence on unreliable evidence.[107] The court, citing *Strickland*, concluded that the petitioner "cannot show that counsel's performed deficiently in failing to move to withdraw the plea, nor can he show prejudice resulting from counsel's failure to do so."[108]

In *United States v. Waucaush*,[109] the Sixth Circuit explicitly rejected a call to apply *Cronic* to counsel's failure to advocate a motion to withdraw a guilty plea. The appellant alleged that his counsel "refused to assist him in filing his motion or affidavit, . . . refused to argue the motion on his behalf, and . . . spent months trying to persuade him to cooperate with the Government in spite of his professed innocence."[110] After denying the appellant's claim under both prongs of *Strickland*, the Sixth Circuit turned to, and rebuffed, his plea to apply *Cronic* instead:

> [The appellant] also argues that he is entitled to a presumption of prejudice under *United States v. Cronic* because his counsel's refusal to help with the withdrawal of the plea constituted a constructive denial of counsel. Such presumptions are reserved, however, for those situations when flaws in the trial mechanism prevent the prosecution's case from being subject to adversarial testing. The specific

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[107] *Id.*

[108] *Id.* at *2.

[109] 2000 WL 1478361, at *5–6 (6th Cir. Sept. 27, 2000).

[110] *Id.* at *5.

> circumstances surrounding this case do not justify a presumption of ineffectiveness.[111]

Reed's allegations do not justify charting a different path than the Sixth, Seventh, and Eleventh Circuits. He was not entirely denied counsel at a critical stage of the proceedings. A plea-withdrawal hearing is indeed a critical stage,[112] but Reed had counsel who was both present and active. They heard his request, investigated his allegations, and evaluated the merits of the motion.[113] Reed claims that their ultimate decision to not pursue the motion was error, but the absence of a motion does not equate to an absence of counsel. Reed's situation is not comparable, for example, to *Urquhart*, where the defendant's counsel was entirely absent for the four months before trial.[114]

Reed's allegations also do not suggest a complete breakdown in the adversarial process. He does not, for example, charge his counsel with pursuing an entire trial strategy at odds with his desired outcome.[115] Instead, Reed's allegations focus on a narrow period between his conviction and sentence. As the United States Supreme Court indicated in *Bell*, whether the defendant is challenging the

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[111] *Id.* at *6 (internal citations omitted).

[112] *White v. State*, 2000 WL 368313, at *1 (Del. Mar. 23, 2000).

[113] A169.

[114] *See* 203 A.3d at 731–32.

[115] *See Cooke*, 977 A.2d at 849–50.

proceedings as a whole, or only at specific points, is a tell.[116] In order to invoke *Cronic*, counsel's failure to test the State's case "must be complete."[117] Reed's contention that his counsel committed error at only one, specific point in the proceedings tells this Court that *Cronic* is not the correct framework for reviewing his claim.

The relative ease at which courts could consider the issue of prejudice further demonstrates that *Cronic* is not the appropriate standard. *Cronic* focused on three specific situations in which prejudice is so likely that the cost of litigating the issue is unjustified.[118] But as the Seventh Circuit articulated in *Ward*, when counsel has failed to file a plea-withdrawal motion, prejudice boils down to two straightforward questions: but for counsel's error, might the defendant have insisted on going to trial, and might the trial court have granted the withdrawal motion.[119] These circumstances do not justify presuming prejudice under *Cronic*.[120]

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[116] 535 U.S. at 697.

[117] *Id.* at 696–97.

[118] *Urquhart*, 203 A.3d at 729.

[119] 613 F.3d at 699.

[120] *See Waucaush*, 2000 WL 1478361, at *6.

B. Reed fails to satisfy both prongs of *Strickland*.

(1) *Reed did not answer the question of deficient performance.*

Under the first part of the *Strickland* test, Reed must prove that his counsel's representation fellow below an objective standard of reasonableness, as judged by prevailing professional norms.[121] The performance prong places a heavy burden on the claimant.[122] He must overcome "'a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance.'"[123] If an attorney makes a strategic choice after a thorough investigation of the relevant law and facts, the decision is virtually unchallengeable.[124] That said, the relevant question is not whether the attorney's choices were strategic, but whether they were reasonable.[125] The reviewing court evaluates the attorney's performance as a whole.[126]

Reed alleges that he "asked his counsel to file his pre-sentencing motion to withdraw his guilty pleas," but his counsel "refused to do so."[127] If Reed's

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[121] *Bussey v. State*, 2020 WL 708135, at *2 (Del. Feb. 11, 2020) (citing *Strickland*, 466 U.S. at 687–88).

[122] *Green v. State*, 2020 WL 4745392, at *8 (Del. Aug. 17, 2020).

[123] *Id.* (quoting *Strickland*, 466 U.S. at 689).

[124] *Id.*

[125] *Id.* (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000)).

[126] *Id.*

[127] Opening Br. 41.

allegation is true, then his counsel's refusal constitutes deficient performance.[128] The decision whether or not to plead guilty is a fundamental decision that belongs to the defendant.[129] The right encompasses the decision whether to pursue a plea-withdrawal motion.[130] Thus, "a lawyer who disregards specific instructions [to file a plea-withdrawal motion] acts unreasonably."[131]

Reed first indicated that he wanted to withdraw his pleas around January 21, 2020.[132] As late as February 17, 2020, on the pre-sentencing teleconference, Reed's counsel indicated that he still desired to withdraw his pleas, despite counsel's determination that the motion was baseless.[133] But the record is silent on what, if anything, transpired between Reed and his counsel over the next 11 days until sentencing. In their affidavit, Reed's counsel does not indicate whether Reed maintained his desire to withdraw his pleas through sentencing or whether he changed his mind again.[134] The Superior Court was under the impression that

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[128] *Ward*, 613 F.3d at 699.

[129] *Nixon*, 543 U.S. at 187.

[130] *Ward*, 613 F.3d at 699; *Hargrove v. United States*, 2015 WL 306793, at *4 (E.D.N.C. Jan. 20, 2015).

[131] *Ward*, 613 F.3d at 699.

[132] D.I. 82; A100–03.

[133] A97–98.

[134] *See* A169.

Reed rescinded his plea-withdrawal request.[135] Reed did not object to moving forward with sentencing and even explained his reasons for pleading guilty.[136] Although Reed filed another *pro se* plea-withdrawal motion within just days of sentencing, the motion could reflect his dissatisfaction with his sentence as much as a continuing desire to withdraw the pleas.[137]

Reed has not requested a remand or expansion of the record to find evidence in support of his claim. But, in any event, in order to succeed on his ineffective-assistance claim, Reed must satisfy both prongs of *Strickland*. Because his allegations cannot support a finding of actual prejudice, this Court should instead affirm the denial of postconviction relief.

(2) *Reed fails to demonstrate that he suffered actual prejudice from the alleged defects in counsel's performance.*

Under *Strickland's* second prong, Reed "'must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[138] A "reasonable probability" is a

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[135] *Reed*, 2020 WL 3002963, at *1.

[136] A117–19.

[137] *See* A143 ("THE COURT: . . . . [Y]ou are going to get basically the same sentence that Mr. Dixon received. And I know you put your head down, and I know you are upset by that, but I think that's what's justified.").

[138] *Starling v. State*, 130 A.3d 316, 325 (Del. 2015) (quoting *Strickland*, 466 U.S. at 694).

"'probability sufficient to undermine confidence in the outcome.'"[139] There must be a "substantial likelihood" or a "meaningful chance" that the outcome would have been different.[140] The standard is lower than "more likely than not,"[141] but a merely conceivable chance is not sufficient.[142] The claimant must make specific allegations of actual prejudice and substantiate them.[143]

When counsel has failed to file a plea-withdrawal motion at the defendant's request, in order to establish prejudice under *Strickland*, the defendant must show there is a reasonable probability that: (i) but for counsel's errors, he would not have pled guilty and would have insisted on going to trial; and (ii) the trial court would have granted his motion to withdraw the plea.[144] Even assuming that Reed would have insisted on taking his case to trial, there is no reasonable probability that the Superior Court would have granted his motion to withdraw the plea.

Under Criminal Rule 32(d), the Superior Court "may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason." The

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[139] *Id.*

[140] *Baynum v. State*, 211 A.3d 1075, 1084 (Del. 2019).

[141] *Id.*

[142] *Starling*, 130 A.3d at 325.

[143] *Outten v. State*, 720 A.2d 547, 552 (Del. 1998).

[144] *Ward*, 613 F.3d at 699 (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

decision lies within the sound discretion of the court.[145] When evaluating whether there is any fair and just reason for the plea withdrawal, the court considers five factors: (i) whether there was a procedural defect in taking the plea; (ii) whether the defendant knowingly and voluntarily consented to the plea agreement; (iii) whether the defendant has a basis to assert legal innocence; (vi) whether the defendant had adequate legal counsel throughout the proceedings; and (v) whether permitting the plea withdrawal would prejudice the State or unduly inconvenience the court.[146] These factors are not balanced, and some may justify relief on their own.[147]

Reed concedes the first two factors, agreeing that there was no procedural defect and that he knowingly and voluntarily consented to the plea agreement.[148] He contends, however, that the third and fourth factors justify relief.[149]

Reed first claims that he did not have adequate counsel throughout the proceedings because his counsel "told him he was going to lose either way because of prejudice in the justice system" and "coerced him into the plea."[150] The

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[145] *Scarborough v. State*, 938 A.2d 644, 649 (Del. 2007).

[146] *Id.*

[147] *Id.*

[148] Opening Br. 35.

[149] Opening Br. 35.

[150] Opening Br. 35.

Superior Court has already rejected these allegations as not credible.[151] Reed's counsel denied the allegation in their affidavit,[152] and the court found "it incredible that counsel would so starkly express the view described by [Reed]."[153] Moreover, Reed had testified at the plea hearing that no one had forced him to enter the pleas.[154] "[A] defendant's statements to the Superior Court during the guilty plea colloquy are presumed to be truthful."[155] Reed cites no evidence to support his bare postconviction allegations and rebut that presumption. The court reasonably credited the declarations of Reed at the plea hearing and his counsel in their affidavit instead.[156] Thus, regardless of whether Reed's allegation against his counsel warranted the appointment of new counsel at the time, as Reed argues in his opening brief,[157] the allegation ultimately would not have constituted a fair and just reason for withdrawing the plea and is not a source of actual prejudice.

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[151] *Reed*, 2020 WL 3002963, at *4.

[152] A169–70.

[153] *Reed*, 2020 WL 3002963, at *4.

[154] A83–84.

[155] *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

[156] *See Reed*, 2020 WL 3002963, at *4.

[157] Opening Br. 35–36.

Reed next claims he had a basis to assert legal innocence.[158] In support of this allegation, Reed cites only comments at the sentencing hearing.[159] His own counsel doubted the strength of the State's case, and the Superior Court "described all the weaknesses of the State's case, the unreliability of the witnesses, and the culpability of uncharged actors."[160]

Reed's reliance on the comments at the sentencing hearing is misplaced. First of all, his counsel's attestations of reasonable doubt appear more aspirational than a realistic evaluation of the evidence: "As I stand here right now, I still believe there is reasonable doubt, even though I know that there are witnesses that say [Reed] was the shooter."[161] And even though his counsel argued there was doubt over his guilt for the indicted murder charge, they appeared to concede his guilt for the charge to which he pled, manslaughter: "It wasn't until the plea changed to manslaughter that our advice to [Reed] changed. . . . Some legal precepts are pretty sophisticated. . . . I give him credit because once he finally got it, he did the right thing, and he pled."[162] The court's feelings toward Reed's guilt

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[158] Opening Br. 36.

[159] Opening Br. 36.

[160] Opening Br. 36.

[161] A106–07; *see also* A133 ("[THE PROSECUTOR] . . . . Jerry Reed had a gun, and he shot [Hatton] that night. This was confirmed by four eye witnesses.").

[162] A107–08.

were even stronger. The court declared its belief that the evidence would have shown beyond a reasonable doubt, not only that Reed was culpable in Hatton's murder, but that Reed was in fact the shooter.[163]

In any event, Reed fails to point to any specific evidence of his legal innocence. "[M]ere assertions of innocence unfounded on specific evidence do not constitute a fair and just reason to withdraw a guilty plea."[164] If general allusions to witness credibility were sufficient, Criminal Rule 32(d) would cease to provide any meaningful protection to orderly court proceedings. Reed's hollow claim would not have justified granting a motion to withdraw his plea.

In sum, there is no reasonable probability that the Superior Court would have granted Reed's motion to withdraw his pleas. His claims would not have constituted fair and just reasons for the withdrawal, leaving the Court with no basis to award him relief. Thus, Reed suffered no prejudice as a result of his counsel's

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[163] A141.

[164] *State v. Barksdale*, 2015 WL 5676895, at *5 (Del. Super. Ct. Sept. 21, 2015) (internal quotation marks) (citing *United States v. Cannistraro*, 734 F. Supp. 1110, 1121 (D.N.J. 1990)); *see also Russell v. State*, 1999 WL 507303, at *2 (Del. June 2, 1999) ("Conclusory allegations of innocence are not sufficient to require withdrawal of a guilty plea, especially when the defendant has admitted his guilt in the plea colloquy.").

failure to file the motion, and the Superior Court did not abuse its discretion by denying him postconviction relief.[165]

[165] The Superior Court denied Reed postconviction relief under the first prong of *Strickland* rather than the second, but this Court may affirm on grounds other than those relied upon by the lower court. *Colon v. State*, 900 A.2d 635, 638 n.12 (Del. 2006); *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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Date: January 25, 2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERRY REED,	§	
	§	No. 214, 2020
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

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Date: January 25, 2021

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