No. 24-6787

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Ralph Reed — PETITIONER

VS.

Brian Emig, Warden, JTVCC — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Delaware Supreme Court

PETITON FOR WRIT OF CERTIORARI

Ralph Reed

1181 Paddock Road

Smyrna, DE 19977

QUESTION(S) PRESENTED

1. Whether the Superior Court denial of Reed's recently-filed motion for postconviction relief, made pursuant to Delaware Superior Court Criminal Rule 61, was an abuse of discretion denying Reed due process and hindering his pursuit of federal *habeas* relief of all meritorious constitutional claims given that the procedural bars are inapplicable when presenting a colorable claim under Rules 61(i)(4)-(5)?

2. Whether Due Process and Equal Protection of State and Federal law are violated where Reed's sentence for Murder First Degree has not been addressed under newly constructed terms now that Delaware's sentencing statute for Murder First Degree, 11 Del. 4209, was deemed unconstitutional?

3. Whether Reed's mandatory life-without-parole sentence constitutes cruel and unusual punishment where progressive and developing evidence indicates that the mitigating qualities of youth contemplated for those under the age of 18 actually encapsulates 18, 19, and 20-year-olds?

4. Whether Due Process and Equal Protection of State and Federal law are violated where Reed, an indigent, *pro se* litigant, was not afforded the assistance of counsel in postconviction proceedings despite clear guidance that "the judge shall appoint counsel for an indigent movant's first timely-filed postconviction motion"?

5. Whether Reed suffered ineffective assistance of counsel where counsel failed to explore the implied bias and the court's treatment of the Black juror in comparison to similarly-situated White jurors, as contemplated by Batson v. Kentucky?

6. Whether Reed's rights were violated by the use of discriminatory voir dire questioning that secured an all-White jury who actually knew the victim's friends and his relatives?

7. Whether Reed's rights were violated by trial counsel's failure to properly investigate and subpoena two crucial defense witnesses that support his innocence?

LIST OF PARTIES

[☐] All parties appear in the caption of the case on the cover page.

[☒] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:
Kathleen Jennings
Attorney General of Delaware
Delaware Department of Justice
820 North French Street, 8th Floor
Wilmington, DE 19801

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITON FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[☐] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix to the petition and is

[☐] reported at ; or,
[☐] has been designated for publication but is not yet reported; or,
[☐] is unpublished.

The opinion of the United States district court appears at Appendix to the petition and is

[☐] reported at ; or,
[☐] has been designated for publication but is not yet reported; or,
[☐] is unpublished.

[☒] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

[☒] reported at unknown; or,
[☐] has been designated for publication but is not yet reported; or,
[☐] is unpublished.

The opinion of the Superior Court court appears at Appendix A to the petition and is

[☒] reported at unknown
[☐] has been designated for publication but is not yet reported; or,
[☐] is unpublished.

JURISDICTION

[☐] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was .

[☐] No petition for rehearing was timely filed in my case.

[☐] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: , and a copy of the order denying rehearing appears at Appendix .

[☐] An extension of time to file the petition for a writ of certiorari was granted to and including [date] on [date] in Application No.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[☒] For cases from **state courts**:

The date on which the highest state court decided my case was October 9, 2024. A copy of that decision appears at Appendix B.

[☒] A timely petition for rehearing was thereafter denied on the following date: , and a copy of the order denying rehearing appears at Appendix .

[☐] An extension of time to file the petition for a writ of certiorari was granted to and including [date] on [date]in Application No.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The decision of the Delaware lower court, which Petitioner seeks review, was issued on October 9, 2024. This petition was filed within 90 days of the Delaware lower court decision in compliance with United States Supreme Court Rule 13.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment to the United States Constitution provides, in pertinent part: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The 14th Amendment to the United States Constitution provides, in pertinent part: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Reed was charged by indictment with one count of Murder First Degree and Possession of a Firearm During Commission of a Felony on May 6, 2000. On January 19, 2001, the Court imposed a sentence of life without parole under 11 Del. 636 and 11 Del. 4209. A timely direct appeal followed and the Delaware Supreme Court affirmed his conviction on August 1, 2001. There were two previously filed motions for postconviction relief between July 8, 2004 and June 26, 2013. On November 8, 2023, a third motion for postconviction relief was filed, citing, *inter alia,* that Rule 61(i)(5) was applicable as an exception in overcoming the procedural bars, given the dates of his conviction and subsequent rulings. The Superior Court denied the third motion on April 3, 2024. A timely notice of appeal followed and the opening brief in support thereof. This opening brief is filed well within 90 days of the Delaware Supreme Court decision in compliance with United States Supreme Court Rule 13.

One of the prevailing claims that attaches to all potential claims is that Reed was forced to pursue his Rule 61 motion without counsel. Reed's case was decided several years before the amended rule which under 61(e)(2) provided: "the judge shall appoint counsel for an indigent petitioner's first timely postconviction motion..."[1]

Part of the rule that did exist, which is being disregarded is Rule 61(i)(5) and the miscarriage of justice exception where review of successive petition is reasonable in light of the seriousness of a retroactive application. See Burton v. State, 2018 Del. LEXIS 588, and as cited in Purnell, No. 113, 2020. The Court's ruling at page 5, claiming that Grounds 1 and 4 are barred, and in glossing over Rule 61(d)(2)(ii) as an exception they suggest "no such pleading was made." Both of these statements are incorrect.

Reed contends that Martinez v. Ryan excuses the default and cause can be established here. See Mack v. Superintendent, 714 Fed Appx. 151. Reed has never had counsel for any of his postconviction claims and yet the court fails to acknowledge the necessity of Rule 61(i)(5) in the pre-2014 version of Rule 61. Where the Court shall only apply the constitutional standards that prevailed at the time the original proceedings took place. See Flamer, 585 A.2d at 749.

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[1] See Super. Ct. Rule 61(e)(2), Amended May 6, 2013.

REASONS FOR GRANTING THE PETITION

The Delaware Supreme Court improperly concluded that Reed did not carry his burden that the Superior Court unreasonably applied the Strickland standard to the facts of Reed's case.

Like the courts before it, the Delaware Supreme Court erred when it failed to consider that Reed was not prejudiced during his trial and post-trial.

The Delaware lower courts have violated the Sixth, Eighth, and 14th Amendments to the United States Constitution whereas the court held, in Hurst v. Florida, 577 U.S. 92 (2016), Rauf v. State, and Powell v. State, that is retroactive to capital and non-capital offenders. Under Delaware law, statute 11 Del. 4209 was deemed unconstitutional entirely and cannot be severable from the rest. Reed was charged under an unconstitutional sentencing scheme statute (11 Del. 636; 11 Del. 4209) that violates Reed's indictment and sentence entirely. Consequently, Reed should be resentenced under a lesser offense.

Because Reed was sentenced under an unconstitutional 11 Del. 4209 statute in a non-capital first degree murder, under this unconstitutional Delaware statute 11 Del. 4209 unconstitutional violation of Reed's sentence. Reed's sentence should be considered void ab initio.

Reed contends that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for those adolescents who were above the age of 18-years-old but not yet adults. Automatically mandatory life sentences, without the possibility of parole, runs afoul of the requirement of individualized sentencing for defendants facing the most serious penalties. Graham v. Florida, 130 S. Ct. 2011 (2010) and Miller v. Alabama, 567 U.S. 407.

Therefore, Reed contends that to sentence him who was an adolescent at the time of the crime to an automatic mandatory life sentence, without the possibility of parole, without a mitigating hearing, is unconstitutional and subjects him to cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution and Reed's life sentence should be considered void ab initio.

As there is evidence that one's brain continues to mature past the age of twenty, it is unconstitutional to apply the same mandatory sentence to all offenders, regardless of age. In the instant case, Reed was 18-years-old and therefore, his brain was still continuing to mature.

Supreme Court Rule 10(a) provides that a writ of certiorari may be granted where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter, has decided an important federal question in a way that conflicts with a decision by a state of last resort, or has so far departed from the accepted and usual court of judicial proceedings, or sanctioned such a departure by al lower court, as to call for an exercise of this court's supervisory power." In finding that Reed had not carried his burden of showing that the Delaware Supreme Court's factual determinations were objectively unreasonable and the court unreasonably applied the Strickland standard, the Delaware court has sanctioned Reed's conviction despite trial counsel overriding his own client's constitutional right to effective assistance of counsel. As such, this court should exercise its supervisory power and grant this petition for a writ of certiorari.

The Delaware Supreme and Superior Court holdings that Reed did not carry his burden of showing that the state court's factual determinations were objectively unreasonable was contravened by the factual record.

MERITS OF THE ARGUMENT

Federal courts will only honor state court postconviction procedural rulings, if those rulings satisfy the fair notice requirements arising from the Due Process Clause of the United States Constitution. To satisfy fair notice requirements, state courts must provide postconviction petitioners with adequate notice of its procedural rules. If a state court applies a new or modified procedural rule without adequate notice, then federal courts will not defer to the state procedural ruling. Instead, the federal courts will consider the merits of the postconviction motion *de novo*. This is what will happen for Reed should this court not reverse the lower court's application Rule 61 (effective June 2014) to Reed's successive petition.

- For a state rule to be adequate, it must be firmly established and regularly applied so as to provide petitioners with notice of how to present their claims prior to the petitioner's initial default date. See Ford v. Georgia, 498 U.S. 411, 424 (1991).
- Where a petitioner meets the requirements of a prior version of the rule, but is later defaulted because of a novel and unforeseeable change to that rule, that change renders the rule inadequate as applied to that petitioner. See generally NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457 (1958).
- The June 2014 version of Rule 61 was applied to Reed's successive petition because this version contains language that it was "effective immediately." The Delaware lower courts

have relied upon this effectivity language repeatedly to uphold dismissals of successive petitions. However, this Court has never analyzed whether this effectivity language satisfies federal due process requirements. As explained above, it does not.

- Therefore, the Delaware lower court erred by relying on Delaware Supreme Court prior opinions to determine that the 2014 version of Rule 61 applies to Reed's successive Rule 61 motion rather than the rule in effect at the time of his conviction.
- Had the lower court applied the correct version of Rule 61, the court would have ruled that Reed pled sufficient facts to establish that merits review is warranted in the "interest of justice" and to prevent a "miscarriage of justice." Under the version applicable to Reed's conviction, a petitioner need not conclusively prove the underlying claim in order to overcome the procedural bars and receive merits review under the Rule 61(i)(5) exception; Reed's motion offers more than mere speculation. See State v. Kirk, 2004 WL 396407 at *4-6; State v. Mayfield, 2004 WL 21267422.
- The case law in place at the time of Reed's default also recognized that repetitive or formally adjudicated claims would be considered in the interest of justice. The Delaware Supreme Court defined the exception with breadth and flexibility. In Weendon v. State, 750 A.2d 521, the Delaware Supreme Court described the former adjudication bar of Rule 61(i)(4) as codification of law of the case doctrine, embracing two exceptions; (1) for error or a change in circumstances, particularly factual circumstances; and (2) for equitable concerns about injustice that trump the prior ruling. Id. at 527-28.
- The grounds in Reed's filing of October 27, 2023, are:

- (1) procedural bars of Rule 61, post-June 2014, are not applicable and the claim should be reviewed under the old version of Rule 61(i)(5) ("miscarriage of justice" exception);
- (2) counsel was ineffective for failing to challenge the constitutionality of Reed's sentence after 11 Del. 4209 was stricken as unconstitutional in its entirety and could not be severable from the rest of the 11 Del. 4209 sentencing statute scheme;
- (3) Progressive/developing newly discovered evidence of life without the possibility of parole is expanded beyond the age of 18. Mandatory life without parole sentences were unconstitutionally cruel when applied to youthful defendants mitigating circumstances;
- (4) Reed has a constitutional right to counsel on his first and all of his postconviction relief motion initial collateral review proceedings under Martinez v. Ryan;
- (5) The Batson claim: ineffective assistance of counsel for failing to explore the implied bias and the court's treatment of the Black juror in comparison to similarly situated White juror;
- (6) The use of discriminatory *voir dire* questioning was to secure an all-White jury who actually knew the victim's friends and his relatives; and
- (7) Trial counsel failed to properly investigate and subpoena two crucial defense witnesses that support his innocence.

- In addition to the above claims, Reed filed a properly-placed motion to appoint counsel and motion for an evidentiary hearing. Both were denied based on the unfair usage of the

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY CONCLUDING THAT REED HAS NOT REACHED THE EXCEPTIONS TO THE PROCEDURAL BARS OF HIS PETITION FOR POSTCONVICTION RELIEF CLAIM FOR TIME LIMITATIONS OF THE ONE-YEAR TIME BAR EIGHTH AND 14TH AMENDMENT RIGHTS § 11 DEL. 4209 STATUTE WAS INVALID.

Scope of Review

Because the petitioner claim the aggravated murder statute is unconstitutional as applied, therefor he is exempt from the one-year time bar. Hurst v. Florida, Rauf v. State, 145 A.3d 430 (Del. 2016); 11 Del. 636; 11 Del. 4209.

Argument

Petitioner's sentences became final long ago, and petitioners are generally barred from filing a PRP "more than one year after the judgment becomes final." R.61(i). But six enumerated exceptions temper this one-year time bar. R. 61(i)(5)(1)(2)(3). One of these exceptions allows petitioner to file a PRP without any deadline if the statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct. 11 Del. 636; 11 Del. 4209. This exception is important because convictions under unconstitutional statutes "are as no conviction at all and invalidate the petitioner's sentence." Rauf v. State, 145 A.3d 430 (Del. 2016); Hurst v. Florida; In re Pers. Restraint of Runyan, 121 Wn. 2d 432, 445, 853 P.2d 424 (1993).

Petitioner challenges the constitutionality of 11 Del. 636 11 Del. 4209, the aggravated murder statute, as applied to him. Petitioner are correct that the aggravated murder statute's

unconstitutional as applied, then the time bar presents no obstacle to his petition. R. 61(i)(5)(1)(2)(3).

In this case, the petitioner challenge not a regular sentencing statute but the aggravated murder statute. The aggravated murder statute is different from sentencing statutes – it requires the state to charge and the jury (or other trier of fact) to find the defendant "guilty" of that very same aggravated murder charge. In other words, petitioner's challenge to the constitutionality of the aggravated murder statute, which criminalizes premeditated first degree murder as aggravated murder in certain circumstances, is a challenge to the criminal statute that he was "convicted of violating." 11 Del. 636; 11 Del. 4209.

Petitioner's Eighth and 14th Amendment rights were violated by the continued unlawful imprisonment under an unconstitutional sentencing scheme. Petitioner went to trial in Sussex County Superior Court and was sentenced to life under 11 Del. 4209. That statute was deemed unconstitutional and struck down. Hurst v. Florida Due Process and Equal Protection have been violated due to an ex post facto sentencing enhancement caused by the framework of the unconstitutional sentencing scheme with 11 Del. 4209 being invalidated.

Petitioner's motion satisfies the pleading requirements of subparagraph (2)(ii) of subdivision (d) of this rule because petitioner pleads with particularity that would retroactive repeal 11 Del. 4209 and appellant claim that a new rule of constitutional law in Hurst v. Florida made retroactive to cases on collateral review by the Delaware Supreme Court applies to petitioner's case and renders the imposed sentence invalid.

Because the aggravated murder statute that Appellant was convicted of violating is unconstitutional as applied to their conduct, the one-year time bar for collateral attacks does not apply. 11 Del. 4209; 11 Del. 636.

ARGUMENT

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PETITIONER'S CLAIM THAT HE DOES NOT MEET THE REQUIREMENT OF AN INDIVIDUALIZED SENTENCE – ONE THAT CONSIDERS THE MITIGATING QUALITIES OF YOUTH – MUST APPLY TO DEFENDANT AT LEAST AS OLD AS 18, 19, OR 20 AT THE TIME OF THEIR CRIMES AGGRAVATED MURDER STATUTE IS UNCONSTITUTIONAL AS APPLIED THE PROTECTION EXTENDS TO YOUTHFUL DEFENDANTS [AGES 18-20] WITHOUT FULLY DEVELOPED BRAINS VIOLATE OUR FEDERAL AND STATUTE CONSTITUTION.

Scope of Review

Our federal and state constitution safeguard protecting youthful defendants that neuroscience does provide many youthful defendants older than 18 share the same developing brains and impulsive behavioral attributes as those under 18. These 19-and-20-year-old defendants qualify for some of the same constitutional protections as well. Id. at 570. Roper recognized that the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Roper, Miller, Montgomery, Graham, federal and state Eighth Amendment prohibit LWOP sentences for juvenile offenders bar against cruel punishment, bar against cruel and unusual punishment, also forbids mandatory LWOP sentences for juvenile offenders. Mitigating circumstances.

Argument

Six enumerated exceptions temper the one-year time bar. Del. Rev. Code 61. One of these exceptions allows petitioner to file a personal restraint petition without any deadline if the statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct. 11 Del. 626; 11 Del. 4209. This exception is important because convictions under unconstitutional statutes are as no conviction at all and invalidate the

petitioner's sentence.

No meaningful neurological bright line exists between age 17 and age 18 or between age 17 on the one hand, and ages 19 and 20 on the other hand. Thus, sentencing courts must have discretion to take the mitigating qualities of youth – those qualities emphasized in Miller v. Alabama and State v. Houston-Sconiers – into account for defendants younger and older than 18.

There is no meaningful cognitive difference between 17-year-olds and many 18-year-olds. When it comes to Miller v. Alabama's prohibition on mandatory LWOP sentences, there is no constitutional difference either. Just as courts must exercise discretion before sentencing a 17-year-old to die in prison, so must they exercise the same discretion when sentencing an 18-,19-, or 20-year-old.

Nature of action: one offender convicted of aggravated first-degree murder committed when he was 18-years-old and sentenced to life imprisonment without the possibility of parole (LWOP) as mandated by 11 Del. 636; 11 Del. 4209 sought relief from personal restraint, arguing that mandatory LWOP sentences were unconstitutionally cruel when applied to youthful defendants like himself.

Supreme Court: Holding that it was unconstitutional for the offenders to receive mandatory LWOP sentences without an individualized inquiry to determine whether the mitigating qualities of youth justified a downward departure, the court grants the petitions, vacates the mandatory LWOP sentences, and remands the cases for resentencing.

When a criminal defendant is convicted of aggravated first-degree murder committed at the age of 18, 19, or 20, Const. Art. I, § 14 requires the sentencing court to conduct an individualized inquiry to determine whether the mitigating qualities of youth justify a downward departure from the sentence of life imprisonment without the possibility of parole mandated by

11 Del. 636, 4209.

Reed was convicted of aggravated first-degree murder and sentenced to life in prison without possibility of parole – a mandatory, non-discretionary sentence under Delaware's aggravated murder statute. 11 Del. 636, 4209, 4204. Reed was 18. Many years after his convictions now filed a personal restraint petition (PRP) asking to consider whether article I, section 14 of our state constitution or the Eighth Amendment to the United States Constitution permits a mandatory life without parole (LWOP) sentence for youthful defendants like himself. Specifically, he asks to decide whether the constitutional requirement that judges exercise discretion at sentencing, which forbids such mandatory LWOP sentences for those under 18, also forbids those sentences for 18-to-21-year-old defendants.

Modern social science, our precedent, and a long history of arbitrary line drawing have all shown that no clear line exists between childhood and adulthood. But when it comes to mandatory LWOP sentences, Miller's constitutional guaranty of an individualized sentence – one that considers the mitigating qualities of youth – must apply to defendants at least as old as these defendants were at the time of their crimes. Miller v. Alabama, 567 U.S. 460, 469-80, 132 S. Ct. 2455, 183 L Ed 2d 407 (2012). Accordingly, the Court grant both PRPs and order that Bartholomew and Monschke each receive a new sentencing hearing.

THE AGGRAVATED MURDER STATUTE IS UNCONSTITUTIONAL AS APPLIED TO YOUTHFUL DEFENDANTS BECAUSE IT DENIES TRIAL JUDGE'S DISCRETION TO CONSIDER THE MITIGATING QUALITIES OF YOUTH

Article I, Section 14 of the Delaware Constitution prohibits "cruel punishment." That state constitutional bar against "cruel punishment" like the Eighth Amendment bar against "cruel and unusual punishments" also forbids mandatory LWOP sentences for juvenile offenders.

Miller, 567 U.S. at 479. It further requires courts to exercise "complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant," even when faced with mandatory statutory language. State v. Houston-Sconiers, 188 Wn. 2d 1, 21, 391 P.3d 409 (2017).

Petitioner argues that the protection against mandatory LWOP for juveniles should extend to them because he was essentially a juvenile in all but name at the time of his crime.

The punishment is categorically cruel in violation of Article I, Section 14. He asks to apply the existing constitutional protections of Miller to an enlarged class of youthful offenders older than 1. Accordingly, instead of the categorical bar test, scrutinize whether an arbitrary distinction between 17- and 18-year-olds for purposes of mandatory LWOP passes constitutional muster.

CONSTITUTIONAL PROTECTIONS FOR YOUTHFUL CRIMINAL DEFENDANTS HAVE GROWN MORE PROTECTIVE OVER THE YEARS

The United States' "age of majority" was largely set at 21 until it changed to 18 "for reasons quite unrelated to capacity." Vivian E. Hamilton, Adulthood in Law and Culture, 91 Tulane L. Rev. 55, 57 (2016). Twenty-one had been the "near universal" age of majority in the United States from its founding until 1942, when war-time needs prompted Congress to lower the age of conscription from twenty-one to eighteen, a change that would eventually lead to the lowering of the age of majority general." Id. at 64; Pub. L. No. 77-772, 56 Stat. 108, 1019 (1942) (changing selective service registration age 18). The linking of military obligation and political participation led to the Twenty-Sixth Amendment; in 1971, it lowered the voting age to 18. Id. at 64-65; U.S. Const. XXVI. States across the country – including Washington – quickly followed

suit, lowering the "age of majority" to 18 for many purposes. Rcw 26, 28.010; Laws of 1971, 1st Ex. Sess., ch. 292 S. 1.

"The character of a juvenile is not as well-formed as that of an adult." Id. at 570. Roper recognized that the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18-years-old."

NO MEANINGFUL DEVELOPMENTAL DIFFERENCE EXISTS BETWEEN THE BRAIN OF A 17-YEAR-OLD AND THE BRAIN OF AN 18-YEAR-OLD

Roper considered juveniles' lack of maturity and responsibility, their vulnerability to negative influences, and their transitory and developing character when it increased the minimum age for death eligibility from 16 to 18. Roper, 543 U.S. at 569-70. All three of these factors weigh in favor of offering similar constitutional protections to older offenders, also, because neurological science recognizes no meaningful distinction between 17- and 18-year-olds as a class.

They have already concluded that under the Sentencing Reform Act of 1981, age may well mitigate a defendant who is over the age of 18." State v. O'Dell, 183 Wn.2d 680, 695, 358 P.3d 359 (2015). The fact that the legislature did not have the benefit of psychological and neurological studies showing that the "parts of the brain involved in behavior control" continue to develop well into a person's 20s" was one of the factors that compelled that conclusion. Id. at 691-92 (footnote omitted) quoting Miller, 567 U.S. at 472 (quoting Graham v. Florida, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L Ed 2d 825 (2010))). The same scientific developments compel us to come to a similar conclusion under article I, section 14.

O'Dell cited articles discussing neurological science extensively. Id. at 692 n.5 (citing

Terry a Maroney, The False Promise of Adolescent Brain Science in Juvenile Justice, 85 Notre Dame L. Rev. 89 (2009); MIT Young Adult Development Project; Brain changes, Mass. Inst. of Tech., http://hr.mit/edu/static/worklife/youngadult/brain.html (last visited Mar. 8, 2021); Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 Ann. N.Y. Acad. Sci. 77 (2004)). The parties bring additional, more recent studies, to our attention. See, e.g., Petitioner's Suppl. Br. Bartholomew at 9-10 (citing, e.g., Kathryn Monahan et al., Juvenile Justice Policy and Practice: A Developmental Perspective, 44 Crime & Just. 577 582 (2015); Alexandra O. Cohen et al., When Does a Juvenile Become an Adult? Implications for Law and Policy, 88 Temple L. Rev. 769 (2016); Elizabeth S. Scott et al., Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy, 85 Fordham L. Rev. 641 (2016)). The overarching conclusion compelled by these sources is clear." biological and psychological development continues into the early twenties, well beyond the age of majority." Scott et al., supra at 742.

The State does not dispute this conclusion. Rather, it contends that Miller is not about brain science" at all and it cites experts who resist the use of neuroscience in legal decision-making altogether. Suppl. Br. of Resp't at 12-13. While all three articles cited by the state emphasize the difficulty of analyzing individual adolescent brains, they support the petitioner's position that there is no distinctive scientific difference, in general, between the brains of a 17-year-old and an 18-year-old. Richard J. Bonnie & The Law, 22 Current Directions in Psychol. Sci. 158, 161 (2013) (So far, neuroscience research provides group data showing a developmental trajectory in brain structure and function during adolescence and into adulthood."); Maroney, supra, at 94 ("Rather than raising deep and likely unsolvable questions about human agency [neuroscience] simply reinforces the (once) noncontroversial idea that as a

group, young people differ from adults in systematic ways directly relevant to their relatively culpability, deterability, and potential for rehabilitation."); B.J. Casey & Kristina Caudle, The Teenage Brain: Self Control, 22 Current Directions in Psychol. Sci. 82 (2013) (discussing overgeneralizations of adolescent brains but never mentioning whose age is meant by "adolescence"). Maroney criticizes the way courts have used neuroscience to justify their conclusions and argues that "the impact of adolescent brain science on juvenile justice has been strongly cabined by the extrinsic reality of legal doctrine." Maroney, supra, at 144-45.

The State conclusion from these articles appears to be that because there is no accounting for the brain development and maturity of particular individuals, we may as well give up and let the legislature draw its arbitrary lines – because they will necessarily be arbitrary no matter where they are drawn. But giving up would abdicate our responsibility to interpret the constitution. The State is correct that every individual is different, and perhaps not every 20-year-old offender will deserve leniency on account of youthfulness. But the variability in individual attributes of youthfulness are exactly why courts must have discretion to consider those attributes as they apply to each individual youthful offender. That is why mandatory sentences for youthful defendants are unconstitutional. Miller, 567 U.S. at 477-80 (requiring consideration of the specific youthful characteristics and many other individual factors related to culpability).

Science may assist our understanding of not just sexual development. Neuroscientists now know that all three of the "general differences between juveniles under 18 and adults" recognized by Roper are present in people older than 18. Roper, 543 U.S. at 569. While not yet widely recognized by legislatures, we deem these objective scientific differences between 18-to-20-year-olds (covering the ages of the two petitioners in this case) on the one hand, and persons

with fully developed brains on the other hand, to be constitutionally significant under Article I, Section 14.

OUR CONSTITUTION'S PROTECTION AGAINST LIFE WITHOUT PAROLE SENTENCES EXTENDS TO YOUTHFUL DEFENDANTS OLDER THAN 18

What they have shown is that no meaningful neurological bright line exists between age 17 and age 18, or, as relevant here, between age 17 on the one hand, and ages 19 and 20 on the other hand. Thus, sentencing courts must have discretion to take the mitigating qualities of youth – those qualities emphasized in Miller and Houston-Sconiers – into account for defendants younger and older than 18. Not every 19- and 20-year-old will exhibit these mitigating characteristics, just as not every 17-year-old will. We leave it up to sentencing courts to determine which individual defendants merit leniency for these characteristics.

Because the aggravated murder statute that petitioner was convicted of violating is unconstitutional as applied to his conduct, the one-year time bar for collateral attacks does not apply. 11 Del. 636, 4209.

Petitioner suggests that they also meet the time bar exceptions for sentence in excess of jurisdiction and retroactive change in the law Rule 61(i)(5) and the federal bar exception. Am. PRP (Monschke) at 24-25; Pet'r's Suppl. Br. (Bartholomew) at 18-19; see concurrence. Because they hold the unconstitutional statute exceptions to the statutory time bar.

There is no meaningful cognitive difference between 17-year-olds and many 18-year-olds. When it comes to Miller's prohibition on mandatory LWOP sentences, there is no constitutional difference either. Just as courts must exercise discretion before sentencing a 17-year-old to die in prison, so must they exercise the same discretion when sentencing an 18-19 or

20-year-old. They grant Monschke's and Bartholomew's PRPs and vacate their mandatory LWOP sentences. They remand each case for a new sentencing hearing at which the trial court must consider whether each defendant was subject to the mitigating qualities of youth.

The lead opinion that the petitioners are entitled to a new sentencing to determine whether their ages at the time of their crimes are a mitigating factor justifying a downward departure from the standard sentence, however, with its analysis of the retroactivity when material. In re Pers. Restraint of Lilght-Roth, 191 Wn.2d 328, 338-39, 422 P.3d 444 (2018).

At the heart of this case is the important question of when a person should be held fully accountable as an adult. This is a question that requires a meticulous examination of a number of scientific, moral, ethical, and practical considerations.

The lead opinion today announces a broad new constitutional safeguard protecting "youthful defendants [ages 18 to 20] without fully developed brains." Lead opinion at 29. In doing so, the lead opinion extends a protection to convicted murders that may shield these individuals from the full legal consequences of their actions.

The lead opinion today casts aside this long-standing deference to the legislature because it believes that the current line at 18 is arbitrary." Lead opinion at 24-23. The lead opinion contends the line at 18 is arbitrary because there is "no distinctive scientific difference, in general, between the brains of a 17-year-old and an 18-year-old"; and notes that at 18, these youths' brains are not fully developed, which leads to decision-making based on immaturity and impulsivity.

In prohibiting mandatory LWOP, the lead opinion now requires courts to exercise discretion in imposing LWOP sentences on 18-29-year-olds, as it asserts that we must provide individualized sentencing for defendants "at least as old as [20]." Lead opinion at 2-07, 29 citing

Miller v. Alabama, 567 U.S. 460, 469-80, 132 S. Ct. 2455, 183 L Ed 2d 407 (2012)).

The lead opinion today relies on Rule 61(5)(1)(2) and (3) as an exception to the time bar to give the petitioners another shot at crafting a new constitutional rule and overturning precedent. Lead opinion at Rule 61(5). This exception reads, in part, "the time limit specified in Rule 61(5) does not apply to a petition or motion that is based solely on one or more of the following grounds: ... [t]he statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct." 11 Del. 636-4209 (emphasis added).

This section was unconstitutional as applied to the prisoner; when it comes to mandatory life without parole sentences, the constitutional guaranty of an individualized sentence – one that considers the mitigating qualities of youth – must apply when sentencing a person who was 18, 19, or 20 years old at the time of his or her crimes. In re Pers. Restraint of Monschke, 197 Wn. 2d 305, 482 P.3d 276, 2021 Wash. LEXIS 152 (Wash. 2021).

Because the aggravated murder statute that the prisoners were convicted of violating was unconstitutional as applied, the one-year time bar for collateral attacks did not apply. In re Pers. Restraint of Monschke, 197 Wn.2d 305, 482 P.3d 276, 2021 Wash. LEXIS 152 (Wash. 2021). Graham v. Florida, 560 U.S. 48, 61, 130 S. Ct. 2011, 176 L Ed 2d 825 (2010) the lead opinion provides support for treating young adults with the leniency of the juvenile.

Miller, 567 U.S. 460, was a categorical bar on punishment when Miller prohibited imposing mandatory LWOP sentences on juveniles. 196 Wn.2d at 231-32, 239 n.5. There, we based our reasoning on Montgomery v. Louisiana, 577 U.S. 190, 136 S. Ct. 718, 193 L Ed 2d 599 (2016). In assessing Miller's retroactivity, Montgomery held that Miller's rule was retroactive because Miller categorically barred mandatory LWOP by render[ing] life without

parole an unconstitutional penalty for "a class of defendants because of their status – that is juvenile offenders whose crimes reflect the transient, immaturity of youth." Montgomery, 577 U.S. at 208.

As Montgomery clarifies, Miller was a case involving a categorical bar. This case is directly analogous to Miller and should also be analyzed under Bassett's categorical bar approach. To make a very plain comparison, Miller barred imposing mandatory LWOP sentences on juveniles. Her, the lead opinion prohibits imposing mandatory LWOP sentences on defendants between the ages of 18 and 20. The only difference between this case and Miller is that they substitute "juveniles" with defendants aged 18 to 20." Accordingly, because Miller was a categorical bar case, this case is as well.

When a criminal defendant is convicted of aggravated first degree murder committed at the age of 18, 19, or 20, Const. Art. I, § 14 requires the sentencing court to conduct an individualized inquiry to determine whether the mitigating qualities of youth justified a downward departure, holding that it was unconstitutional for the offenders to receive mandatory LWOP sentences without an individualized inquiry to determination of mitigating qualities of youth. The Court grants the petition, vacates the mandatory LWOP sentence and remands the case for resentencing. Reed should be resentenced as well.

ARGUMENT

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PETITIONER HIS CONSTITUTIONAL RIGHT TO COUNSEL ON HIS FIRST AND ALL OF HIS POSTCONVICTION MOTION INITIAL COLLATERAL PROCEEDING UNDER MARTINEZ V. RYAN, 132 S. CT. 1309

Scope of Review

The federal and state constitution of Petitioner's rights to counsel pursuant to Martinez v. Ryan, 132 S. Ct. 1309 (2012), Trevino v. Thaler, 133 S. Ct. 1911, 2013 WL 2300805, Defendant should have an opportunity for a meaningful review of his claims.

Argument

Ralph Reed invoked Martinez v. Ryan, 132 S. Ct. 1309 (2012) procedural default exception for my ineffective assistance of trial counsel claims. Reed did not have counsel for his first or any of his postconviction relief motions (initial collateral proceeding). The Supreme Court said that all defendants have a right to a lawyer in their postconviction motion initial collateral proceedings. The exception contained in Martinez v. Ryan, 132 S. Ct. 1309 Reed previously litigated claims should be heard and granted relief as well.

Pursuant to Martinez v. Ryan, 132 S. Ct. 1309 (2012), a state procedural default will not bar a federal habeas court from hearing the ineffective assistance of trial counsel claims where there was no counsel or counsel was ineffective. Trevino v. Thaler, 133 S. Ct. 1911, 2013 WL 2300805. The Trevino decision considered as a systematic matter if a defendant has an opportunity for a meaningful review of the claims.

The court has said that one of the narrow exceptions in Coleman v. Thompson for a defaulted claim to be heard is that (1) the ineffective assistance of counsel claim is substantive;

and (2) that the cause consisted of there being no counsel in his collateral proceedings. Reed has not had counsel in any of his collateral proceedings at all.

Delaware law so establishes by providing criminal defendants a state law created "as a right" to all convictions.

The Delaware constitution Article IV, Section II specifically addresses the required mandate.

Jurisdiction of Supreme Court

(1)(B) To receive appeals from the lower court in criminal cases upon application of the accused in all cases in which the sentence shall be death, imprisonment exceeding one month of fine exceeding one hundred, and such other cases shall be provided by law. And to determine finally all matters of appeal from the lower court in cases of prosecution under Section 8 of Article II of this constitution shall be governed by the provisions of this section."

It is well established federal law that where a state provides criminal defendants with "appeal as of right" under the laws of that state. Appointment of counsel is, as well, mandated.

"The United States Supreme Court nevertheless held that when states provide a first appeal as of right, they must supply indigent defendants with counsel." Ross, supra at 607, 94 S. Ct. 2437; Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L Ed 2d 242 (2012); and Trevino v. Thaler, 569 U.S. 413, 133 S. Ct. 1911, 185 L Ed 2d 1044 (2013).

But Douglas had already answered that question as Supreme Court summarily declared [appointed counsel] may not be denied to a criminal defendant solely because of his indigence on the only appeal which the state affords him as a matter of right. 386 U.S. at 259, 87 S. Ct. 996 (emphasis added); Holbert v. Michigan, 545 U.S. 605, 628, 125 S. Ct. 2582, 2596, 260 (2005).

The constitutional provision by the State of Delaware places the state law created "appeal

as of rights" squarely within the confines of federal constitutional guarantees of Due Process and Equal Protection under the law. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985) states:

Nonetheless, if a state has created petitioner courts as an integral part of the ... system for finally adjudicating the guilt or innocence of a Defendant, Griffin v. Illinois, 351 U.S. 12, 18 (1956), the procedures in deciding appeals must comport with the demands of the Due Process and Equal Protection Clause of the Constitution. In Griffin itself, a transcript of the trial court proceeding was a prerequisite to a decision on the merits of an appeal. We held that the State must provide such a transcript to indigent criminal petitioners who could not afford to buy one if that was the only way to assure an adequate and effective appeal" at 393. Just as a transcript may by rule or custom be a prerequisite to petitioner review, the services of a lawyer will, for virtually every layman, be necessary to present an appeal in a form suitable for petitioner consideration on the merits. See Griffin, supra, 351 U.S. at 20, 76 S. Ct. at 591. Therefore, Douglas v. California, supra, recognized that the principles of Griffin required a state that afforded a right of appeal to make that appeal more than a "meaningless ritual" by supplying an indigent petitioner in a criminal case with an attorney. 372 U.S. at 358, 835 S. Ct. at 817. Martinez. This right to counsel is to the first appeal as of right. See Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L Ed 2d 341 (1974) at 393-94.

In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that is like a trial, is governed by intricate rules that to a lay person would be hopelessly forbidding, an unrepresented defendant at trial is unable to protect the vital interest at stake" at 396.

The lesson of our cases, as we pointed out in Ross supra 417 U.S. 609, 94 S. Ct. at 2443,

is that each clause triggers a distinct inquiry "Due Process" emphasizes fairness between the state and the individual dealing with the state regardless of how other individuals in the same situation may be treated. Equal Protection on the other hand emphasizes disparity in treatment by a state between classes of individuals whose situations are arguably indistinguishable. In cases like Griffin and Douglas, Due Process concerns were involved because the states involved had set up system of appeal as a right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the state treated a class of defendants - indigent ones – differently for purposes of offering them a meaningful appeal. Both of these concerns were implicated in the Griffin and Douglas cases and both clauses supported the decisions reached by the United States Supreme Court at 405.

Delaware law does not allow a criminal defendant to raise ineffective assistance of trial counsel claims on direct appeal of his conviction in the Delaware Supreme Court. The narrow exception explained by this Court to that rule of law in Wright v. State, 513 A.2d 1310 (1986) is extremely rare and hardly ever occurs.

The State of Delaware in creating its system of appellate processes has itself manufactured the situation that the defendants first postconviction proceeding under Superior Court Criminal Rule 61 are the first designated proceedings for pursuing ineffective assistance of trial counsel claims literally making those proceedings "the equivalent of a prisoner's direct appeal as to that claim." Martinez, supra with whom the causative origin lies is clearly apparent.

Further, Reed asserts the burden the state system by way of design, which impeded on his constitutional rights to Due Process, Equal Protection and to be guaranteed counsel for his direct appeal claims are so imperative to him and not having counsel for his ineffective assistance of

counsel claim. The U.S. Supreme Court in Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L Ed 2d 242 (2012) and later in Trevino v. Thaler, 569 U.S. 413, 133 S. Ct. 1911, 185 L Ed 2d 1044 (2013) held that, despite the presence of a procedural default, a federal court can nonetheless hear a prisoner's claim that his trial counsel was ineffective where (1) the framework of state procedural law "makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal," Id. at 429, 133 S. Ct. 1911, 185 L Ed 2d 1044, 1051, (2) in the state initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective, Martinez, 566 U.S. at 17, 132 S. Ct. 1309, 182 L Ed 2d 272, and (3) the underlying ineffective assistance of trial counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit," Id. at 14, 132 S. Ct. 1309, 182 L Ed 2d 272.

Reed asserts while the courts in Martinez and Trevino did not address timing, it is equally imperative to a prisoner like himself who did not have counsel for ineffective assistance of trial counsel claims in his initial collateral proceeding because of the time it takes and took him to scramble together the petition on his own.

Lastly, Reed asserts this Court, the U.S. Supreme Court, recognized and reiterated in Chessman v. Teets, 354 U.S. 156 (1957). Their overriding responsibility is to the U.S. Constitution as it held" on many occasions. This Court has found it necessary to say that the requirements of the Due Process Clause of the 14th Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution. Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of

the constitution is found to exist. This court may not disregard the constitution because an appeal in these cases, as in others, has been made on the eve of execution. His constitutional violations demand this court to hear petitioner's claims and grant relief for a new trial or resentence to a lesser offense.

ARGUMENT

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR IMPARTIAL JURY UNDER THE UNITED STATES AND FEDERAL CONSTITUTION THE JUROR'S POTENTIAL BIAS HARM THE PETITIONER'S TRIAL RIGHTS BATSON ANALYSIS

Scope of Review

Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 171, 90 L Ed 2d 69 (1986) prosecutor's violation of the striking of juror discrimination. The Constitution forbids even a single prospective juror for a discriminatory purpose. Petitioner showed purposeful and factual discrimination in the juror selection during trial race violate federal laws. Prosecutor's reasons for striking a Black prospective juror apply equally to an otherwise similar non-Black prospective juror who is allowed to serve tends to suggest purposeful discrimination. Miller-El v. Dretke, 545 U.S. 231, 241, 125 S. Ct. 2317, 162 L Ed 2d 196 (2005). Superior Court violated Petitioner's Due Process and federal Rights under the Sixth and 14th Amendments.

Argument

The State court has proceeded on an incorrect perception of the federal law, it has been this court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state law question free of misapprehensions about the scope of federal

law." Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 152, 104 S. Ct. 2267, 81 L Ed 2d 113 (1984); see also S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice 212 (10th ed. 2013). In a situation like the one presented here, the correct approach is for this court to decide the question [578 U.S. 523] of federal law and then to remand the case to the lower court so that it can reassess its decision on the underlying federal issue. Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L Ed 2d (1986). Batson violation. Miller-El v. Cockrell, 123 S. Ct. 1029, 1043 (2003).

It is fundamental that this court only power over state judgments is to correct them to the extent that they incorrect adjudge federal rights." Herb v. Pitcairn, 324 U.S. 117, 125-26, 65 S. Ct. 459, 89 L Ed 789 (1945).

Because of the State's willingness to accept White jurors with the same characteristics, for example, the prosecution claims that it struck the Black juror, Ms. Turner, and the other four Black jurors who said they knew the Petitioner's relatives or friends, but the White juror, Mr. Haley, and other jurors of the victim's family's relatives and friends were allowed to serve. The State used peremptory challenges in a racially discriminatory [136 S. Ct. 1757] manner in violation of Batson." Id. at 195-96. The federal constitutional claim, were violated the evidence advanced by petition in support of his argument that the prosecution's strikes of Black members of the venire were based on race. Petitioner is entitled to a new trial under Batson violation.

ARGUMENT

V. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PETITIONER'S CLAIM THAT THE STATE USE OF UNCONSTITUTIONAL VOIR DIRE QUESTIONING RESULTS IN DISCRIMINATORY SELECTION OF JURORS THAT VIOLATE THE SIXTH AND 14TH AMENDMENTS TO THE STATE AND FEDERAL CONSTITUTION

Scope of Review

The scope of *voir dire* questioning examination in the discretion. Jacobs v. State, 358 A.2d 725 (Del. Supr. 1996). Also, the discrimination use in *voir dire* questioning which violate Batson v. Kentucky, 476 U.S. 69 (1986) is reviewed by the standard set forth in Miller-El v. Cockrell, 123 S. Ct. 1029 (2003) concerted effort to keep Black prospective jurors off the jury.

Argument

Petitioner wrote to the trial court requesting the appointment of an attorney to represent him due to the complexity of the issues raised in the postconviction motion, especially the Batson claim, which involves the obvious discrimination disparate voir dire questioning which were specifically targeted at excluding Black African Americans jurors from Petitioner's trial.

Evidence that a prosecutor's reasons for striking a Black prospective juror apply equally to an otherwise similar non-Black prospective juror who is allowed to serve tends to suggest purposeful discrimination. Miller-El v. Dretke, 545 U.S. 231, 241, 125 S. Ct. 2317, 162 L Ed 2d 196. Such evidence is compelling with respect (2016 U.S. LEXIS 7) to Turner and four other jurors and, along with the prosecution's shifting explanations, misrepresentations of the record, and persistent focus on race, leads to the conclusion that the striking of those prospective jurors was "motivated in substantial part by discriminatory intent." Snyder, 552 U.S. at 485, P_. 195 L

Ed 2d at 20(d) reeks of afterthought." Miller-El, 545 U.S. at 246. And the focus on race in the proseuction's record file plainly demonstrates a concerted effort to keep Black prospective jurors off the jury. Pp __-__, 195 L Ed 2d at 20-21.

During jury selection at his trial, the State exercised peremptory strikes against all four Black prospective jurors qualified to serve. Reed argued that the State's use of those strikes was racially motivated, in violation of our decision in Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L Ed 2d 69 (1986).

Because of the State's willingness to accept White jurors with the same characteristics. For example, the prosecution claims thtat it struck juror Turner and four other jurors because they revealed they knew the defendant or his friends and relatives but three out of four revealed they knew the victim or his friends and relatives four White prospective jurors knew the victim's friends and relatives were allowed to serve. Pp. __-__, 195 L Ed 2d at 13-16.

Other justifications for striking Turner and four other jurors fail to withstand scrutiny because no concerns were expressed with regard to similar White prospective jurors. Pp. __-__, 195 L Ed 2d at 16-20.

While permitting White jurors members to serve on the jury who actually knew the victim friends and his relatives. When you look at the prosecution records and files show they secure jurors who know the victim of crime. Also show the unconstitutional use of peremptory challenges and the disparate voir dire questioning of similarly situated White and Black jurors which resulted in the purposeful exclusion of all the Black jurors. Miller-El v. Cockrell, 123 S.Ct. 1029, 1043 (2003) the questioning posed by the prosecutors are some evidence of discrimination. Batson, 476 U.S. at 97, 106 S. Ct. 1712. For the reasons set forth in the arguments above, this Court shall reverse the Superior Court decision and grant the Petitioner a

new trial or a resentence of a lesser charge.

ARGUMENT

VI. THE TRIAL COURT ABUSED ITS DISCRETION BY CONCLUDING THAT PETITIONER'S TRIAL COUNSEL DID NOT DEPRIVE HIM OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PROPERLY INVESTIGATE AND SUBPOENA TWO CRUCIAL DEFENSE WITNESSES THAT SUPPORT HIS INNOCENCE

Scope of Review

Trial counsel failed to investigate properly is reviewed under the performance and prejudice test of Strickland v. Washington, 466 U.S. 668 (1984). The standard and scope of review is whether the Superior Court abused its discretion in denying that petitioner Strickland claim in the postconviction relief proceeding. Shockley v. State, 565 A.2d 1373, 1377 (Del. 1989).

Argument

Prior to trial, Petitoner made several requests to his trial counsel to interview and subpoena Jerome Reed and Keyshawn Banks. Jerome Reed would have testified that he observed someone else shoot the victim near the apartment complex. (See Jerome Reed Affidavit).

Although Petitioner was unable to locate and obtain an affidavit from Keyshawn Banks, however, petitioner expects that Mr. Banks will confirm that he has personal knowledge that it was not Petitioner shooting.

Materiality of Jerome Reed affidavit

The sown averments contained in J. Reed's affidavit demonstrates that trial counsel's

decision not to subpoena J. Reed as a defense witness was not reasonable and prejudiced Petitioner's defense that someone else committed the crime.

First, Petitioner has a constitutional right under state and federal law to put on evidence of the State character tending to identify some other person as perpetrator of the crime." See D.R.E. 404(b) and Jones v. Wood, 207 F.3d 557, 562-63 (9th Cir. 2000).

The Jones court held that before evidence implicating another suspect can be admitted, "there must be such proof of connection with the crime, such as a trial of facts or circumstances as tends clearly to point out someone beside the accused as the guilty party." Id. at 562. Furthermore, the Jones court concluded that "because the other suspect evidence was admissible under Washington law, Jones has established Strickland prejudice" from counsel failure to present such evidence at trial. Id. at 563.

Second, evidence of motive, ability and opportunity for a third person to commit a crime is not sufficient foundation for the introduction of other suspect evidence. Id. at 562. Such evidence must be "coupled with other evidence tending to connect such other person with the actual commission of the crime charged." Id. However, a lesser foundational restriction applies to cases involving circumstantial proof of crime.

> If the prosecution's case against the defendant is largely circumstantial, the defendant may neutralize or overcome such evidence by presenting sufficient evidence of the same character tending to identify some other persons as the perpetrator of the crime. See Jones, 207 F.3d at 562-63 (citing State v. Clark, 78 Wash. App. 471, 898 P.2d 854, 858 (1995)).

Applying this law to the facts of this case, which is consistent with D.R.E. 404(b), the averments contained in J. Reed's sworn affidavit, that he witnessed and observed another person as the other. See Affidavit A.

Therefore, under the Jones standard (which is very similar to the sufficiency of evidence test), this evidence of the same character tending to identify some other person as the perpetrator

of the offense, "such as a train of facts and circumstances demonstrated herein above, was admissible under D.R.E. 404(b). Petitioner points out that the prosecution theory (argued in summation) that there was no other person who could have committed the crime: a theory that Petitioner was entitled to rebut once the prosecution relied upon it. Jones, 207 F.3d at 563. Petitioner's trial counsel's failure to subpoena J. Reed as a witness to rebut the prosecution theory (as Petitioner set forth herein) was grossly unreasonable and sufficient to establish the prejudice needed and required under Strickland to create a reasonable probability of a different outcome but for counsel's errors. This conclusion is premised upon the following summary:

> The State witnesses did not testify truthfully about who in fact possessed the gun and shot the victim. At the very least, "the train of evidence" according to Jones revealed here shows beyond a reasonable doubt that someone else were actual accomplices to the murder which should have been explained to the jury and court by Petitioner's trial counsel with a request for a full chance instruction on the lesser included offenses to first degree murder under 11 Del. 271 and 274, e.g. second degree murder 11 Del. 635, Manslaughter 11 Del. 631. Chance v. State, 685 A.2d 351.

The circumstances of Petitioner's case is identical to what happened in Kyles v. Whitley, 514 U.S. 419 (1995), where the actual perpetrator of the crime provided the investigation police officer with all the evidence and information that led to Kyles' arrest and conviction. Instead of advancing the available same character defense theory that someone else committed the crime. See J. Reed Affidavit A.

The Third Circuit Court ruling on ineffective assistance of counsel in Berryman v. Morton, 100 F.3d 1089 (1996) support Petitioner's claims for postconviction relief based upon Jones v. Wood, 207 F.3d 557 (9th Cir. 2000). A contrary ruling would be totally unreasonable to the federal law governing this issue. Id. at 1097-1102. The Third Circuit reviewed each of Berryman's claims separately and found that counsel's performance strategy was unreasonable.

The Delaware courts unconstitutionally violated in denying Reed's postconviction motion appeal, the lower courts violated Reed's rights in concluding that Reed failed to carry his burden of demonstrating that the Delaware Superior Court's factual determinations were objectively unreasonable.

For the foregoing reasons, Reed requests that this Court grant the petition for certiorari, order a new trial, or resentence Reed under a lesser offense.

The Delaware state courts unreasonably applied the facts of Reed's case to the clearly established federal law set forth in Strickland, Batson v. Kentucky, Martinez v. Ryan, and their progeny, as well as Holmes v. State.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ralph Reed

Date: 1-13-25