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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

REPLY BRIEF

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Dated: February 9, 2021

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Appellant Jerry Reed, through the undersigned counsel, replies to the State's Answering Brief as follows:

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

The State responds to this claim by asserting it should be reviewed for plain error, if at all, because it was not raised below.[1] In fact, the State makes no substantive response to this claim at all. Moreover, the State appears to consider this claim a postconviction claim filed under Superior Court Rule 61.[2] It is not. This claim alleges that Mr. Reed's autonomous right to determine his plea was undermined when the judge would not consider his pre-sentencing motion to withdraw his plea, and his lawyers refused to file it.

This claim should be considered *de novo* by this Court because it is a structural claim of the denial of important constitutional rights. Mr. Reed tried mightily to get his attempt to withdraw his plea before the court but was rebuffed. 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

[1] *Ans. Br.* at 16-21.
[2] *Ans. Br.* at 19-20.

pro se filings when the accused has counsel."[3] Moreover, the Court completely misapprehended Mr. Reed's intentions:

> 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.**[4]

That never happened. As such, the Court not only refused to hear Mr. Reed's motion, but also mistakenly believed it to be withdrawn.

The State did not respond to the assertion in the Opening Brief that this case is analogous to *Holland v. State*, where this Court considered a vindictive prosecution claim properly raised *pro se* even though the defendant had counsel.[5] That holding has application here and should cause this Court to consider Mr. Reed's important constitutional claim *de novo*.

The State's argument is wrong in two respects. First, this question was fairly presented to the trial court in the form of a written motion. The Court never questioned Mr. Reed about his motion, apparently laboring under a misperception

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[3] 213 A.3d 560, 563 (Del. 2019).
[4] *State v. Reed*, 2020 WL 3002963 at *1 (Del. Super. June 4, 2020)(Emphasis added).
[5] *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).

that the motion had been withdrawn. Second, this question should be considered in the interests of justice. As extensively detailed in the Opening Brief, our jurisprudence around plea withdrawals is extremely inconsistent. In the interests of justice, the inconsistencies should be reconciled. The tension between Superior Court Criminal Rules 32(d) and 47 currently results in the inconsistent administration of justice in our trial courts. A decision on the merits by this Court will resolve the conflict.

As such, this Court should consider this constitutional claim *de novo*.

The Opening Brief raised important issues regarding a defendant's constitutional right of autonomy over his plea decision and asserted that our jurisprudence holds that plea withdrawal is a critical stage requiring the assistance of counsel. Because the State did not respond to these issues, Mr. Reed will rely upon the arguments made in the Opening Brief.

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.

The State asserts that *Cronic*[6] does not apply because Mr. Reed was not completely deprived of counsel.[7] The State goes on to argue that Mr. Reed was not entitled to postconviction relief under the *Strickland* standard[8] either. Each contention will be addressed in turn.

Mr. Reed was deprived of counsel between the plea and sentencing

The State claims *Cronic* is inapplicable because "Reed's allegations focus on a narrow period between his conviction and sentence."[9] If the State means between the plea and sentence, the State is correct that this is the timeframe in which Mr. Reed was deprived of counsel. This was a critical stage in the proceedings during which Mr. Reed was entitled to competent counsel. Because counsel abdicated their roles (based apparently on a misunderstanding of our jurisprudence), Mr. Reed is entitled to relief without resorting to the deficiency-and-prejudice rubric of *Strickland*.

The State points this Court to a few federal cases, each of which is distinguishable, and in any event not relevant as this Court has already decided that

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[6] *U.S. v. Cronic*, 466 U.S. 648, 659 (1984).
[7] *Ans. Br.* at 23-28.
[8] *Strickland v. Washington*, 466 U.S. 668 (1984).
[9] *Ans. Br.* at 27.

Cronic applies.

In *Ward v. Jenkins*, the defendant's lawyer refused to file a plea withdrawal motion, despite apparently having drafted it.[10] The *pro se* Ward, seeking state postconviction relief, cited only to *Strickland* and never asked for review under *Cronic*.[11] The Court also agreed that *Strickland* would apply.[12] The Court held that counsel's failure to file the motion to withdraw the plea despite being instructed to do so constituted deficient performance.[13] The State conceded that fact.[14] The question of prejudice was not resolved because, as in Mr. Reed's case, there was never a hearing on the motion to withdraw the guilty plea. The 7th Circuit remanded for an evidentiary hearing as to whether Ward would have insisted on going to trial and whether the plea withdrawal motion would reasonably likely have been granted under the "fair and just reason" federal standard.[15]

As such, while it is true the *Ward* Court applied *Strickland*, it was never asked to do otherwise, and the record lacked sufficient facts to make a final determination.

Fisher v. Florida Attorney General[16] is not relevant to Mr. Reed's case.

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[10] *Ward v. Jenkins*, 613 F.3d 692, 695 (7th Cir. 2010).
[11] *Id.* at 695, 697.
[12] *Id.* at 698.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 701-702.
[16] 2018 WL 4846652 (11th Cir. Mar. 29, 2018).

Fisher complained that his counsel would not move to withdraw his plea *after* sentencing.[17] The state postconviction court would not consider the claim because it had not been raised in the trial court prior to sentencing.[18] Mr. Reed attempted to withdraw his plea before sentencing. Under Delaware law, motions to withdraw guilty pleas after sentencing are governed by Rule 61.[19] Mr. Reed's claim is that he did not have counsel for the time between the plea and sentencing because counsel would not file a motion. As such, *Fisher* is inapplicable.

The last of the State's cited federal cases, *United States v. Waucaush*,[20] is inapposite for a different reason. While it is true that Waucaush complained that his attorney refused to file a motion to withdraw his guilty plea,[21] unlike Mr. Reed, Waucaush had a full hearing before a judge on his *pro se* motion.[22] So, unlike the Superior Court judge in Mr. Reed's case, the trial judge in Waucaush's case agreed to hear his motion. The grounds for Waucaush's motion were "tenuous," and the judge denied it.[23]

The 6th Circuit did reject Waucaush's claim under *Cronic*; holding that he

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[17] *Id.* at *1.
[18] *Id.*
[19] Super. Ct. Crim R. 32(d).
[20] *U.S. v. Waucaush*, 2000 WL 1478361 (6th Cir. Sept. 27, 2000).
[21] *Id.* at *5.
[22] *Id.* at *2.
[23] *Id.* at *5.

was not completely deprived of counsel.[24] However, as noted, Waucaush at least had a judge hear his motion.

The State also points to *Bell v. Cone*,[25] a United States Supreme Court case which held a claim of ineffectiveness at sentencing in a capital case was governed by *Strickland*, not *Cronic*. The Circuit Court had applied *Cronic*. The State argues that *Bell* holds that a claim of denial of counsel in a part, rather than the whole of trial, will not be *Cronic*-reviewable.[26] But that is not the holding in *Bell*.

In *Bell v. Cone*, denial of counsel at sentencing was not complete. The defense lawyer conducted cross-examination and established for the penalty phase jury that Bell had been awarded the Bronze Star in Vietnam.[27] The defense lawyer decided not to give a closing because he did not want the prosecutor to be able to rebut.[28] During the guilt phase, the defense attorney was able to present extensive mitigating evidence about the defendant by pursuing a not guilty by reason of insanity defense.[29] The Supreme Court held it was reasonable for counsel to believe that evidence was still fresh in the jury's minds.[30] Counsel also made reasonable investigations into calling penalty phase witnesses, including the

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[24] *Id.* at *6.
[25] 535 U.S. 685 (2002).
[26] *Ans. Br.* at 27-28.
[27] *Bell*, 535 U.S. at 691.
[28] *Id.* at 692.
[29] *Id.* at 699.
[30] *Id.*

defendant.[31] It is little wonder, then, that the Supreme Court applied *Strickland*, not because the claim was only about the sentencing hearing, but because there was not a complete deprivation of counsel.[32]

The most important holding of *Bell v. Cone* for purposes of this case is not what the State argues. It is that the Court held that *Cronic* applies when the accused is denied the presence of counsel at a critical stage in the proceedings.[33] The *Bell* Court defined "critical stage" as "a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused."[34]

As explained in the Opening Brief, a plea withdrawal motion is a critical stage of the proceedings in a criminal case. This Court has so held.[35] Many state courts have also held that a plea withdrawal motion is a critical stage conferring the right to counsel.[36]

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[31] *Id.* at 700.
[32] *Id.* at 702.
[33] *Id.* at 695, *citing U.S. v. Cronic*, 466 U.S. at 648.
[34] *Bell*, 535 U.S. at 696.
[35] *White v. State*, 2000 WL 368313 at *1 (Del. Mar. 23, 2000).
[36] *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).

Moreover, this Court has already held that a postconviction claim involving deprivation of counsel for a plea withdrawal is reviewed under *Cronic*, not *Strickland*. In *Pringle v. State*,[37] the defendant filed a *pro se* plea withdrawal without telling his lawyer. The judge granted the motion without involving counsel:

> [PROSECUTOR]: Good morning, Your Honor. I need to find out first if Mr. Pringle wants to withdraw his guilty plea. The State moves the sentencing or withdraw [sic] of the plea of Tyrone Pringle.
>
> [DEFENSE COUNSEL]: **This is news to me, Your Honor.**
>
> THE COURT: I'll show you the letter I received, Mr. [Defense Counsel]. I'll hand it to the bailiff.
>
> (Pause.)
>
> THE COURT: Mr. Pringle, the Court has received from you a letter dated March 20th in which you asked to withdraw your guilty plea.
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you want to do that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. I'll allow you to do that. The matter will be set for trial. The plea is undone. You'll go to trial as originally charged.[38]

[37] 2010 WL 2278272 (Del. June 7, 2010).
[38] *Id.* at *1 (emphasis in original).

The Superior Court denied Mr. Pringle's Motion for Postconviction Relief.[39] On appeal of that decision, this Court noted that "the withdrawal of a plea is a critical stage in the criminal process at which the constitutional right to the effective assistance of counsel attaches."[40] This Court further held that *Strickland* does not apply when the defendant is denied counsel at a critical stage of the proceedings, and that the Superior Court erred in applying *Strickland*.[41] This Court vacated the judgment and remanded for reconsideration using the *Cronic* standard.[42]

As in the *Pringle* case, Mr. Reed did not have counsel for his plea withdrawal motion. He was constitutionally entitled to counsel because plea withdrawals are a critical stage. The proof of the lack of counsel is the fact that counsel did not either file the motion or move to withdraw and get out of the way so substitute counsel could file the motion. A complete deprivation of counsel at a critical stage implicates *Cronic*, and prejudice must be presumed, and relief granted. As such, Mr. Reed seeks reversal of the Superior Court.

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[39] *State v. Pringle*, 2009 WL 1463627 (Del. Super. May 19, 2009).
[40] *Pringle v. State*, 2010 WL 2278272 at *2 (Del. June 7, 2010).
[41] *Id.*
[42] *Id.* Appellate counsel missed the *Pringle* case in research for the Opening Brief, and only found it while researching for this Reply Brief. Counsel regrets the oversight.

***Mr. Reed also prevails under* Strickland**

The State concedes that failure to file a pre-sentencing motion to withdraw a guilty plea is deficient performance, satisfying the performance prong of *Strickland*.[43] But then the State misrepresents the facts to argue that perhaps Mr. Reed changed his mind.[44] Nothing could be farther from the truth.

Mr. Reed's attempts to withdraw his plea are documented in the Opening Brief.[45] Most notably, trial counsel averred in their joint postconviction affidavit that, "Defendant asked counsel to withdraw his guilty plea multiple times, in person and in writing."[46] Nowhere in the affidavit does it state that Mr. Reed changed his mind, nor is the record "silent" as to the period between February 17 and March 3, 2020.[47] The record confirms that Mr. Reed was steadfast.

Nor is there any truth to the State's contention that Mr. Reed's final motion to withdraw his guilty plea was the result of dissatisfaction with his sentence.[48] Mr. Reed's final *pro se* motion to withdraw the plea was docketed on Monday, March 2, 2020,[49] which was the Monday after his sentencing on Friday, February 28, 2020. Obviously, he mailed the motion prior to sentencing and it did not get

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[43] *Ans. Br.* at 29-30.
[44] *Id.* at 30-31.
[45] *Op. Br.* at 17-22.
[46] A169.
[47] *Ans. Br.* at 30.
[48] *See*, A31.
[49] A156-159.

docketed until the Monday after sentencing.

The State also comments that Mr. Reed did not seek a remand or expansion of the record "to find evidence in support of his claim."[50] There would be no point in doing so. The record is well-established that Mr. Reed sought to withdraw his plea prior to sentencing and was stuck in an all too familiar Catch-22: his lawyers would not file a motion and the judge refused to consider his *pro se* motions.

Mr. Reed suffered prejudice. A reasonable likelihood exists that the motion to withdraw the guilty plea would have been granted; after all, the rule provides for granting such a motion "for any fair and just reason."[51] The trial judge did not address prejudice at all, probably due to an erroneous belief that Mr. Reed had changed his mind about withdrawing his plea prior to sentencing. Instead, the Court found that counsel were not ineffective,[52] and that the plea was properly entered.[53]

The Superior Court did not analyze whether Mr. Reed's motion would likely have been granted under the required analysis first articulated in *Friend v. State*:

> (a) was there a procedural defect in taking the plea;
> (b) did the defendant knowingly and voluntarily consent to the plea

[50] *Ans. Br.* at 31.
[51] Super. Ct. Crim. R. 32(d).
[52] *State v. Reed*, 2020 WL 3002963 at *3 (Del. Super. June 4, 2020).
[53] *Id.* at *4.

agreement;
(c) does the defendant have a basis to assert legal innocence;
(d) did the defendant have adequate legal counsel; and
(e) will the State be prejudiced or the court unduly inconvenienced if the motion is granted.[54]

Mr. Reed had a fair and just reason to withdraw his plea because he had a basis to assert legal innocence. One of his own lawyers at sentencing stated there was reasonable doubt that Mr. Reed shot the victim.[55] She went on to say he could be found guilty "under conspiracy liability" for encouraging a fistfight that led to a killing.[56]

Mr. Reed's other lawyer "agonized" over the decision to recommend a plea or trial.[57] He went into detail about Mr. Reed not being involved in the main action between the combatants in the case. He noted Mr. Reed's steadfast denial that he possessed a firearm, but he opined that Mr. Reed could nevertheless be found guilty if he possessed a firearm "constructively."[58] Counsel went on to note the inconsistent statements in the case, including the codefendant's "convenient spin."[59]

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[54] *Patterson v. State*, 684 A.2d 1234, 1238 (Del. 1996), *citing State v. Friend*, 1994 WL 234120 at *2 (Del. Super. May 12, 1994), *aff'd Friend v. State*, 1996 WL 526005 (Del. Aug. 16, 1996).
[55] A106-107.
[56] A107.
[57] A109.
[58] A109-111.
[59] A112.

The prosecutor had a very different take on the case, obviously. But that is what trials are for. Mr. Reed seems to have pled guilty on the advice of counsel on the basis that he arranged a fistfight that turned into a shooting. On those facts, Mr. Reed had a fair and just reason to assert legal innocence.

Mr. Reed also had a fair and just reason to assert that he did not have adequate legal counsel. Counsel was certainly inadequate for failing to be aware of the *Friend* factors and deciding they would not file Mr. Reed's motion because they thought the only basis to do so was a claim of newly discovered evidence.[60] But also, according to Mr. Reed, counsel told him he was going to get found guilty of something, particularly because the system is set up against blacks and minorities.[61] Trial counsel did not specifically deny this claim. But counsel admitted by affidavit, albeit obliquely, that they advised him about "the probable makeup of the jury pool."[62]

The judge, without holding any hearing, found it "incredible" that counsel would express a view about the race issue to Mr. Reed in such stark terms.[63] Similarly, the judge criticized Mr. Reed's "bold and conclusory allegation" that his

[60] A169.
[61] A163.
[62] A169.
[63] *Reed,* 2020 WL 3002963 at *4.

plea was coerced,[64] but never held a hearing to determine if the allegation had merit.

The point in terms of a prejudice analysis is that there exists a reasonable probability that an impartial judge would have granted Mr. Reed's motion to withdraw his pleas under the "any fair and just reason" standard. As such, Mr. Reed was prejudiced by the ineffectiveness of his counsel, who failed to either file Mr. Reed's motion or be substituted by conflict-free counsel, a procedure the Superior Court routinely approves.

Given the foregoing, even if this Court determines *Strickland* is the proper lens through which to assess this case, the Superior Court should be reversed.

[64] *Id.*

CONCLUSION

For the foregoing reasons, as well as those stated in the Opening Brief, Appellant Jerry Reed respectfully requests that this Court reverse the judgment of the Superior Court.

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