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Case Number 302,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERRY REED,	§	
	§	No. 302, 2022
Defendant Below,	§	
Appellant,	§	On appeal from the Superior Court
	§	of the State of Delaware
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

STATE'S ANSWERING BRIEF

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Date: November 7, 2022

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page(s)**

Constitutions, Statutes, and Rules **Page(s)**

NATURE OF PROCEEDINGS

On November 5, 2018, a Superior Court grand jury indicted Jerry Reed and his co-defendant, Traevon Dixon, on charges of first-degree murder, first-degree conspiracy, 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 agreement, the State agreed to *nolle pros* the remaining charges.[4] The Superior Court conducted a plea colloquy with Reed and accepted his pleas as knowing, intelligent, and voluntary.[5] The court deferred sentencing for a pre-sentence investigation.[6]

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

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[1] A1, at Docket Item ("D.I.") 5; A60–62.
[2] A3, at D.I. 20; A5, at D.I. 41.
[3] A7, at D.I. 76; A88–89.
[4] A7, at D.I. 76; A88.
[5] A80–84.
[6] A7, at D.I. 76.
[7] A8, at 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).

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 to a total of 30 years at Level V incarceration, suspended after 20 years for 3 years of decreasing levels of supervision.[11] Reed did not appeal.[12]

Instead, Reed filed three *pro se* motions: (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 (collectively, the "Collateral Motions").[13] Reed's trial counsel filed an affidavit responding to the claims.[14] The Superior Court denied all three Collateral Motions in a written opinion dated June 4, 2020.[15]

Reed appealed the denial of the Collateral Motions.[16] This Court remanded the case back to the Superior Court to conduct an evidentiary hearing on two issues and then decide Reed's surviving postconviction claims.[17]

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[9] A7, at D.I. 81; A90.
[10] A176; *see also* A169.
[11] A8, at D.I. 84; A148–49.
[12] *See* D.I. 84–87.
[13] A8, at D.I. 85–87; A156–68.
[14] A8, at D.I. 89; A169–71.
[15] *Reed*, 2020 WL 3002963.
[16] *Reed v. State*, 258 A.3d 807 (Del. 2021).
[17] *Id.* at 831.

Reed, through his appointed counsel and with leave of the Superior Court, filed an amended postconviction motion on January 6, 2022.[18] Reed's trial counsel filed a second affidavit in response to the amended motion.[19] The court held an evidentiary hearing on March 11, 2022.[20] After receiving post-hearing briefing from the parties, the court denied the motion for postconviction relief on July 27, 2022.[21]

Reed filed a timely notice of appeal on August 25, 2022, and filed an opening brief on October 6, 2022. This is the State's answering brief.

[18] A11b, at D.I. 129; A224–67.
[19] A11b, at D.I. 131; A268–74.
[20] A11b–11c, at D.I. 134; A275–427.
[21] *State v. Reed*, 2022 WL 2967236, at *18 (Del. Super. Ct. July 27, 2022); A11c–11d, at D.I. 136, 139, 143, 145.

SUMMARY OF ARGUMENT

I. The Appellant's argument is denied. The Superior Court did not abuse its discretion by denying Reed's motion for postconviction relief. The court determined that Reed's allegations were not credible, and competent evidence supported its factual findings. In light of the evidentiary record developed on remand, the Superior Court reasonably concluded that Reed's trial counsel did not render ineffective assistance with regard to the advice they provided Reed. The Superior Court also reasonably concluded that Reed did not suffer prejudice from trial counsel's failure to file a plea-withdrawal motion on his behalf. There was no reasonable probability that the court would have granted a plea-withdrawal motion because no applicable factor weighed in Reed's favor.

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.[22] After the argument, Reed, Dixon, and Hatton traveled to Portsville Pond, where Hatton was shot and killed.[23] The Delaware State Police found Hatton's "bullet-riddled body" in the weeds along the pond.[24] The police arrested Reed and Dixon for Hatton's murder.[25]

History of Representation Through Reed's Plea on the Day of Trial

At the outset of Reed's case, attorney Ronald Phillips was appointed through the Office of Conflicts Counsel to represent him.[26] Phillips had 28 years of experience and had conducted hundreds of trials, including eight or nine murder trials.[27] As the case proceeded toward trial, Julianne Murray was appointed as co-counsel.[28]

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[22] *See Reed*, 2020 WL 3002963, at *1; A129.
[23] *Reed*, 2020 WL 3002963, at *1.
[24] *Id.*
[25] *Id.*
[26] A333.
[27] A363–64, A389.
[28] A418.

During the early stages of case, trial counsel did not have many conversations with Reed about negotiating a plea deal.[29] Based on his experience trying murder cases in Delaware and his conversations with the prosecutor, Phillips did not expect the State to extend an offer "better" than second-degree murder.[30] Reed was unwilling to plead guilty to second-degree murder.[31]

The plea-bargaining outlook changed on Thursday, January 2, 2020, when the State extended an offer to manslaughter and PFDCF.[32] Trial counsel met with Reed the next day to review the offer.[33] Reed accepted, completed the Truth-in-Sentencing Guilty Plea Form ("TIS Form"), and signed the plea agreement.[34] Phillips' office mailed the signed plea paperwork to the prosecutors that same day.[35] Final Case Review had been scheduled for Wednesday, January 8, but following the meeting with Reed, Phillips asked the Superior Court to schedule an earlier plea-by-appointment on Monday, January 6.[36]

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[29] A364–65.
[30] A364–65.
[31] A365.
[32] *See* A337, A469.
[33] A338.
[34] A337–38; A468–69. At the Rule 61 evidentiary hearing, Reed claimed that he did not intend to accept the State's offer when he executed the paperwork on January 3. A327. According to Reed, his counsel advised him to fill out the paperwork so that it would be ready in case he changed his mind. A327.
[35] A340.
[36] A337–38.

At the January 6 hearing, Reed changed course and rejected the plea offer.[37] Reed had gone "back and forth" on his decision, so it did not surprise Phillips that Reed changed his mind.[38] At that point, trial counsel believed the State's plea offer was off the table.[39] They continued to prepare for trial, which was scheduled to begin one week later, on Monday, January 13.[40]

During that week, Murray had a conversation with Reed's girlfriend, who wished that Reed had taken the plea offer.[41] Reed's family reached out to Phillips to discuss the State's offer, and they had a conversation in his office.[42] After these conversations, Phillips sent a text message to the prosecutors asking if it was possible to revive the plea offer.[43] Phillips told the prosecutors that Reed's sister and brother "were going to see him this weekend" and "think he should have taken [the plea]."[44] The prosecutors indicated that they would be open to revisiting a plea deal if Reed changed his mind.[45]

Murray traveled to the prison on Sunday, January 12—the day before trial—to meet with Reed and find out if the conversations with his family and girlfriend

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[37] A63–75.
[38] A341.
[39] A342.
[40] A369.
[41] A404–05.
[42] A369–70.
[43] A450–65.
[44] A451.
[45] A451–52.

changed his mind.[46] They talked about Reed's girlfriend giving birth and whether he would be able to see his child outside of prison.[47] Reed told Murray that he wanted to discuss it more with his girlfriend, giving Murray the impression that he was leaning toward taking the offer.[48]

On the day of trial, Phillips and Murray were at the courthouse when the doors opened so they could talk to Reed.[49] Reed was still nervously weighing whether to accept the plea offer.[50] Trial counsel assured Reed that they were ready for trial regardless of his decision.[51] With respect to the State's plea offer, they discussed Reed's exposure in light of his possible choices and outcomes.[52] Phillips "probably" told Reed what he thought his sentence might be if he pled, but he also would have explained that the judge ultimately determines his sentence.[53] Phillips believed Reed would receive a 10- to 15-year sentence, but not the minimum 7-year sentence.[54]

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[46] A405. At the Rule 61 evidentiary hearing, Reed claimed that Phillips, and only Phillips, met with him in-person at the prison on January 12 to discuss the State's plea offer. A314–15.
[47] A421.
[48] A421–22.
[49] A463.
[50] A409.
[51] A409.
[52] A347, A371, A409, A422–23.
[53] A348; A423.
[54] A377.

Reed decided to accept the offer and plead guilty to manslaughter and no contest to PFDCF.[55] The Superior Court engaged him in a plea colloquy.[56] Reed understood the charges to which he was pleading and that he would not have a trial.[57] 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.[58] Reed reviewed his case with his counsel, they answered all of his questions, and he was satisfied with their representation.[59] He testified that no one forced him to enter the pleas.[60] The court accepted his pleas as knowing, intelligent, and voluntary and deferred sentencing until February 28, 2020.[61]

Another Change of Heart

Eight days after he entered the pleas, Reed wrote a letter to the Superior Court requesting to withdraw them.[62] Reed explained his reasons for wanting to withdraw the pleas, including an allegation that trial counsel advised him to take the plea offer because the justice system is prejudiced against minorities and "no

[55] A7, at D.I. 76; A88.
[56] A80–84.
[57] A80.
[58] A81–82.
[59] A80.
[60] A83–84.
[61] A85.
[62] A8, at D.I. 82; A100–03.

matter what [Reed] was going to get found guilty of something."[63] Reed further mentioned that he told his counsel "multiple times" that he would like to withdraw from the plea agreement.[64] The court declined to consider a *pro se* motion from a represented defendant and forwarded the letter to trial counsel.[65]

Reed also wrote his trial counsel directly about the request.[66] On February 10, he sent trial counsel a form notice asking them to file a motion to "withdraw from plea agreement."[67]

The Superior Court scheduled a pre-sentencing teleconference for February 17 to discuss the scope of the presentation at the hearing.[68] The court brought up Reed's letter and had the following exchange with Reed's trial counsel:

> 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.

[63] A100–02.
[64] A102.
[65] *Reed*, 2020 WL 3002963, at *1 (citing Super. Ct. Crim. R. 47).
[66] A7, at D.I. 81; A90.
[67] A90.
[68] A90a–b.

THE COURT: Okay.[69]

A moment later, the call ended.[70]

Reed's case proceeded to sentencing on February 28, 2020.[71] Neither Reed's counsel nor the Superior 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.[72] 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.[73]

Three days after sentencing, the Superior Court received a *pro se* motion from Reed seeking to withdraw his pleas under Superior Court Criminal Rule 32(d).[74] The motion was dated "February __, 2020"—indicating that Reed drafted the motion on or before his sentencing date.[75]

At the Rule 61 evidentiary hearing, Phillips testified that Reed "probably" said he still wanted to file a plea-withdrawal motion even though trial counsel

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[69] A97–98.
[70] A98.
[71] A104–47.
[72] A135.
[73] A117–20.
[74] A156–59.
[75] *See* A158.

advised he had no basis to do so.[76] Phillips could not recall if Reed broached the subject with him and Murray again after rendering that advice, but Phillips "kn[e]w that if [Reed] could have withdrawn it, he would [have]."[77] Phillips admitted that they should have filed the motion.[78]

[76] A398–99.
[77] A375.
[78] A398.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING REED'S MOTION FOR POSTCONVICTION RELIEF.

Question Presented

Whether the Superior Court abused its discretion by denying Reed's motion for postconviction relief.

Scope of Review

This Court reviews the denial of a motion for postconviction relief for abuse of discretion.[79] An abuse of discretion occurs when the judge exceeds the bounds of reason under the circumstances or ignores recognized rules of law or practice in a way that produces injustice.[80] This Court carefully reviews the record to determine whether competent evidence supports the lower court's findings of fact.[81] It review questions of law *de novo*.[82]

Merits of Argument

This postconviction matter first came before the Court in 2021 with an incomplete evidentiary record.[83] Reed made the serious assertion that his trial

[79] *Neal v. State*, 80 A.3d 935, 941 (Del. 2013).
[80] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994).
[81] *Neal*, 80 A.3d at 941.
[82] *Id.*
[83] *Reed*, 258 A.3d at 826–27.

counsel advised he should plead guilty because his race would prevent him from receiving a fair trial in Sussex County.[84] This Court was concerned that trial counsel's affidavit only generally denied the allegation and the Superior Court did not conduct "an evidentiary hearing directly probing the question of whether Reed's attorney told him words to the effect that a Black man will not receive a fair trial in Sussex County."[85] Noting various gaps in the record, this Court reversed the Superior Court's denial of postconviction relief and remanded the case for further investigation.[86]

Two claims survived the postconviction appeal and were subject to the remand: Reed's "Advice Claim" and his "Withdrawal Claim."[87] Under the Advice Claim, Reed claimed that his trial counsel rendered ineffective assistance by advising that he would be convicted irrespective of his guilt because of his race, thereby causing him to plead guilty involuntarily.[88] Under the Withdrawal Claim, Reed claimed that his trial counsel rendered ineffective assistance by failing to file a plea-withdrawal motion upon his request.[89]

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[84] *Id.* at 826.
[85] *Id.*
[86] *Id.* at 826–27.
[87] *Id.* at 831.
[88] *Id.* at 825.
[89] *Id.* at 827.

This Court provided instructions for the Superior Court on remand. Concerning the Advice Claim, the Superior Court was ordered to investigate "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."[90] On the Withdrawal Claim, the Superior Court was tasked with determining "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."[91] After conducting additional factfinding on these issues, the Superior Court "should then address Reed's Rule 61 challenges . . . in view of the evidentiary record as further developed."[92]

The Superior Court conducted the required investigation. It allowed Reed to refine his claims through postconviction counsel's amended postconviction motion. The court accepted new, more-detailed affidavits from Reed's trial counsel. It then conducted an evidentiary hearing where Reed and both of his trial attorneys testified. Based on the more thoroughly developed record, the court

[90] *Id.* at 831.
[91] *Id.* (citing *Scarborough v. State*, 938 A.2d 644 (Del. 2007)).
[92] *Id.*

determined that Reed's allegations were not credible. Accordingly, the court denied Reed's postconviction claims.

On appeal, Reed challenges the Superior Court's factual findings and its decision to deny postconviction relief. Because competent evidence supported the Superior Court's factual findings, the court did not abuse its discretion by denying Reed's postconviction motion.

A. The Governing Standard of Review Under *Strickland*

To prevail on an ineffective-assistance claim, Reed must meet the standard enunciated in *Strickland v. Washington*[93] and prove that: (i) his counsel's representation was deficient; and (ii) he suffered substantial prejudice as a result of counsel's errors.

Under the first part of the test, the claimant must prove that his attorney's conduct fell below an objective standard of reasonableness, as judged by prevailing professional norms.[94] The performance prong places a heavy burden on the claimant.[95] He must overcome "'a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance.'"[96] If an attorney makes

[93] 466 U.S. 668, 687–88 (1984).
[94] *Bussey v. State*, 2020 WL 708135, at *2 (Del. Feb. 11, 2020) (citing *Strickland*, 466 U.S. at 687–88).
[95] *Green v. State*, 238 A.3d 160, 174 (Del. 2020).
[96] *Id.* (quoting *Strickland*, 466 U.S. at 689).

a strategic choice after a thorough investigation of the relevant law and facts, the decision is virtually unchallengeable.[97] That said, the relevant question is not whether the attorney's choices were strategic, but whether they were reasonable.[98] The reviewing court evaluates the attorney's performance as a whole.[99]

Under the second part of the test, the claimant "'must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[100] A "reasonable probability" is a "'probability sufficient to undermine confidence in the outcome.'"[101] There must be a "substantial likelihood" or a "meaningful chance" that the outcome would have been different.[102] The standard is lower than "more likely than not,"[103] but a merely conceivable chance is not sufficient.[104] The claimant must make specific allegations of actual prejudice and substantiate them.[105]

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[97] *Id.*
[98] *Id.* (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000)).
[99] *Id.*
[100] *Starling v. State*, 130 A.3d 316, 325 (Del. 2015) (quoting *Strickland*, 466 U.S. at 694).
[101] *Id.*
[102] *Baynum v. State*, 211 A.3d 1075, 1084 (Del. 2019).
[103] *Id.*
[104] *Starling*, 130 A.3d at 325.
[105] *Outten v. State*, 720 A.2d 547, 552 (Del. 1998).

B. Competent evidence supported the Superior Court's factual conclusion that trial counsel did not advise Reed to plead guilty because his race would prevent him from receiving a fair trial.

On the facts underlying the Advice Claim, trial counsel's accounts were wholly inconsistent with Reed's. They disagreed over "whether absolute comments were made, the nature of any related discussions, and when those discussions took place."[106] As a consequence, the Superior Court was compelled to determine whose testimony to credit.[107]

To properly assess witness credibility and fulfill its factfinding mission, the Superior Court considered, as it must, factors such as the availability of corroborating evidence, the accuracy of the testimony, and the witnesses' potential bias.[108] Ultimately, the court deemed Phillips and Murray more credible and found that "they never said to Mr. Reed that 'no Black man can ever get a fair trial in Sussex County.'"[109] Competent evidence supported the court's findings.

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[106] *Reed*, 2022 WL 2967236, at *9.
[107] *Reed*, 2022 WL 2967236, at *9.
[108] *See id.*
[109] *Id.* at *11.

(1) *The Conflicting Accounts*

(a) *Reed's Version*

Reed claimed he steadfastly declined to accept the State's plea offers until the morning of trial on January 13, 2020.[110] He was dressed and ready for trial when Phillips and Murray met with him and, for an hour and a half tried to convince him to accept the State's plea offer, but Reed still refused.[111] Then, according to Reed, Phillips asked if he was "willing to put [his] life in the hands a system that's made to go against blacks and minorities."[112] The jury would be "all older people and white people" and not a jury of his peers.[113] They would not understand Reed's life experiences and why he lied to the police after the shooting.[114] If he went to trial, he would "lose no matter what" and would receive a life sentence.[115] According to Reed, this was the first and only time that trial counsel discussed with Reed any issues relating to the jury.[116]

Reed claimed that, during this portion of the conversation, Phillips restated his chances of success with grimmer odds. Although Phillips previously told Reed that his chances were 50/50, he now estimated an 80% chance that Reed would

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[110] A280–86.
[111] A287.
[112] A287.
[113] A290.
[114] A290.
[115] A295, A316.
[116] A308.

lose.[117] Trial counsel connected the worsening odds to the unfair, racially biased system.[118]

Reed alleged that his trial counsel attempted to illustrate the uphill battle that Reed faced.[119] Phillips told Reed that he had lost both murder trials he defended in Sussex County but won each one he tried in Kent County.[120] He also shared the cautionary tale of Macarthur Risper, who rejected the same plea offer, went to trial, was convicted, and received a sentence of life plus 32 years in prison.[121]

(b) *Trial Counsel's Version*

Phillips was 99% certain that they did not discuss the jury or its makeup during the meetings on the morning of trial.[122] Murray also did not recall any such discussion that morning.[123] Phillips never told Reed—or, for that matter, any other client—that he could not get a fair trial in Sussex County.[124] Phillips never told Reed that the jury would decide the case based on his race.[125] Murray never heard Phillips make such statements to Reed, nor did she make them herself.[126]

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[117] A288.
[118] A288–89.
[119] *See* A296–97.
[120] A296.
[121] A297.
[122] A354.
[123] A409–10.
[124] A352, A388.
[125] A387.
[126] A424.

Phillips had a conversation with Reed about the probable makeup of the jury pool, but the conversation happened weeks before trial, in the context of preparing for jury selection.[127] Based on his professional experience, Phillips found that Sussex County jury panels tended to be "older and whiter" than the general population of Sussex County.[128] This posed two issues that the defense would need to address. First, people in those demographics tended to "be a lot more conservative" and defer to the judgment of law enforcement.[129] Those tendencies posed practical problems for Reed. The police identified Reed as a shooter, and the jury might not interpret the events before and after the shooting in a favorable light.[130] Second, a more uniform jury panel posed a greater risk of groupthink.[131] One of Phillips' primary concerns during jury selection was empaneling a diverse jury—in terms of race, sex, income, careers, and so forth—whose members would hold each other accountable and not merely fall in line with similar impressions.[132] This was strategy that Phillips developed, at least in part, from what he learned

[127] A352–54.
[128] A351, A384.
[129] A385.
[130] *See* A386–87.
[131] A383.
[132] *See* A381–86.

during professional seminars.[133] Phillips gives the same advice to all of his clients, including his white clients.[134]

(2) *The Superior Court reasonably credited trial counsel's account over Reed's.*

After hearing Reed's, Phillips', and Murray's accounts, the Superior Court found: "Trial Counsel credible in their testimony that they never said to Mr. Reed that 'no Black man can ever get a fair trial in Sussex County.' They testified that the issue of race was discussed in much more appropriate, nuanced terms."[135] The Superior Court did not exceed the bounds of reason by crediting Philips's and Murray's testimony over Reed's. Competent evidence—including their testimony and contemporaneous text messages—supported their versions of the events.[136] Reed's account, by contrast, was "uncorroborated, inaccurate, . . . self-serving, and . . . flatly contradict[ed by] his representations at the plea colloquy."[137] The Superior Court detailed the many instances in which these factors came into play:

> First, Mr. Reed claims that Mr. Phillips told him during the January 13, 2020 meeting that he could not receive a fair trial in Sussex County because of his race. As detailed above, Mr. Phillips and Ms. Murray both deny making any such statement to Mr. Reed. Ms. Murray did not

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[133] A386.
[134] A388–89.
[135] *Reed*, 2022 WL 2967236, at *11.
[136] *Id.* at *9–11.
[137] *Id.* at *9.

recall any conversation about the makeup of the jury pool that morning, and Mr. Phillips was 99% sure it did not happen then.

Second, Mr. Reed claims that Mr. Phillips told him he lost both murder trials he defended in Sussex County but won each one he tried in Kent County, to demonstrate "how the system [is more] messed up in Sussex County than it is in Kent County and there's no winning in Sussex County." This is demonstrably not Mr. Phillips' record, suggesting that the stark contrast between Kent County and Sussex County does not exist. It is improbable that Mr. Phillips, whose preference "after all that preparation would have been just to go to trial," would misrepresent his record to persuade Mr. Reed to plead guilty. Ms. Murray did not recall any discussion of Mr. Phillips's record during the January 13 meeting.

Third, Mr. Reed claims that Mr. Phillips had previously characterized Mr. Reed's odds of succeeding at trial as 50/50 but dropped them to 20/80 during the exchange about the unfairness of the system. Mr. Phillips doubted he would have expressed Mr. Reed's chance numerically, and Ms. Murray did not recall it.

Fourth, Mr. Reed claims that Mr. Phillips shared "the cautionary tale of Macarthur Risper"—who rejected a plea offer, went to trial, and received a sentence of life plus 32 years in prison—to persuade him to accept the plea. Mr. Phillips did not recall doing that and did not believe he would. Ms. Murray also did not recall any discussion about other murder cases during the January 13, 2020 meeting.

Fifth, Mr. Reed claims that Trial Counsel advised him that he would receive only a 12 year minimum mandatory sentence if he accepted the State's plea offer because his co-defendant, Mr. Dixon, also received a minimum mandatory sentence. Mr. Reed relies on Ms. Murray's handwritten notes from a meeting with Mr. Reed, where the number "10" is circled next to charges in the plea offer. Mr. Reed says that Trial Counsel presented 10 years as the remainder of the 12-year sentence (he had already served two). However, the minimum mandatory sentence for Manslaughter and PFDCF, is 7 years, not 12 years. This is reflected in Ms. Murray's notes where, next to the circled "10," she identified the plea offer's penalty range as "7–50" years. These notes do not corroborate Mr. Reed's claim that Trial Counsel were assuring him that he "should get the minimum" because

> his "codefendant got the minimum of everything." Rather, the notes support the testimony of Mr. Phillips, who believed Mr. Reed would receive a 10- to 15-year sentence, but not the minimum.
>
> Sixth, Mr. Reed claims that Mr. Phillips, and only Mr. Phillips, came to the prison on January 12, 2020 to discuss the State's plea offer in person. Contemporaneous text messages show, however, that Ms. Murray went to the prison on January 12, 2020 while Mr. Phillips stayed behind to prepare for trial. Ms. Murray confirmed that she was the one who visited Reed that day.
>
> Seventh, Mr. Reed claims that Mr. Phillips authored the notes about sentencing on January 13, 2020 while urging him to accept the State's plea offer. But Mr. Phillips denied writing it, and Ms. Murray identified it as her handwriting.
>
> Eighth, and of great importance to me, Mr. Reed's account is contradicted by his own statements at the time of the plea. Mr. Reed told me that he was satisfied with Trial Counsel's representation of him. He testified that no one forced him to plead guilty. He completed a TIS Form and affirmed that his answers were truthful. Absent clear and convincing evidence to the contrary, Mr. Reed's answers on the TIS Form and his statements during the plea colloquy are presumed to be truthful. Mr. Reed's own self-serving, uncorroborated testimony is not clear and convincing evidence.[138]

Reed contends that the Superior Court's "factfinding mission was not conducted on a level playing field."[139] First, he argues that the court accepted trial counsel's testimony based on "dim recollections" and advice "usually or probably given" while intensely scrutinizing Reed's.[140] Reed made a similar argument

[138] *Id.* at *10–11 (internal footnotes omitted). The Superior Court's findings are supported by the record at A80–84, A89, A287–98, A314–16, A342, A346–47, A350, A354, A377, A389, A405–06, A409–10, A428, A450–52, and A490–96.
[139] Opening Br. 27.
[140] Opening Br. 27–28.

below, criticizing trial counsel's testimony as "bereft of detail" in comparison to his own.[141] The Superior Court reasonably rejected Reed's position. Trial counsel's habits or routine practices were relevant to the determination of what advice they would have provided Reed.[142] And whereas some lapses of memory should be expected with the passage of time, verifiable inaccuracies—such as those in Reed's account—stand out as problematic. Reed's version of the January 13 meetings may have been detailed, but those details were not credible.

Second, Reed complains that the Superior Court considered the availability of corroborating evidence because he could not offer independent support of his own account.[143] Yet, consideration of corroborating evidence is a common and useful tool for judging credibility. For example, it is considered when weighing witnesses' testimony at trial or when judging the reliability of an informant's tip.[144] Reed's lament about the unavailability of evidence supporting his claim is especially unavailing considering that he, as the petitioner for postconviction relief, had the burden of proof.[145]

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[141] A487.
[142] *See* D.R.E. 406.
[143] Opening Br. 27.
[144] *E.g.*, *Morales v. State*, 133 A.3d 527, 532 (Del. 2016) (witness testimony); *Dendy v. State*, 1989 WL 160444, at *3 (Del. Dec. 27, 1989) (informants' tips).
[145] *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

Third, Reed questions why the fact that his testimony was self-serving "would make him any less credible."[146] Bias, of course, is one of the most fertile grounds for impeaching the credibility of a witness.[147] Reed's story may not be new,[148] but he unveiled it when he decided he wanted to rescind his pleas.[149] The fact that Reed maintains his story while he continues that effort does not remove the element of self-interest that existed from its inception or shield it from doubt or skepticism. The Superior Court's factfinding was not defective or partial. Rather, it followed the evidence presented and logical inferences therefrom.

Reed also contests the Superior Court's decision to assign "great importance" to his statements at the plea colloquy.[150] Even though Reed "*claims* he was operating under deficient advice when answering the [Superior] Court's questions during the colloquy,"[151] it is only that: a claim. No court had made that factual finding. And, of course, the Superior Court has now specifically rejected it.[152]

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[146] Opening Br. 27.
[147] *Jackson v. State*, 770 A.2d 506, 515 (Del. 2001).
[148] Opening Br. 27.
[149] A102.
[150] Opening Br. 30.
[151] Opening Br. 30 (emphasis added).
[152] *Reed*, 2022 WL 2967236, at *12.

Reed had gone back and forth over the plea offer. He accepted it, signing the plea forms.[153] Then he rejected it at the plea hearing.[154] Then he accepted it again on the day of trial and entered it in open court.[155] He then sought to back out again.[156] But he could not simply rescind it: he needed some "fair and just reason."[157] Reed now claims that he never intended to enter a plea until counsel's advice forced his hand, but he told the Superior Court that day—when the advice was allegedly front and center for him—that no one forced him to plead guilty.[158] Reed's unconvincing testimony was not sufficient evidence to rebut the presumption that his statement during the plea colloquy was the truthful one.[159]

Finally, Reed maintains that the Superior Court's decision was influenced by an incorrect factual finding.[160] He claims the Superior Court misapprehended when Reed first alleged that his counsel advised him to plead guilty because of his race.[161] Citing the Superior Court's statement that Reed made the allegation "to create a way out of the sentence [it] had imposed," Reed argues that the court

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[153] A337–38; A468–69.
[154] A63–75.
[155] A80–89.
[156] A100–03.
[157] *See* Super. Ct. Crim. R. 32(d).
[158] *See Reed*, 2022 WL 2967236, at *12.
[159] *Id.* at *11 (citing *Savage v. State*, 2003 WL 214963, at *2 (Del. Jan. 31, 2003); *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997)).
[160] Opening Br. 25–26.
[161] Opening Br. 26.

incorrectly understood Reed as first making the allegation after his sentencing.[162] He thus argues that the court wrongly interpreted his actions as reflecting buyer's remorse and wrongly discredited his testimony for that reason.[163]

The Superior Court did not misconstrue how the events unfolded. It cited Reed's first letter, submitted eight days after his plea hearing, in which Reed made the advice allegation against his counsel.[164] It cited Reed's plea-withdrawal motion dated "February __, 2020," which also raised the allegation.[165] The court found it "likely that the motion was mailed prior to sentencing on February 28, 2020."[166]

The Superior Court determined that Reed was attempting to avoid the risk of the harsh sentence it would ultimately impose because he was no longer comfortable with that risk. The Superior Court's statement that Reed made the allegation "to create a way out of the sentence [it] had imposed" was an inartful way to express that idea. Later in the opinion, the Superior Court more clearly stated that Reed, "consistent with his history of uncertainty, . . . changed his mind yet again about whether admitting guilt would secure a lesser sentence."[167] Indeed,

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[162] Opening Br. 25 (citing *Reed*, 2022 WL 2967236, at *11).
[163] Opening Br. 25–26.
[164] *Reed*, 2022 WL 2967236, at *1.
[165] *Id.* at *2.
[166] *Id.*
[167] *Id.* at *13.

the harsh sentence appeared to cement Reed's remorse about taking the plea, but from the time he accepted the plea, he knew (and may have regretted) the risk of such a sentence. And he demonstrated that remorse by attempting to withdraw his plea just eight days after entering it.

The Court recognized when Reed initiated his attempts to withdraw his plea and was well aware that his remorse began before his sentencing. There was no fundamental misapprehension of the timeline or Reed's motivations.

(3) *The Superior Court reasonably found that conversations with family precipitated Reed's guilty plea—not the alleged advice about race.*

Reed rejected the State's plea offer at the January 6, 2020 plea hearing.[168] One week later, he changed his mind and accepted it.[169] Reed alleges that trial counsel's advice regarding race prompted the decision, but the Superior Court rejected that allegation. Its investigation on remand revealed what factors actually caused Reed's change of heart on the day of trial: his conversations with family.[170]

Reed contends the Superior Court made this finding "without any factual basis" and denies the conclusion.[171] But ample, competent evidence developed during the evidentiary hearing supported the court's finding.

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[168] A63–75.
[169] A88–89.
[170] *Reed*, 2022 WL 2967236, at *12–13.
[171] Opening Br. 31.

During the week between Final Case Review and trial, Phillips and Murray had conversations with Reed's family and girlfriend, who wanted Reed to take the plea.[172] Phillips told the prosecutors that Reed's sister and brother "were going to see him this weekend" and "think he should have taken [the plea]."[173] At the prison on January 12, Murray and Reed talked about Reed's girlfriend giving birth and whether he would be able to see his child outside of prison.[174] Reed told Murray that he wanted to discuss it more with his girlfriend, giving Murray the impression that he was leaning toward taking the offer.[175] The next morning, Reed was still nervously weighing whether to accept the plea offer.[176] Trial counsel assured Reed that they were ready for trial.[177] Nevertheless, they discussed Reed's exposure in light of the possible choices and outcomes.[178] The ultimate sentence was always one of Reed's chief concerns.[179] Murray advised that sometimes taking a plea is about damage control and that manslaughter had less exposure than

[172] A369–70, A404–05.
[173] A451.
[174] A405, A421.
[175] A421–22.
[176] A409.
[177] A409.
[178] A371, A422–23.
[179] A364–65, A423.

murder.[180] Reed decided to accept the State's plea offer—a decision, Murray believed, that resulted from Reed's conversations with his girlfriend.[181]

Like Reed's claims about the advice itself, his claims about the impetus of his decisions were not worthy of credit. The record developed on remand demonstrated that Reed struggled to weigh the costs and benefits of pleading guilty, repeatedly changed his mind, and ultimately entered the plea after consulting with his family and girlfriend.[182]

C. The Superior Court reasonably denied the Advice Claim.

Reed contends that the Superior misconstrued this Court's holding on the initial appeal "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.'"[183] He argues that the Superior Court's inquiry was supposed to be more nuanced and explore "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."[184] He claims that Phillips' advice "would lead any defendant to avoid a trial."[185]

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[180] A423.
[181] A410–11.
[182] *Reed*, 2022 WL 2967236, at *13.
[183] Opening Br. 32.
[184] Opening Br. 33.
[185] Opening Br. 33.

Reed cites the Superior Court's use of quoted language as evidence that the court was conducting an inflexible, narrow review. But the Superior Court was simply tying a portion of its decision to this Court's instructions: the directive to "prob[e] the question of whether Reed's attorney told him words to the effect that a Black man will not receive a fair trial in Sussex County."[186] The Superior Court was not under the impression that its mandate on remand was so narrow, and its decision does not reflect it, either.

In its opinion remanding this case to the Superior Court, this Court stated that "[i]f Reed's counsel had instructed him that he would not receive a fair trial, that would fall below an objective standard of reasonableness" and there would have been "a reasonable probability that had counsel not made such an error, Reed would not have entered a plea."[187] That ruling indicated that such definitive advice would constitute deficient performance and actual prejudice under *Strickland* as a matter of law. The *per se* rule was narrow, and for good reason. The record on the precise content and context of trial counsel's advice had not yet been developed.[188] Furthermore, this Court acknowledged that defendants and their counsel operate in an imperfect world, one that suffers some degree of racial bias.[189] Criminal

[186] *Reed*, 258 A.3d at 826.
[187] *Id.* at 825–26.
[188] *Id.* at 831.
[189] *Id.* at 825 n.87.

defendants face material consequences in that reality, and a defense attorney who ignores its risks would do his client a disservice. The system itself does not ignore the possibility of racial bias creeping into trial. *Batson v. Kentucky*,[190] for example, bars either party from striking a juror on the basis of race or sex. For similar reasons, the Missouri Court of Appeals held in *Dorsey v. Missouri*[191] that defense counsel did not perform deficiently under *Strickland* by advising his client to waive a jury trial because of the racial makeup of the jury pool.

The Superior Court adopted a similarly empathetic view of how the sensitive issue of race might impact the criminal justice system:

> Any discussion of how race may affect decision-making in the criminal law process will always be fraught with difficulty and concern. Even considering that race may affect outcomes is troubling. But for me the answer is not to ignore the racial issue. The goal is race neutrality, but assuming that goal has been achieved ignores evidence to the contrary.[192]

The Superior Court found that trial counsel did not give definitive advice that Reed could not receive a fair trial because of his race.[193] Indeed, Phillips testified: "I just know I would not have said that. I would not have said he couldn't have gotten a fair trial period."[194] The Superior Court credited trial

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[190] 476 U.S. 79 (1986).
[191] 113 S.W.3d 311 (Mo. Ct. App. 2003).
[192] *Reed*, 2022 WL 2967236, at *18.
[193] *Id.* at *12.
[194] A352.

counsel's testimony and found that he instead provided "a more nuanced discussion of the factor of race in criminal trials."[195] The court summarized Phillips' account as follows:

> 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. Having practiced in all three Delaware 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." This was relevant to Mr. Phillips because the people who ended up in the jury panel do not have the same experience with criminal law enforcement as do the defendants. Mr. Phillips testified that in Sussex 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." That mindset i[s] more conservative. Their experience with law enforcement is mostly positive, so they believe 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." Mr. Phillips went on to explain that everyone comes into jury service with their own implicit biases. Mr. Phillips explained diversity helps to hold people accountable in the jury room. He had learned this from professional seminars. In a trial, evidence would have been presented involving guns, possible drug deals and other activities that would be negatively perceived by an older and whiter jury. Phillips gives the same advice to all his clients, including his white clients.[196]

The Superior Court conducted the specific, searching inquiry into the precise nature and timing of Phillips' advice. Rather than require defense attorneys to ignore the realities of an imperfect world, the court recognized there was room for discussing the topic of race short of coercing their clients to plead guilty. In this

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[195] *Reed*, 2022 WL 2967236, at *12.
[196] *Id.* at *8.

case, the court found that Phillips discussed topics of race "in much more appropriate, nuanced terms."[197] Accordingly, the Superior Court did not find deficient performance or actual prejudice as a matter of law under this Court's decision on the first appeal.

The Superior Court's analysis was not finished, however, because this Court ordered it to "address Reed's Rule 61 challenges . . . in view of the evidentiary record as further developed."[198] The Superior Court thus applied *Strickland* to its findings of fact. It held that "competent counsel should discuss the issue of race with the client," as trial counsel did with Reed, because those issues persist in the real world, despite the system's efforts to neutralize them.[199] Then the court found that Reed suffered no prejudice as a result of the allegedly wrongful advice.[200] As discussed above, the court found that Reed entered the plea because of conversations with his family, who wanted him to take the plea—not because of any advice involving the topic of race.[201]

These facts supported the denial of the Advice Claim. The Superior Court did not abuse its discretion in doing so.

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[197] *Id.* at *11.
[198] *Reed*, 258 A.3d at 831.
[199] *Reed*, 2022 WL 2967236, at *11.
[200] *Id.* at *12–13.
[201] *Id.*

D. The Superior Court reasonably denied the Withdrawal Claim.

The Superior Court also reasonably rejected Reed's Withdrawal Claim.[202] The court found that Reed did not rescind his request to file a plea-withdrawal motion and held that trial counsel therefore performed deficiently by not filing it.[203] But the court concluded that Reed suffered no actual prejudice as a result.[204] In consideration of the "*Scarborough* factors," the court found no reasonable probability that it would have granted Reed's plea-withdrawal motion if his trial counsel had filed it.[205]

Under Criminal Rule 32(d), this Court "may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason." The decision lies within the sound discretion of the court.[206] When evaluating whether there is any fair and just reason for the plea withdrawal, the court considers five *Scarborough* 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

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[202] *Id.* at *13–17.
[203] *Id.* at *13.
[204] *Id.* at *17.
[205] *Id.* at *13–17.
[206] *Scarborough*, 938 A.2d at 649.

the court.[207] The court must consider each factor but need not weigh them equally.[208] Some may justify relief on their own.[209]

The Superior Court considered each of these factors and determined that none weighed in favor of granting a plea-withdrawal motion in this case. First, the Superior Court found there were no procedural defects in taking the plea.[210] Reed does not challenge that finding.[211]

Second, the Superior Court found that Reed voluntarily entered the pleas.[212] Reed challenges this finding, contending that he was "in trial clothes and ready to proceed to trial" and only changed his mind at the last minute because trial counsel advised that he would not get a fair trial because of his race.[213] As discussed above, the Superior Court properly found that Reed's advice allegations were not credible. Accordingly, the Superior Court properly rejected the argument under the Withdrawal Claim, too.

Third, the Superior Court found that Reed had no basis to assert legal innocence.[214] Reed challenges this conclusion, arguing that his trial counsel

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[207] *Id.*
[208] *Id.*; *see also Reed*, 258 A.3d at 830.
[209] *Scarborough*, 938 A.2d at 649.
[210] *Reed*, 2022 WL 2967236, at *15.
[211] *See* Opening Br. 36–39.
[212] *Reed*, 2022 WL 2967236, at *15–16.
[213] Opening Br. 36.
[214] *Reed*, 2022 WL 2967236, at *16.

believed Reed had "a basis to put the State to its proof at trial."[215] The Superior Court correctly held that being able to subject the State's case to adversarial testing is not equivalent to asserting a legally cognizable defense.[216]

In support of his assertion, Reed cites his trial counsel's presentation at the sentencing hearing, including Murray's stated belief there was reasonable doubt that Reed shot Hatton.[217] Reed argues that he would not have merely challenged the State's evidence but presented a narrative that he simply encouraged a fistfight and was not party to the homicide.[218] Also, in the court below, Reed denied shooting Hatton.[219] He pointed out that the police recovered only a single 9mm projectile, but witnesses saw Reed with a revolver.[220] He said the State's witnesses would be subject to cross-examination.[221] He said the surveillance video showed that Reed was not involved in any disagreement with Hatton at the deli before the shooting.[222] Reed argued that his proffered motive—shooting Hatton because Hatton owed him money—was less believable than the motives of the people involved in the disagreement at the deli.[223]

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[215] Opening Br. 36.
[216] *Reed*, 2022 WL 2967236, at *16.
[217] Opening Br. 36–37.
[218] Opening Br. 38.
[219] A262.
[220] A262.
[221] A263.
[222] A262–63.
[223] A263.

Reed's assertions do not amount to a basis to assert legal innocence. They attack the weight and credibility of the State's evidence but do not amount to a legally cognizable defense. He does not offer evidence of mental illness, involuntary intoxication, duress, entrapment, mistake, justification, or immunity.[224] He also does not suggest that the State would be incapable of proving the charges as a matter of law. Indeed, the State proffered that four witnesses would identify Reed as someone who shot and killed Hatton.[225] As the Superior Court observed:

> If the mere ability to challenge the weight of the State's evidence constituted a basis to assert legal innocence, this factor would cease to be a meaningful inquiry into whether there is a fair and just reason to withdraw the plea. Only perfect and unimpeachable cases would survive a plea withdrawal motion, destroying the procedural certainty the rule is designed to defend.[226]

Accordingly, the Superior Court properly concluded that Reed had not established that he had a basis to assert legal innocence.

Fourth, the Superior Court found that Reed had adequate legal counsel throughout the proceedings.[227] Reed challenges this conclusion, pointing to the allegation that counsel advised him to plead guilty because of his race and the finding that his trial counsel performed deficiently by not filing the plea-

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[224] *See* 11 *Del. C.* §§ 401–75.
[225] A133.
[226] *Reed*, 2022 WL 2967236, at *16.
[227] *Reed*, 2022 WL 2967236, at *17.

withdrawal motion.[228] Again, the Superior Court found trial counsel gave no such advice to plead guilty because of his race. Furthermore, Reed's argument about counsel's failure to file the plea-withdrawal motion is circular. It is the conduct that triggered this prejudice inquiry. If it was sufficient to justify withdrawal of the plea, then it would destroy the need to independently evaluate the second prong of *Strickland*. Moreover, the failure to file the motion occurred after Reed entered the pleas and, therefore, could not have affected its validity. It would not be "fair and just" to allow Reed to withdraw his pleas for reasons that had no direct or indirect bearing on his decision.

Fifth, the Superior Court found that there was a risk of prejudice to the State by granting the plea-withdrawal motion.[229] The court recognized that "trials do not get better with time" and that "[p]utting this case back on the path to trial risks problems with witness availability and memory."[230] Thus, even though "the importance of this factor is slight," it still weighed against granting the plea-withdrawal motion.[231] Reed does not challenge this conclusion on appeal.[232]

Because no factor weighed in favor of allowing Reed to withdraw his plea, the Superior Court appropriately concluded there was no reasonable probability

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[228] Opening Br. 38.
[229] *Reed*, 2022 WL 2967236, at *17.
[230] *Id.*
[231] *Id.*
[232] *See* Opening Br. 36–39.

that it would have granted such a motion, if filed.[233] Reed contends that the court's mistaken belief that Reed "concocted his account of the advice he was given" after his sentencing erroneously informed the court's decision.[234] But as explained above, the Superior Court was not under any such misapprehension. In any event, Reed's motivation for pursuing the withdrawal of his plea is not a factor under Rule 32(d) or *Scarborough*, and the Superior Court did not rely upon it in its analysis.[235] For all of these reasons, the Superior Court did not abuse its discretion by denying the Withdrawal Claim.

[233] *Reed*, 2022 WL 2967236, at *17.
[234] Opening Br. 39.
[235] *See Reed*, 2022 WL 2967236, at *13–17.

CONCLUSION

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

Respectfully submitted,

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Date: November 7, 2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERRY REED,	§	
	§	No. 302, 2022
Defendant Below,	§	
Appellant,	§	On appeal from the Superior Court
	§	of the State of Delaware
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

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Date: November 7, 2022

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