EFiled: Oct 06 2022 01:14PM EDT
Filing ID 68222156
Case Number 302,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERRY REED, Defendant Below-Appellant, v. STATE OF DELAWARE, Plaintiff Below-Appellee.	)))))))))))	No. 302, 2022 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 & PRICE

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

Attorney for Appellant

Dated: October 6, 2022

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules

NATURE OF THE PROCEEDINGS

Arrest, pretrial matters, and entry of plea

On September 27, 2018, police arrested 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)(Intentional Murder)
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 Superior Court granted a motion to sever the

[1] A13.
[2] A18.
[3] A60-62.
[4] *Id.*

defendants for separate trials.[5] In the same order, this Court granted a motion to sever the PFBPP charge.[6] Trial was scheduled for 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]

On January 13, 2020, the day of trial, Mr. Reed entered a plea. He pled guilty to the lesser offense of Manslaughter and pled *nolo contendere* to the PDFCF charge.[10] As part of the plea, the State entered a *nolle prosequi* on the severed PFBPP case.[11] After a thorough colloquy with Mr. Reed,[12] the Superior Court judge found Mr. Reed's pleas to be knowing, intelligent, and voluntary.[13] The plea called for open sentencing; this Court ordered a presentence investigation.[14]

---

[5] A5; D.I. 41.
[6] *Id.*
[7] *Id.*
[8] *State v. Dixon*, ID No. 1809015332, D.I. 81.
[9] A128.
[10] A88-89.
[11] A88; ID No. 1809014725, D.I. 63.
[12] A80-83.
[13] A84.
[14] *Id.*

Mr. Reed's efforts to withdraw the plea before sentencing

Mr. Reed wrote to the judge eight days after the entry of the plea, seeking to withdraw it.[15] The judge forwarded the letter to defense counsel.[16] Moreover, prior to sentencing, Mr. Reed filed a form letter to his counsel asking him to file a motion to withdraw the plea.[17] Mr. Reed filed another Motion to Withdraw from Plea Agreement and handwrote the date as February ___, 2020.[18] The motion was not docketed until March 2, 2020, however – two days after sentencing. The Superior Court has noted that the motion was likely mailed prior to sentencing and docketed after sentencing.[19]

Sentencing and post-sentencing filings

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

Mr. Reed filed three *pro se* motions. He filed the aforementioned Motion to Withdraw from Plea Agreement, which was drafted before sentencing but not docketed until March 2, 2020.[21] On March 31, 2020, Mr. Reed filed a Motion for

---

[15] *State v. Reed*, 2020 WL 3002963 at *1 (Del. Super. June 4, 2020); A100-103.
[16] *Id.*
[17] A90.
[18] A156-159.
[19] *State v. Reed*, 2022 WL 2967236 at *1 (Del. Super. July 27, 2022).
[20] A148-151.
[21] A156-159.

Postconviction Relief.[22] On April 13, 2020, Mr. Reed filed a Motion for Sentence Modification.[23]

The Court did not appoint counsel for Mr. Reed's Motion for Postconviction Relief.[24] The Court did expand the record by ordering an affidavit from trial counsel.[25] Counsel filed a joint affidavit on May 14, 2020.[26]

On June 4, 2020, this Court issued a Memorandum Opinion and Order as to Mr. Reed's three filings, denying them all.[27]

Appeal to this Court

Now represented by the undersigned attorney, Mr. Reed filed a timely notice of appeal to this Court. After briefing and oral argument, this Court on August 11, 2021, reversed and remanded to the Superior Court for an evidentiary hearing.[28]

Postconviction proceedings on remand

After the remand, postconviction counsel filed an Amended Motion for Postconviction Relief.[29] Trial counsel filed a joint affidavit in response to the Amended Motion.[30] The parties and the Court then agreed it would be preferable to

---

[22] A160-164.
[23] A165-168.
[24] *State v. Reed*, 2020 WL 3002963 at *3 (Del. Super. June 4, 2020).
[25] *Id.*
[26] A169-172.
[27] *State v. Reed*, 2020 WL 3002963 (Del. Super. June 4, 2020).
[28] *Reed v. State*, 258 A.3d 807 (Del. 2021); A180-221.
[29] A224-267.
[30] A268-274.

hold an evidentiary hearing, then proceed with briefing. The Superior Court held an evidentiary hearing on March 11, 2022.[31]

After post-hearing briefing,[32] the Superior Court issued a Memorandum Opinion and Order on July 27, 2022, denying Mr. Reed's Amended Motion for Postconviction Relief.[33]

Postconviction counsel filed a timely Notice of Appeal. This is Mr. Reed's Opening Brief.

[31] A275-427.
[32] A470-498, A499-546, A547-563.
[33] *State v. Reed*, 2022 WL 2967237 (Del. Super. July 27, 2022).

SUMMARY OF ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING MR. REED'S POSTCONVICTION RELIEF.

Since eight days after he entered his pleas to Manslaughter and PFDCF, Mr. Reed has been attempting to withdraw them. He alleges his attorneys told him on the day of trial that he would not get a fair trial due to the racial makeup of the jury pool in Sussex County. This Court remanded Mr. Reed's postconviction case for an evidentiary hearing to develop further facts about this claim.

In its Memorandum Opinion and Order, the Superior Court has misapprehended the sequence of events. The Superior Court found that Mr. Reed invented or embellished his claim that trial counsel told him a Black man could not get a fair trial in Sussex County "to create a way out of the sentence I had imposed."[34] Incorrect. Mr. Reed has repeatedly and consistently made the same claim since well before sentencing. The Court acknowledges this in its Memorandum Opinion and Order. Yet in the Opinion, the Court describes Mr. Reed as turning legitimate advice about race into the "lowest common denominator" because he had "damaged expectations by the sentence he received."[35]

[34] *Reed*, 2022 WL 2967237 at *11.
[35] *Id.* at *18.

Perhaps due to this misunderstanding of the record, the Court finds Mr. Reed self-serving and not credible. The Court wholly credits trial counsel, neither of whom remember much about the case. Mr. Phillips' testimony consisted almost completely of what he normally, usually, or probably did. Ms. Murray recalled almost nothing about the case.

The record demonstrates that trial counsel's advice on the day of trial about the racial makeup of the jury pool caused him to give up his trial rights and accept the plea offer. The Superior Court erred in denying postconviction relief and should be reversed.

STATEMENT OF FACTS

The three witnesses testified at the evidentiary hearing on remand as follows:

Jerry Reed

Mr. Reed had a meeting with both trial attorneys the weekend before final case review.[36] Counsel explained the plea offer to Mr. Reed and told him he had three days to decide.[37] Counsel told him going to trial was like a gamble for life. To demonstrate, Mr. Phillips flipped his glasses case like flipping a coin: trial or plea.[38] Mr. Reed did not want to accept the plea. Counsel asked Mr. Reed to sign the plea in case he changed his mind and explained they would be speaking to his family members.[39] Upon questioning from this Court, Mr. Reed explained he signed the plea despite not wanting to take it because his lawyers advised him he only had three days until court. By signing it beforehand, if he changed his mind, "it's already signed and ready."[40]

[36] Billing records and other testimony indicate the meeting was January 2, 2020. *See*, A846.
[37] A281.
[38] A282.
[39] A283.
[40] A327.

Counsel returned the following evening and Mr. Reed told them he had not changed his mind and still wanted to go to trial.[41] Mr. Reed was transported to court on January 6, 2020 and rejected the plea offer.[42]

On the trial date of January 13, 2020, Mr. Reed was transported to the courthouse and changed into his civilian trial clothing.[43] At that point, trial counsel tried to convince him for "like, an hour and a half" that it was in his best interest to take the plea.[44] They told him his odds had gone down and that what once was a 50/50 was now an 80/20 chance of losing at trial.[45] They told him that if he went to trial, "you willingly put your life in the hands of a system that's already set up to go against blacks and minorities."[46] Because of this, he would lose trial and get a life sentence.[47] Specifically, counsel explained that the jury would not be his peers; instead it would be all older people and white people. These people, according to trial counsel, would not know where he came from, what he has experienced, or why he lied to police.[48]

---

[41] *Id.*
[42] *See*, A70-82.
[43] A287.
[44] *Id.*
[45] A288.
[46] A289.
[47] A316.
[48] A290.

Mr. Reed testified trial counsel told him it was an 80 percent chance and guaranteed he would lose and advised him to take the plea to make it home to his daughter while she is still young.[49] This was the only meeting in which trial counsel discussed the makeup of the jury with Mr. Reed.[50]

In support of Mr. Phillips' argument that Sussex County juries were racially biased, he explained to Mr. Reed that he had lost every murder trial he had done in Sussex County but won each one in Kent County.[51] According to Mr. Phillips, the jury system in Sussex is more "messed up" than in Kent, and "there's no win in Sussex County."[52]

Mr. Phillips also discussed the case of Macarthur Risper, who had been in pretrial detention with Mr. Reed. Mr. Phillips said Risper was offered the same plea as Mr. Reed, went to trial, and ended up sentenced to life plus 32 years.[53] (A jury found Macarthur Risper guilty of Murder First Degree – in Sussex County – on November 25, 2019.[54] Risper was sentenced on January 10, 2020, just three days prior to Mr. Reed's trial date.[55])

---

[49] *Id.*
[50] A308, A316.
[51] A296.
[52] A290.
[53] A297.
[54] *State v. Risper*, ID No. 1805007714A, D.I. 112. (November 25, 2019).
[55] *State v. Risper*, ID No. 1805007714A, D.I. 114 (January 10, 2020).

Mr. Reed also testified that trial counsel urged him to consider that if he took the plea he would be home before his young daughter graduated high school.[56] Mr. Phillips presented a handwritten document listing various exposure times for the plea and the trial. The paper lists under the heading "trial" a jail time exposure of 20 years to life if he was convicted of Murder Second Degree and the firearms charges.[57] The manslaughter scenario is also listed, with the minimum mandatory being twelve years.[58] The plea scenario listed a minimum mandatory of seven years.[59] Mr. Reed testified that Mr. Phillips used this paper to illustrate the various scenarios.[60] Mr. Phillips told Mr. Reed that if he took the plea he would get 12 years, and he had already done two, so would have 10 more to go.[61] That was the significance of the number 10 circled on the page.[62] Mr. Phillips advised Mr. Reed he would likely get the minimum because the codefendant got the minimum sentence.[63]

After the entry of the plea, Mr. Reed notified his attorneys that he wanted to withdraw it. He never changed his mind about his desire to withdraw the plea.[64] In

---

[56] A291.
[57] A428.
[58] *Id.*
[59] *Id.*
[60] A293.
[61] A294.
[62] *Id.*
[63] A295.
[64] A299.

a meeting, Mr. Phillips told Mr. Reed he would check into the possibility of plea withdrawal.[65] At the next meeting, Mr. Phillips told Mr. Reed he had checked into his "allegations" and they did not pan out, and that it was not in Mr. Reed's interest to withdraw the plea. The allegation referred to was the possibility of a witness changing his story.[66] After that did not pan out, Mr. Phillips told Mr. Reed there was no legal basis for plea withdrawal.[67]

The day before sentencing, Mr. Phillips brought Mr. Reed a letter to read to this Court at sentencing; Mr. Reed referred to it as a "remorse letter."[68] He told Mr. Reed that is what he wanted him to say at sentencing. However, he wanted Mr. Reed to rewrite it in his own handwriting so that it looked like he wrote it himself.[69] Mr. Reed did so.[70]

Mr. Reed was always represented by counsel, including sentencing. Nevertheless, the State questioned Mr. Reed as to why he did not speak up at sentencing about his desire to withdraw the plea. Mr. Reed responded that he was told by counsel to read the remorse letter and that saying anything else could

[65] A300.
[66] A301.
[67] A302.
[68] A304, A429-430.
[69] A304-305, A306.
[70] A431-433.

jeopardize him.[71] Moreover, Mr. Reed was hoping that the judge would say something about it as he had written letters to the judge and heard nothing back.[72]

The postconviction judge also asked Mr. Reed why he did not speak up at sentencing and say, "what about my request to withdraw?"[73] Mr. Reed again explained that he had been told by Mr. Phillips just to read his remorse letter. Also, Mr. Reed thought the issue was being dealt with by the Court, given that he had written letters and motions to the Court and never received anything back.[74]

Ronald Phillips, Esquire

Mr. Phillips did not recall much about his interactions with Mr. Reed. He had no memoranda in his file to memorialize discussions with Mr. Reed or important issues regarding the plea and attempts to withdraw the plea.[75] Writing such memos is not his practice, unless "I feel some reason to cover my backside for some reason."[76] He did discuss the upcoming evidentiary hearing with the prosecutors the week prior to the hearing and learned that his memory of events

[71] A321-322.
[72] A322-323.
[73] A330.
[74] A330-331.
[75] A334-335.
[76] A335.

was not correct.[77] His memory was refreshed by the production of a group text among the defense attorneys and prosecutors from January 12 and 13, 2020.[78]

Mr. Phillips discussed the plea offer with Mr. Reed on January 2 and 3, 2020. He did not recall these events until reviewing the text messages; he thought it had all occurred right before trial.[79] Mr. Phillips did not agree that Mr. Reed signed the plea just in case he changed his mind.[80] However, Mr. Phillips was not particularly confident Mr. Reed would go through with the plea and was not surprised when Mr. Reed rejected the plea on January 6, 2020.[81]

Mr. Phillips was sure he discussed Mr. Reed's chances at trial, although he did not know whether he expressed it in numerical terms. He doubted that he did, but said it was possible.[82]

On the day of trial, Mr. Phillips texted the attorneys that he was going to talk to Mr. Reed when the courthouse doors opened. A prosecutor wished him good luck to which he replied, "it would be good luck for everyone."[83] At 8:38 AM, Mr. Phillips texted the prosecutor "plea to 10?" and the prosecutor responded,

---

[77] *Id.*
[78] A450-465.
[79] A343.
[80] A338.
[81] A341.
[82] A342.
[83] A345-346; A463-464.

"Huh?"[84] Then there was a FaceTime call with the prosecutor, followed by a text from Mr. Phillips: "still talking."[85] Then Mr. Phillips at some point before 10:52 AM wrote, "yes to plea."[86]

Regarding his morning-of-trial meeting with Mr. Reed, Mr. Phillips testified that he could probably not recall specifics but could testify to the gist of what was discussed.[87] Most of Mr. Phillips' testimony was what he "probably told him," what he "typically tell[s] people," and what he "would have told him," based on his experience over the years.[88] In fact, Mr. Phillips agreed that his testimony about the meeting with Mr. Reed on the day of trial was not based on his independent recollection but rather based on what he typically tells clients about a jury trial.[89]

Mr. Phillips agreed that his affidavit states, "juries in Sussex tend to be older and whiter than the general population."[90] He further testified that he had "probably objected to every jury panel I've ever had about the makeup of the jury."[91] However, he "would not have said he couldn't have gotten a fair trial period."[92] He did not recall the specific discussion but Mr. Reed but "would not

---

[84] A464.
[85] *Id.*
[86] A465.
[87] A346.
[88] *See, e.g.,* A348-349.
[89] A349.
[90] A351; A270.
[91] A351-352.
[92] A352.

have said he couldn't have gotten a fair trial period." Mr. Phillips testified that the context of the conversation would have been about the jury pool itself and that he would be objecting if he was unhappy with the jury pool.[93]

Having practiced in all three counties, Mr. Phillips testified as to Sussex County, "having been here for a long time, you know, for a long time it was difficult to look out into a jury panel and see a head that wasn't white or bald."[94] This was relevant to Mr. Phillips because the people who end up in the jury panel do not have the same experience with criminal law enforcement, certainly no felons, and no people not registered to vote.[95] Mr. Phillips testified that in Sussex County jury panels, "growing up here, there's a mindset, I think, when you get a particular group of people, particularly the older and whiter group."[96] That mindset it more conservative. Their experience with law enforcement is mostly positive, so that if the defendant was arrested, he is probably guilty. Mr. Phillips acknowledged "it's uncomfortable for people to say, but it's just the fact."[97] Upon questioning from this Court, Mr. Phillips clarified that there is a difference in the age and race of juries between Kent and Sussex Counties.[98]

---

[93] A353.
[94] A384.
[95] *Id.*
[96] A385.
[97] *Id.*
[98] *Id.*

Mr. Phillips went on to explain that everyone comes into jury service with their own biases whether they be pro law enforcement or anti-certain ethnic groups. Mr. Phillips explained that is why diversity is important – to hold people accountable in the jury room.[99] In Mr. Reed's trial, evidence would be presented involving exchanges of guns, Mr. Reed going back and forth between the Little Creek Deli conducting what look like drug deals and other evidence that would be perceived negatively by an older and whiter jury.[100]

When Mr. Phillips had conversations with Mr. Reed about the racial and age makeup of the jury panel is murky. Mr. Phillips testified that it "would not" have happened on the morning of trial.[101] It "would have" happened in the weeks leading up to trial.[102] Mr. Phillips "probably would have" had more than one conversation about the jury – a broad overview conversation, then he "would have" had a more specific conversation closer to trial.[103] Mr. Phillips did not know when these conversations occurred. He did not know whether they occurred prior to final case review or between final case review and trial.[104] During these conversations, Mr. Phillips "would have" told Mr. Reed that it is very difficult to get a diverse

[99] A386.
[100] A395-396.
[101] A353.
[102] *Id.*
[103] A380.
[104] A382.

jury in Sussex County, that it's a big problem, and that they would have to work very hard to get a diverse jury.[105]

Mr. Phillips testified that his record on murder trials in Sussex County was "0 for 3" while his record in Kent County was "split."[106]

Mr. Phillips did not recall whether he told Mr. Reed what his odds were of succeeding at trial. He did not recall mentioning another murder case that went to trial but did not think he did so.[107] As to what sentence Mr. Reed would get if he pled, Mr. Phillips testified he "probably" told him his idea of what it would be with the final say being up to the judge.[108]

Mr. Phillips recalled the several times Mr. Reed informed him he wanted to withdraw the plea.[109] He was familiar with the *Scarborough* factors, particularly because a research assistant provided a memo about them.[110] He did not consider Mr. Reed's claim that he was told he could not win at trial due to the racial makeup of the jury to fall under the inadequate legal counsel factor: "I don't remember giving it a lot of consideration because I did not believe it to be so."[111] Mr. Phillips

---

[105] A383.
[106] A389.
[107] A350.
[108] A348.
[109] A355-356.
[110] A357, A466.
[111] A358.

recalled telling Mr. Reed that after checking into the possibility that a witness changed his story, there was no basis for plea withdrawal. [112]

Mr. Phillips had little recollection of the typed and handwritten versions[113] of what Mr. Reed was to say at sentencing. He did not recall if he typed it up or Ms. Murray did.[114] He thought probably the typewritten document was done first, because counsel had discussed with Mr. Reed what he would say at sentencing.[115]

Julianne Murray, Esquire

Ms. Murray testified briefly because she remembered little about the case. She did not recall whether she attended the January 2, 2020 meeting in which the plea was discussed with Mr. Reed.[116] She did recall speaking with Mr. Reed's girlfriend after the plea was rejected and then going to see Mr. Reed again just before trial.[117] Ms. Murray testified she "would have" discussed with Mr. Reed whether he had changed his mind. But she had no specific recollection of the meeting.[118]

---

[112] A359.
[113] A429-433.
[114] A360.
[115] A361.
[116] A402.
[117] A405.
[118] *Id.*

Ms. Murray recognized the handwritten paper[119] with the various sentence possibilities and the circled number 10 as being written by her. However, she had no recollection of a meeting with Mr. Reed in which this paper was used. She did not remember why the number 10 was circled.[120]

Ms. Murray attended the morning-of-trial meeting with Mr. Reed. She did not specifically recall what was said in this meeting, except that her impression was that Mr. Reed was still weighing whether to take the plea.[121]

Ms. Murray was not involved in the discussions with Mr. Reed about withdrawing his plea.[122] She was, however, aware of Mr. Reed's several letters and motions regarding his desire to withdraw his plea.[123] Ms. Murray, like Mr. Phillips, did not consider Mr. Reed's allegation that he took the plea because of comments regarding race made by counsel to be a reason to move to withdraw the plea.[124]

Ms. Murray recalled typing up the statement Mr. Reed was to make at sentencing. She did not recall the handwritten version.[125] She did not recall which came first.[126] Ms. Murray did not recall what advice she gave Mr. Reed as to what

---

[119] A428.
[120] A406-407.
[121] A409.
[122] A411.
[123] A414.
[124] A415.
[125] A416.
[126] *Id.*

to say at sentencing, but testified, "I imagine I probably would have given him some advice regarding what he could say or what would be advisable to say."[127]

Ms. Murray testified that Mr. Reed never gave up on this determination to withdraw his plea.[128]

[127] A417.
[128] *Id.*

ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING MR. REED'S POSTCONVICTION RELIEF.

A. Question Presented

Whether the Superior Court erred in denying Mr. Reed's postconviction relief by misapprehending important facts from the evidentiary hearing and finding that trial counsel did not advise Mr. Reed that Sussex County jury pools were unfair to Black defendants. This issue was preserved by the filing of an Amended Motion for Postconviction Relief upon remand from this Court.[129]

B. Scope of Review

This Court reviews the denial of a motion for postconviction relief for an abuse of discretion. This Court applies a *de novo* standard of review to legal and constitutional questions.[130]

C. Merits of Argument

This Court's remand established the analytical framework for Mr. Reed's claim.

This Court remanded this case for postconviction proceedings.[131] Specifically, this Court remanded to address two issues.

---

[129] A224-267.
[130] *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013).
[131] *Reed v. State*, 258 A.3d 807 (Del. 2021).

This Court termed the first issue the "advice claim." This Court held that if Mr. Reed's trial attorneys advised Mr. Reed that he could not get a fair trial due to the racial makeup of the jury, as Mr. Reed claims, then that would be deficient performance under *Strickland*.[132] This Court further held that since a reasonable probability exits that Mr. Reed would not have pled without such advice, the prejudice prong would be met as well.[133]

This Court noted that when Mr. Reed entered into his plea and answered the judge's questions in the plea colloquy, he claimed to be operating under advice from counsel that he would not get a fair trial due to his race. As such, this Court remanded for a hearing to determine "whether Reed's attorney told him words to the effect that a Black man cannot get a fair trial in Sussex County.[134]

This Court termed the second issue the "withdrawal claim." The Court held that trial counsel were ineffective for failing to move to withdraw Mr. Reed's plea prior to sentencing at his request – or seeking substitute counsel to file the motion.[135] However, that did not settle the question as to whether Mr. Reed was prejudiced by counsel's deficient performance. This Court held that to demonstrate prejudice, "Reed would have insisted on going to trial and that the trial court would

---

[132] *Id.* at 825-826, *citing Strickland v. Washington*, 466 U.S. 668 (1984).
[133] *Id.* at 826.
[134] *Id.*
[135] *Id.* at 829.

have granted his motion to withdraw the plea."[136] Because the record was undeveloped, this Court directed the Superior Court to consider the *Scarborough* factors to determine that question.[137] The *Reed* Court noted:

> Of particular importance is the precise content of counsel's advice to Reed about how his race, or the racial mix of the Sussex County jury pool, would affect his trial prospects and the impact of any such advice on the voluntariness of his plea. The Superior Court should also determine, through additional fact-finding whether Reed at any point rescinded his instructions to counsel to withdraw his guilty plea and whether his counsel appropriately considered the *Scarborough* factors when they decided to override Reed's instructions regarding the plea withdrawal motion. The Superior Court should then address Reed's Rule 61 challenges considered herein in view of the evidentiary record as further developed.[138]

This Court also noted that the postconviction judge mistakenly believed that Mr. Reed had abandoned his efforts to withdraw his plea. The Court below found that "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."[139] This Court found that the Superior Court was mistaken in this regard and remanded for consideration of the prejudice to Mr. Reed.[140]

---

[136] *Id.* at 829-830.
[137] *Id., citing Scarborough v. State*, 938 A.2d 644 (Del. 2007).
[138] *Id.* at 831.
[139] *Id.* at 817.
[140] *Id.* at 831.

The Superior Court mistakenly held that Mr. Reed created his claim about trial counsel's advice to create a way out of his sentence.

The Superior Court judge sentenced Mr. Reed to the same amount of Level V time as his codefendant, who pled to Murder Second Degree. The Court held in its Memorandum Opinion, "In my view, Mr. Reed then made the claim that Trial Counsel told him that 'no Black man can ever get a fair trial in Sussex County' to create a way out of the sentence I had imposed."[141] The Court went on to hold that "[Mr. Reed] was disappointed and had damaged expectations by the sentence he received."[142] The Court held further that Mr. Reed's "buyer's remorse" resulted in "what I have found to be incredible attacks on trial counsel. I suspect Mr. Reed now has convinced himself that what he says his lawyers told him is true, but that does not make it so."[143]

In reality, the record reflects that on January 21, 2020, Mr. Reed wrote to the judge seeking to withdraw his pleas. He wrote:

> My attorney advised me that it was in my best interest to take this plea weather [sic] or not I was innocent or not because if I would of went to Trial I was going up against a justice system that is set up to go against Black people and minorities and no matter what I was going to get found guilty of something…"[144]

---

[141] *State v. Reed*, 2022 WL 2967236 at *11 (Del. Super. July 27, 2022).
[142] *Id.* at *18.
[143] *Id.*
[144] A100.

In his motion to withdraw his pleas, which the Superior Court now acknowledges was not docketed until a few days after sentencing but likely mailed before sentencing,[145] one of Mr. Reed's claims was:

> Going to trial will prove my innocents [sic] which my attorney failed to mention and bring to my attention instead of telling me that going to trial would of been a bad decision because I would be going against a system made to go against Black people and minorities to already lose Trial.[146]

As such, the record reflects that Mr. Reed did not invent this claim after sentencing to get out of a sentence. Moreover, Mr. Reed's claim is not the "most egregious possible articulation of the issue of race in legal matters."[147]

The Superior Court's misapprehension of the sequence of events is likely why the Court characterizes Mr. Reed's testimony as "uncorroborated, inaccurate, and self-serving."[148] Actually, Mr. Reed was the only witness who testified about specific facts. Trial counsel's testimony consisted mostly of a lack of recollection and speculation about what counsel probably said or typically says.

---

[145] *Reed*, 2022 WL 2967236 at *2.
[146] A158.
[147] *Reed*, 2022 WL 2967236 at *11.
[148] *Id.* at *9.

Applying wholly different credibility standards to Mr. Reed and trial counsel, the Superior Court erred in finding that trial counsel did not advise Mr. Reed he would not get a fair trial due to the makeup of the Sussex County jury pool.

The Court engaged in a "factfinding mission" to determine "whose testimony to credit: Mr. Reed's on the one hand, or Trial Counsel's, on the other."[149] But the factfinding mission was not conducted on a level playing field. Trial Counsel were credited with corroborating each other, "within the constraints of memory."[150] In contrast, the Court subjected Mr. Reed to scrutiny of every aspect of his testimony, and found him "uncorroborated, inaccurate, and self-serving."[151]

The Court's description of Mr. Reed's testimony as uncorroborated leaves one to wonder who was supposed to corroborate it. He testified under oath as to his best recollection of the events of January 2020. The Court also faults Mr. Reed for being self-serving. It is not clear why that would make him any less credible. This is not a new story Mr. Reed invented after learning his sentence. He has made the same claim since eight days after the plea hearing.

As noted, trial counsel's testimony was based, at best, on dim memories of the advice given to Mr. Reed. Mr. Phillips testified that even his memory was wrong and was corrected during his preparatory meeting with prosecutors through

[149] *Id.* at *9.
[150] *Id.*
[151] *Id.*

text messages. Most of the testimony was not even based on memory; it was based on advice usually or probably given.

Nevertheless, the Superior Court accepted these dim recollections and non-recollections as true, while engaging in point-by-point scrutiny of Mr. Reed's memory.

First, the Court simply accepts trial counsel's denial that they told Mr. Reed on the day of trial that he would not get a fair trial, even though Mr. Phillips' testimony was not based on his actual memory of the meeting and Ms. Murray had little recollection at all.[152]

Second, the Court faults Mr. Reed for recalling Mr. Phillips' record in Sussex County murder trials as having never won but having won all his murder trials in Sussex – "demonstrably not Mr. Phillips' record."[153] Mr. Phillips testified that his record on murder trials in Sussex County was "0 for 3" while his record in Kent County was "split."[154] Perhaps Mr. Reed's recall was not perfect, but the point was made. The Court found it unlikely that Mr. Phillips would misrepresent his trial record, because at that point he just wanted to go to trial.[155] But that does not explain why when the prosecutor texted Mr. Phillips good luck wishes when he

[152] *Id.* at *10.
[153] *Id.*
[154] A389.
[155] *Reed* at *10.

was going to discuss the plea with Mr. Reed on the day of trial, Mr. Phillips replied, "it would be good luck for everyone."[156]

The Court's third and fourth criticisms of Mr. Reed pertain to Mr. Phillips giving odds of success to Mr. Reed and mentioning the Risper case in which the defendant did not plead and was convicted at trial. The Court merely accepts trial counsel's word over Mr. Reed. But Mr. Phillips testified that his testimony about the meeting with Mr. Reed on the day of trial was not based on his independent recollection but rather based on what he typically tells clients about a jury trial.[157]

Next, the Court faults Mr. Reed's math regarding his possible sentence being 12 years if he got the minimum sentence, because the actual minimum was seven.[158] But the handwritten document clearly lists "7 + 5" and below that "12 min man." Mr. Reed testified that other five years beyond the minimum for Manslaughter and PFDCF was for the person prohibited charge.[159] Mr. Reed was also clear that Mr. Phillips told him he could get more than the minimum sentence.[160] Whatever the discussions about the trial and plea scenarios were, they are not evidence that Mr. Reed was lying when he testified.

---

[156] A345-346; A463-464.
[157] A349.
[158] *Reed* at *10.
[159] A294.
[160] A295.

In the sixth and seventh examples of Mr. Reed's supposed untruthfulness, the Court notes that Mr. Reed was incorrect about which attorney visited him on January 12, 2020 and which attorney wrote the notes regarding the various sentences.[161] Mr. Reed's inability to recall which attorney visited him on one of several meetings over a cluster of dates does not make him not credible. Were that the standard, then almost none of trial counsel's testimony would be found credible, as they recalled very little. Moreover, the fact that Mr. Reed recalled one attorney writing the notes when both attorneys were present does not render Mr. Reed not credible. Mr. Reed testified that Mr. Phillips was doing most of the talking during the meeting. He is the one who presented the various sentence options as to plea and trial.[162]

Finally, the Court finds "of great importance" Mr. Reed's answers to the plea colloquy which led to the Court's acceptance of the plea.[163] But if Mr. Reed's answers to the plea colloquy were based on advice from counsel that he would not get a fair trial, the colloquy was merely purpose-driven to get the plea done. Indeed, this Court recognized that Mr. Reed claims he was operating under deficient advice when answering the Court's questions during the colloquy.[164]

---

[161] *Reed* at *11; *See*, A428.
[162] A291-292.
[163] *Reed* at *11.
[164] *Reed v. State*, 258 A.3d 807, 825 (Del. 2021).

In sum, the Superior Court unfairly scrutinized Mr. Reed's testimony while simply accepting the dimly or not at all remembered testimony of trial counsel. As noted, this disparate treatment may have arisen out of the judge's incorrect belief that Mr. Reed concocted his claim about improper advice only after being sentenced, which is demonstrably untrue.

Instead, the Court, without any factual basis, finds that Mr. Reed changed his mind about the plea offer based on advice from family members.[165] Mr. Reed denied that was the case. He testified that his family advised him not to plead guilty to something he did not do.[166] Ms. Murray had the impression that he was "leaning toward pleaing [sic]" days before trial because he wanted a chance to talk it over with his girlfriend.[167] That may have been Ms. Murray's impression, but it is scant foundation upon to hold:

> The record developed on remand at the evidentiary hearing demonstrates that Mr. Reed struggled with pleading guilty, repeatedly changed his mind, and ultimately entered the plea after consulting with his family and girlfriend. He sought to withdraw his plea because, consistent with his history of uncertainty, he changed his mind yet again about whether admitting guilt would secure a lesser sentence.[168]

---

[165] *Reed*, 2022 WL 2967236 at *12-13.
[166] A313.
[167] A422.
[168] *Reed* at *13.

This holding, copied almost *verbatim* from the State's Post-Hearing Answering Brief,[169] is unsupported in the record. Besides, it would be a rare case indeed if a defendant facing murder charges did not consider a plea and consult with family before making a decision. None of that bears upon Mr. Reed's credibility as to the advice trial counsel gave him.

Anyone in Mr. Reed's position would understand trial counsel's advice to mean that he should take a plea because he would not get a fair trial in Sussex County due to his race.

This Court's decision remanding the case ordered an evidentiary hearing to determine "whether Reed's attorney told him words to the effect that a Black man cannot get a fair trial in Sussex County.[170] This Court held that "of particular importance is the precise content of counsel's advice to Reed about how his race, or the racial mix of the Sussex County jury pool, would affect his trial prospects and the impact of any such advice on the voluntariness of his plea."[171]

The Superior Court misconstrued this Court's holding to mean that Mr. Reed had to demonstrate that trial counsel specifically told him "no Black man can get a fair trial in Sussex County."[172] The Court's "factfinding mission" was to determine whether "absolute comments were made."[173] The Court held that Mr.

---

[169] *See*, A533.
[170] *Reed v. State*, 258 A.3d 807, 826 (Del. 2021).
[171] *Id.* at 831.
[172] *See*, *State v. Reed*, 2022 WL 2967236 at *11, *12 (Del. Super. July 27, 2022).
[173] *Id.* at *9.

Reed's claim accused trial counsel of giving "lowest common denominator" advice about race.[174]

This Court's instructions on remand were more nuanced than the Superior Court understood them to be. The inquiry was supposed to be into the precise nature of the advice given and how that affected Mr. Reed's decision to accept a plea offer on the day of trial. A review of the advice Mr. Phillips claims to have given Mr. Reed, although he is not sure of exactly when, would lead any defendant to avoid a trial:

- He has objected to the makeup of just about every jury panel he has had in Sussex County.[175]
- In Sussex County, it is difficult to look out into the jury panel and not see a head that was not white or bald.[176]
- The Sussex County panels, particularly the older, whiter group, tend to have the same mindset, frustrating diversity of opinion.[177]
- This mindset is conservative and pro-law enforcement: if the defendant got arrested, he is probably guilty. As Mr. Phillips said, "it's uncomfortable for people to say that, but it's just the fact."[178]
- In Mr. Reed's case, the facts such as the presence of guns and drug transactions would be perceived negatively by an older and whiter jury.[179]

---

[174] *Id.* at *18.
[175] A351-352.
[176] A384.
[177] A385
[178] *Id.*
[179] A395-396.

- Mr. Phillips believes it is very difficult to get a diverse jury in Sussex County, and it is a big problem, and it would take hard work to get a diverse jury.[180]

These points reflect Mr. Reed's testimony on the advice he was given by trial counsel. On the day of trial, Mr. Reed was in his trial clothes[181] and had every belief that the plea was off the table.[182] He testified that counsel told him he was not going to get a jury of his peers. Counsel told him that the jury would not have the same experiences he had in life. Counsel advised Mr. Reed that the jury would not understand why he lied to the police.[183] This testimony comports with Mr. Phillips' testimony that the older, whiter jurors are pro law-enforcement and would not take well to evidence of drug dealing and gun possession.

The record clearly reflects that trial counsel advised Mr. Reed he would not be able to get a fair trial in Sussex County due to the makeup of the jury pool. The inquiry is not whether trial counsel spoke a precise combination of words. The overall record demonstrates that Mr. Reed was ready to go to trial. He only took the plea and gave his answers in the colloquy due to trial counsel's advice on the morning of trial. The Superior Court's holding that counsel did not give such advice was error; this Court should reverse.

---

[180] A383.
[181] A286-287.
[182] A284.
[183] A290.

The Superior Court erred in holding that there was no reasonable probability his motion to withdraw his plea would have been granted.

Recently, this Court clarified the standard for postconviction claims involving counsel's failure to file a pre-sentencing motion to withdraw a guilty plea:

> To satisfy the second prong of *Strickland* in the plea withdrawal context, Morrison must show a reasonable probability that but for his counsel's error, he would have insisted on going to trial and the trial court would have granted his motion to withdraw plea. Under Rule 32(d), the defendant bears the burden of showing a fair and just reason to permit withdrawal of his plea. The relevant factors to consider are whether: (i) there was a procedural defect in taking the plea; (ii) the defendant voluntarily entered the plea; (iii) the defendant had a basis to assert legal innocence; (iv) the defendant had adequate legal counsel; and (v) granting the motion would prejudice the State or unduly inconvenience the court.[184]

A reasonable probability is "a standard lower than 'more likely than not.'"[185]

The Superior Court properly adopted the standard set forth in *Morrison*.[186] The Court also properly held that but for trial counsel's error in failing to file a motion to withdraw his plea, Mr. Reed would have filed a motion to withdraw his plea before sentencing and insisted on going to trial.[187] The Superior Court erred,

---

[184] *Morrison v. State*, 2022 WL 790507 at *4 (Del. Mar. 16, 2022)(internal citations omitted).
[185] *Reed*, 258 A.3d at 829, *citing*, *Starling v. State*, 130 A.3d 316, 325 (Del. 2015).
[186] *Reed*, 2022 WL 2967236 at *14.
[187] *Id.* at *15.

however, in finding that there was no reasonable probability that Mr. Reed's motion to withdraw his plea would have been granted.[188]

In determining whether there is "any fair and just reason"[189] to withdraw a plea, a trial court must review the *Scarborough*[190] factors. Even though all factors must be reviewed, they need not be weighed equally, and some of these factors in themselves justify relief.[191]

Mr. Reed did not voluntarily enter into the plea. As discussed, he was in trial clothes and ready to proceed to trial. It was only trial counsel's advice that he could not get a fair trial that caused him to change his mind at the last minute. He would not agree to plead guilty to the firearm charge and entered a no contest plea instead. For the aforementioned reasons, the Superior Court erred in finding that such advice was not given. The Court also erred in finding that Mr. Reed's assertions were made only after sentencing as a means to escape his sentence.

Mr. Reed has a basis to assert legal innocence. One only need review the sentencing hearing to understand that Mr. Reed's own attorneys believed that Mr. Reed has a basis to put the State to its proof at trial. Ms. Murray told the Superior Court that counsel believed there was reasonable doubt that Mr. Reed was the

---

[188] *Id.*
[189] *See*, Super. Ct. Crim. R. 32(d).
[190] *Scarborough v. State*, 938 A.2d 644 (Del. 2007).
[191] *Reed*, 258 A.3d at 830, *citing*, *Scarborough* at 649.

shooter of Hatton.[192] 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.[193]

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."[194] Mr. Phillips went on to say that security camera video confirms Mr. Reed's account of what happened at the Little Creek Deli and that much or most of what codefendant Dixon said is inaccurate.[195] 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."[196] According to Mr. Phillips, Mr. Reed's only involvement was encouraging two men in a dispute, Winder and Hatton, to go to the boat ramp and "fight it out."[197]

Of course, "conclusory allegations of innocence are not sufficient to require withdrawal of a guilty plea, especially when the defendant has admitted his guilt in

---

[192] A106-107.
[193] A107.
[194] A109.
[195] A110.
[196] *Id.*
[197] A114.

the plea colloquy."[198] However, Mr. Reed pled no contest to PFDCF because he would not plead guilty to possessing a firearm. As he explained, he pled because his lawyers told him that his role in encouraging the fistfight could lead to a conviction at trial.[199]

The Superior Court held that if the mere ability to challenge the weight of the State's evidence was sufficient basis to assert legal innocence, this factor would lose its meaning.[200] But Mr. Reed would not merely be challenging the State's evidence. Based on trial counsel's comments at sentencing, the defense would be that Mr. Reed encouraged a fistfight and was not a party to the homicide.

Mr. Reed did not have adequate legal counsel throughout the proceedings. This Court has already found trial counsel's failure to file his plea withdrawal motion was deficient performance.[201] As discussed elsewhere in this brief, counsel rendered deficient performance by advising Mr. Reed on the day of trial that he could not get a fair trial due to the makeup of the Sussex County jury pool. But for that advice, he would not have pled guilty. Mr. Reed did not plead the week before when brought to court to do so. As far as he was concerned, all plea offers were withdrawn and it was time for trial. But on the morning of trial, trial counsel

---

[198] *State v. Barksdale*, 2015 WL 5676895, at *5 (Del. Super. Sept. 14, 2015), *citing Russell v. State*, 1999 WL 507303 at *2 (Del. June 2, 1999).
[199] A117-118.
[200] *Reed*, 2022 WL 2967236 at *16.
[201] *Reed*, 258 A.3d at 829.

rendered the advice about his chances before a Sussex County jury pool. He followed that deficient advice and entered his pleas on that basis.

In sum, a review of the *Scarborough* factors when applied to Mr. Reed's case demonstrate that he had a fair and just reason to withdraw his plea and there existed a reasonable probability that his plea withdrawal motion would have been granted.

The Superior Court's opinion to the contrary was likely informed by the judge's belief that Mr. Reed concocted his account of the advice he was given because "he was disappointed and had damaged expectations by the sentence he received."[202] That is demonstrably untrue. Mr. Reed did not experience post-sentencing "buyer's remorse," as the Superior Court found.[203] His efforts to withdraw his plea, and the basis for that withdrawal, has been a matter of record since just after the plea hearing and long before sentencing.

Mr. Reed has established a reasonable probability that his plea withdrawal motion would have been granted; as such, the Superior Court should be reversed.

[202] *Reed*, 2022 WL 2967236 at *18.
[203] *Id.*

CONCLUSION

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

COLLINS & PRICE

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

Attorney for Appellant

Dated: October 6, 2022