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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHAUNCEY S. STARLING, Defendant below, Appellant v. STATE OF DELAWARE, Plaintiff below, Appellee	)	No. 533, 2014 On appeal from the Superior Court of the State of Delaware in and for New Castle County

APPELLANT'S CORRECTED OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

On October 22, 2003, Defendant Chauncey Starling was convicted of two counts of murder in the first degree, two counts of possession of a firearm during the commission of a felony, and one count of conspiracy in the first degree. The jury recommended the death penalty, and on June 10, 2004, the Trial Court sentenced Starling to death. After all direct appeals were exhausted, Starling moved, *pro se*, for Rule 61 post-conviction relief on April 16, 2007.

On April 1, 2008, present counsel filed an Amended Petition on Starling's behalf. The State answered on October 17, 2008, and Starling replied on March 17, 2009. Starling sought Rule 61 discovery from the State, and on July 20, 2010, the Court ordered the State to produce certain discovery.[1] In November 2012 and January 2013, the Court conducted evidentiary hearings and heard testimony.

On June 12, 2013, Starling filed his Supplemental Amended Petition. The State answered on September 6, 2013, and Starling replied on October 29, 2013.

On August 28, 2014, Judge Rocanelli issued her decision denying Starling's Petition for post-conviction relief. On September 5, 2014, Judge Rocanelli issued an amended decision, which included a new section addressing the miscarriage of justice exception to the Rule 61(i) procedural bars. Starling filed his Notice of Appeal to this Court on September 22, 2014. This is Starling's opening brief.

[1] *See State v. Starling*, 2010 Del. Super. LEXIS 296 (Del. Super. Ct.).

SUMMARY OF ARGUMENTS

I. Starling was denied a fair trial because the State failed to disclose exculpatory evidence that the state had provided benefits to its key witness prior to trial, in violation of the Due Process Clause and Fourteenth Amendment of the United States Constitution, as well as the State's *Brady* obligation.

II. Starling was denied a fair trial because Trial Counsel provided ineffective assistance of counsel by failing to object to the admission of a highly prejudicial out-of-court statement despite the statement being involuntary and the State failing to meet any of the procedural requirements for admission under Delaware Code Section 3507, in violation of the Sixth Amendment of the United States Constitution.

III. Starling was denied a fair trial because the State failed to disclose an exculpatory witness statement that contradicted its key witness's pretrial statement and testimony about the night of the shooting, in violation of the Due Process Clause and Fourteenth Amendment of the United States Constitution, as well as the State's *Brady* obligation.

IV. Starling was denied a fair trial because the State failed to disclose exculpatory cellphone records of Starling's co-defendant, which contradicted the statements and testimony of the State's key witness, in

violation of the Due Process Clause and Fourteenth Amendment of the United States Constitution, as well as the State's *Brady* obligation.

V. Starling was denied a fair trial because the State committed prosecutorial misconduct when it falsely told the jury that Starling ignored the incoming calls to his cellphone around the time of the shootings, in violation of the Due Process Clause and Fourteenth Amendment of the United States Constitution.

VI. Starling was denied a fair trial because the State provided ineffective assistance of counsel throughout the investigation, trial, and sentencing, in violation of the Sixth Amendment of the United States Constitution.

STATEMENT OF FACTS

At 8:40 pm on March 9, 2001, a masked gunman fired a shot through the front door of the Made 4 Men Barbershop in Wilmington, Delaware.[2] The gunman then entered the barbershop and fired shots at one of the customers, Darnel Evans. Five-year old Damon Gist, Jr. was also struck by a stray bullet. Both victims died.

The witnesses to the shooting could not identify the shooter and gave varying descriptions of the shooter's height and weight.[3] The police were unable to find the weapon or any physical evidence connecting any person to the crime.

On April 7, 2001, Pennsylvania police found Alfred Gaines wounded from gunshots in Chester, Pennsylvania.[4] He had crack cocaine and money in his pockets.[5] Gaines was arrested in Pennsylvania and a Violation of Probation ("VOP") was issued in Delaware.[6] Gaines's probation officer recommended that Gaines be arrested, extradited from Pennsylvania, and sent to prison to serve the rest of his sentence, and the Superior Court issued a capias for Gaines's arrest.[7]

After his arrest, Gaines told police that Starling had shot him and that two other individuals, Richard Frink and Matthew Minor, were with Starling at the

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[2] A486, 493-94, 504 (10/15/03 Trial Tr. 67:2-4, 96:2-97:9, 139:10-140:2).

[3] *See, e.g., id.* at A488, 496, 498-99 (75:7-76:21, 105:15-106:11, 115:23-117:23).

[4] A190 (4/18/01 Capias related to Gaines's VOP (History of Supervision)).

[5] *Id.* at A190 (History of Supervision).

[6] *Id.* at A186-190 (History of Supervision & Exs. A & B).

[7] *See* A184-90 (4/18/01 Capias related to Gaines's VOP).

time.[8] Gaines also claimed that Starling had committed the barbershop shootings, Frink had been the driver, and Minor had orchestrated the shooting.[9]

On October 16, 2001, one of Starling's prosecutors, Deputy Attorney General ("DAG") Joelle Wright contacted the Delaware Superior Court and requested that it withdraw Gaines's capias and dismiss his VOP.[10] The Superior Court dismissed the capias and VOP on October 17, 2001.[11] Prior to trial, the State falsely told Trial Counsel that Gaines had a *pending* VOP and that the State had not taken any actions with Gaines's VOP.[12]

The State charged Starling and Frink[13] with the shootings. Both Starling and Frink denied any involvement.

On April 27, 2001, police took Starling's brother, Michael Starling, to the Wilmington Police Station for questioning.[14] The police took Michael's cell phone

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[8] A178-79 (4/17/01 Gaines Tr. at 10-11).

[9] *See generally* A192-263 (4/25/01 Gaines Tr.).

[10] *See* A1229 (11/26/12 Florax Tr. 65:11-19); *see also* A358-59 (10/16/01Gaines's Probation Progress Report).

[11] *See* A912-19 (3/13/08 Superior Court Criminal Docket).

[12] S*ee* A1333 (11/27/12 Wallace Tr. at 59:2-6).

[13] Starling and Frink's trials were severed and Frink entered a plea agreement with the State, which did not require him to admit guilt and for what he understood was time served. Frink was sentenced to four years on two separate charges, after having already served more than three years. His counsel indicated the belief that the sentences would be served concurrently, meaning Frink would have less than a year left to serve. However as the sentencing judge explained, Level V offenses are served consecutively, and thus Frink was required to serve an additional four years. A902 (7/23/04 Trial Tr. 14-15).

and told him he was not allowed to make any phone calls.[15] Two detectives questioned Michael for two hours. They told Michael multiple times that Starling said he was sorry about shooting the little boy.[16] They threatened Michael with being charged for crimes and going to jail for crimes for which he could not be charged.[17] The detectives told Michael he could only leave when he told them that Starling had said he was sorry about shooting the little boy.[18] At the end of two hours, Michael told the detectives that Starling had said he was sorry about the little boy.[19] At trial, the State introduced the recorded Michael Starling interview.[20] However, the State did not establish through Michael that it was voluntary; it did not introduce the recording on direct examination of Michael; and the Trial Court

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[14] *See* A575 (10/17/03 Trial Tr. at 25:5-16). Michael Starling had been arrested, held in custody for six to seven hours, and then released by the Wilmington Police several days earlier. *See id.* at A574 (23:8-24:10).

[15] *See id.* at A574 (22:21-23).

[16] *See, e.g.*, A310 (4/27/01 M. Starling Tr. at 47) "[W]e already know what happened, we know the story, but we know that he told you that he was sorry for I just need to hear it from you!"

[17] *See, e.g.* A289, 291 (26, 28) ("The bottom line is don't drag yourself down the sewer when you weren't even there! Unless you want to get charged? I don't think you're that you know, you're not that stupid are you? You don't want to take a charge for something you didn't do? Particularly when you don't have to."); A1590 (11/29/2012 Mullins Tr. at 20:4-10 ("Q. Did you or did Detective Sullivan threaten Michael with being criminally charged in connection with something he didn't do? . . . A. Yeah I guess.")).

[18] A322 (4/27/01 M. Starling Tr. at 59) ("I want you to tell us because I want you to walk out the door . . . .")

[19] A348-49 (*Id.* at 85-86).

[20] A582 (10/17/03 Trial Tr. at 56:9-12).

did not rule that the statement was voluntary. Trial Counsel did not object to the admission of the recording.[21]

On April 19, 2001, Wilmington detectives interviewed Starling's girlfriend, Vickie Miller. Contrary to what Gaines had told police, Miller said that the only thing Starling had ever said to her about the shootings was that the police should catch the shooter.[22] The State did not produce the Miller statement to Trial Counsel prior to trial.

Prior to trial, the State produced Starling's cellphone records but did not produce Frink's cellphone records.[23] And during closing, the prosecutor argued to the jury that Starling had not answered incoming calls to his cell phone during the time of the shootings.[24]

Starling was convicted in October 2003. The Superior Court denied Starling's petition for post-conviction relief on September 5, 2014 (order attached).[25]

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[21] A582 (*Id.* at 59:13-14).

[22] *See* A191 (4/29/01 V. Miller recording (9:40-12:00)).

[23] *See* A1390-91 (11/27/12 Wallace Tr. at 116:3-117:15); A920 (3/16/08 Malik Aff. ¶ 4); A1177 (3/22/12 Malik Aff. ¶ 6). The State's lead prosecutor specifically testified that he has no recollection of ever providing Starling a copy of Frink's cellphone records. *See* A1391 (11/27/12 Wallace Tr. at 117:4-7).

[24] *See* A665 (10/22/03 Trial Tr. at 133:9-14 (emphasis added)).

[25] In the Statement of Facts, to avoid redundancy, we cite examples of supporting facts from the record. Additional supporting facts from the record are cited and discussed in the relevant argument sections below.

ARGUMENT

I. Starling was denied a fair trial because the State failed to disclose exculpatory evidence that the state had provided benefits to its key witness prior to trial, in violation of the Due Process Clause and Fourteenth Amendment of the United States Constitution, as well as the State's *Brady* obligation.

A. Question presented: Did the State violate *Brady v. Maryland*, 373 U.S. 83 (1963) when it failed to disclose to Trial Counsel that one of Starling's prosecutors called a Superior Court Judge and arranged for a Violation of Probation and Capias against Gaines to be withdrawn? (A1945-67 (6/12/13 Supp. Am. Pet. at 6-28); A2197-239 (10/29/13 Reply to State's Answer to Supp. Am. Pet. at 2-44)).

B. Scope of review: A Superior Court's decision on a motion for postconviction relief, including factual determinations, is reviewed for abuse of discretion. "Questions of law and constitutional claims, such as claims that the State failed to disclose exculpatory evidence, are reviewed *de novo*."[26] All of Starling's claims are constitutional claims and should be reviewed *de novo*.

C. Merits of Argument: In addition to finding a procedural bar, the Superior Court denied Starling's claim that the State violated its *Brady* obligation when it failed to disclose evidence that could have been used to impeach Alfred Gaines.[27] The Superior Court's ruling is wrong in both respects.

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[26] *Wright v. State*, 91 A.3d 972, 982 (Del. 2014)

[27] *See* A2404, 2408-14 (9/5/14 Order at 5, 9-14).

Gaines was the State's key witness against Starling and his testimony was essentially uncorroborated. The barbershop shooting occurred on March 9, 2001. Gaines first decided to incriminate Starling approximately one month later following an April 7, 2001 incident in Chester, Pennsylvania in which Gaines was shot.[28] Chester police then arrested him for having crack cocaine in his possession. The incident then led Gaines's probation officer to determine that Gaines was in violation of his probation for missing his curfew, leaving the state of Delaware without permission, and being in the possession of illegal narcotics (crack cocaine). Gaines's probation officer recommended that Gaines be arrested, extradited back from Pennsylvania, and sent to prison to serve the remainder of his sentence. On April 18, 2001, the Superior Court signed the capias for Gaines's arrest and indicated that Gaines's bail be set at $10,000 cash.[29]

Initially, the State took steps to extradite Gaines for violating his probation. On April 23, 2001, one of Starling's prosecutors, Deputy Attorney General ("DAG") Joelle Wright (now Florax), contacted Gaines's probation officer to discuss Gaines's probation violation.[30] DAG Wright told the probation officer that Wilmington Detective Ron Mullin "will file a Detainer and when [Gaines's]

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[28] *See* A184-90 (4/18/01 Capias related to Gaines's VOP).

[29] *See id.*

[30] *See* A35 (Gaines's Probation record at 4/23/01).

charges are cleared in PA, they will extradite him to Delaware."[31] On May 14, 2001, DAG Wright contacted Gaines's probation officer and advised that Gaines was still in custody in Chester, Pennsylvania, but that the "detainer has been filed, and he will be taken into custody when his charges in PA have been taken care of."[32] On May 17, 2001, upon a motion by the State, the Pennsylvania Court of Common Pleas ordered that upon the resolution of Pennsylvania's drug charges, Gaines would be released to Detective Mullin and extradited back to Delaware.[33]

Gaines was never extradited back to Delaware and was never sentenced for his VOP due to the actions of DAG Wright. On September 6, 2001, the Assistant District Attorney of Delaware County (PA) who was handling Gaines's prosecution following Gaines's April 18, 2001 arrest in Pennsylvania, sent a letter to DAG Wright requesting that she contact the Delaware County DA's Office "as soon as you have any definite plans for Alfred Ganes [sic]."[34] On October 15, 2001, DAG Wright notified Gaines's probation officer that Gaines was being allowed to relocate to another state.[35] On October 16, 2001, DAG Wright contacted the Delaware Superior Court and requested that it withdraw Gaines's

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[31] *See id.*

[32] *See id.* at A35 (entry dated 5/14/01).

[33] *See* A351-56 (5/17/01 Order).

[34] *See* A357 (9/6/01 Letter from Stephanie L. Wills, Assistant District Attorney to Joelle Wright, Esq., Office of the Attorney General).

[35] *See* A35 (Gaines's Probation record at 10/15/01).

capias and dismiss his VOP.[36] The Superior Court dismissed the capias and VOP on October 17, 2001.[37]

Despite the State's actions and dismissal of the VOP and capias, prior to Starling's trial, the State told Trial Counsel that Gaines had a *pending* VOP and that the State had not taken any actions with Gaines's VOP, which was being held in abeyance until after Starling's trial.[38]

To be clear, because of the State's misleading and incomplete disclosures, Trial Counsel was unaware of the following:

- Gaines's probation officer recommended that Gaines be extradited, that his probation be revoked and that he be returned to prison to serve out the remainder of his suspended sentence;[39]
- In response to the probation officer's recommendation, a Delaware Superior Court judge signed a capias for Gaines's arrest and set bail in the amount of $10,000;[40]
- The State, including one of Starling's prosecutors, filed a detainer against Gaines and obtained an extradition order so that Gaines could be taken into custody upon his release from a Pennsylvania prison where Gaines was being held after being arrested on April 18, 2001, for possession of crack cocaine;[41]

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[36] *See* A1229 (11/26/12 Florax Tr. 65:11-19); *see also* A358-59 (10/16/01Gaines's Probation Progress Report).

[37] *See* A912-19 (3/13/08 Superior Court Criminal Docket).

[38] *See* A1333 (11/27/12 Wallace Tr. at 59:2-6).

[39] *See* A1727 (1/8/13 Malik Tr. at 15:11-18).

[40] *See id.* at A1727-28 (15:19-16:3).

[41] *See id.* at A1728 (16:4-6).

- The State decided not to extradite Gaines for violating his probation and lifted the detainer against him;[42] and
- One of Starling's prosecutors contacted a Superior Court judge and had Gaines's capias and VOP dismissed.[43]

Trial counsel testified that had the State disclosed the above information prior to trial, he would have used it on cross-examination to impeach Gaines's credibility.[44]

1. The Superior Court erred by ruling that Starling's Brady claim is procedurally barred.

The Superior Court ruled that "Starling's claim of a *Brady* violation regarding information to impeach Gaines" was procedurally barred under Rule 61(i)(3) because it was not presented at trial or on direct appeal.[45] The Superior Court corrected its decision and also ruled that Starling failed to present "a colorable claim of a miscarriage of justice because of a constitutional violation to warrant application of the exception in Rule 61(i)(5)."[46] The Superior Court erred in finding that Starling's *Brady* claim was procedurally barred.

First, Starling's *Brady* claim cannot be barred by Rule(i)(3), because it is based on evidence that the State suppressed until these post-conviction

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[42] *See id.* at A1728 (16:7-9).

[43] *See id.* at A1728 (16:10-21).

[44] *See id.* at A1729 (17:1-23).

[45] *See* A2404 (9/5/14 Order at 5).

[46] *Id.* at A2416 (16).

proceedings. Rule 61(i)(3) provides: "Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, *unless the movant shows* (A) Cause for relief from the procedural default and (B) Prejudice from violation of the movant's rights."[47] Satisfaction of the first prong of Rule 61(i)(3)—cause for relief from procedural default—"ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim."[48] Here, the external impediment is that, until Rule 61 discovery, the State withheld from Trial Counsel the evidence that it had Gaines's probation violation dismissed, which prevented Starling from previously raising this claim. Starling was prejudiced by the State's *Brady* violation because he was denied evidence that substantially impeached the State's star witness.[49] If the Superior Court's ruling were correct, it would eviscerate the State's *Brady* obligations because a *Brady* claim would only be reviewable if the State was "caught" before a defendant's direct appeal.

Second, the Superior Court clearly misapplied Rule 61(i)(5), which provides that the bars to relief enumerated in the rule "shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of

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[47] Del. Super. Ct. Crim. R. 61(i)(3) (emphasis added).

[48] *See, e.g.*, *Younger v. State*, 580 A.2d 552, 556 (Del. 1990) (citing *Murray v. Carrier*, 477 U.S. 478, 492 (1986)).

[49] *See* Section I.C., *infra*.

justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."[50] It is well settled that the Rule 61 "bars to relief do not apply where there is a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."[51] The law is equally clear: "[w]hen the *Brady* rule is violated, postconviction relief cannot be barred by Rule 61(i)(3) because a *Brady* violation undermines the fairness of the proceeding leading to the judgment of conviction. Because *Brady* violations strike at the core of a fair trial, the consequences of a failure to comply with *Brady* must be examined carefully."[52]

In finding that Rule 61(i)(5) did not cover Starling's claim, the Superior Court stated that:

> Unlike the circumstances in *Wright*, Defendant's contentions fall short of establishing colorable *Brady* violations when considered individually or cumulatively. For instance, Defendant offered no evidence to support his claim that the State had an agreement with Gaines to discharge Gaines' probation in exchange for Gaines' cooperation and testimony.[53]

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[50] Del. Super. Ct. Crim. R. 61(i)(5).

[51] *Wright v. State*, 91 A.3d 972, 985 (Del. 2014) (internal quotation marks and citations omitted).

[52] *Id.* at 986 n.28 (quoting and citing *Jackson v. State*, 770 A.2d 506, 515-16 (Del. 2001).

[53] A2414 (9/5/14 Order at 15).

The Superior Court's rationale for barring Starling's *Brady* claim fails for two reasons. First, Starling has repeatedly stated that his *Brady* claim is *not* premised on the existence of a *quid pro quo* agreement, nor is an agreement required.[54] Second, Starling's *Brady* claim is predicated on the State failing to disclose that it had Gaines's VOP dismissed[55]—not that Gaines was ultimately discharged from probation.[56] Because Starling's claim is based on an actual *Brady* violation, it cannot be barred by Rule 61.

2. The Superior Court erred by ruling that there was no Brady violation.

In deciding that there was no *Brady* violation, the Superior Court misstated Starling's claim and contradicted the evidentiary record. According to the Superior Court, Starling's *Brady* claim was premised on the fact that "the State did not reveal to Trial Counsel the role that the Delaware Department of Justice ('DDOJ') played in the discharge of Gaines' Delaware probation."[57] But Starling's *Brady* claim is that the State failed to disclose that Starling's prosecutor asked the court to withdraw the *capias* for Gaines's arrest and dismiss Gaines's VOP.

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[54] *See, e.g.*, A2218 (10/29/13 Reply at 23).

[55] *See id.*

[56] On April 8, 2002, Gaines was discharged from probation because Gaines "is not reporting to the probation office and is being supervised by the Attorney General's Office." *See* A397-99 (3/27/02 Progress Report Disposition).

[57] A2409-10 (9/5/14 Order at 10-11).

The Superior Court also incorrectly found that Trial Counsel was "aware of the discharge of the violation of probation."[58] In fact, there is no dispute that the State's lead prosecutor incorrectly told Trial Counsel *that Gaines's VOP was pending until after Starling's trial*—even though Gaines's VOP had already been dismissed at the request of one of Starling's prosecutors.[59] Immediately before Starling's trial, the State's lead prosecutor also provided Trial Counsel a DELJIS rapsheet purporting to summarize Gaines's prior criminal history, which incorrectly listed Gaines's April 18, 2001 VOP as *pending*.[60] Trial Counsel relied on the accuracy of Gaines's rapsheet and what the lead prosecutor had told him,[61] which is corroborated by the fact that Trial Counsel's handwritten summary of Gaines's prior criminal history also incorrectly lists the April 18, 2001 VOP as *pending*.[62]

Based on a complete misstatement of the record, the Superior Court further ruled that Starling did not suffer any prejudice for the State's lack of disclosure.

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[58] *Id.* at A2412 (13).

[59] *See* A1333 (11/27/12 Wallace Tr. at 59:2-6 (The lead prosecutor testified: "That he had pending VOPs? Yeah, I told him that. That he was not—that we weren't doing anything or that nothing was being done with them, they were being held in abeyance until after his trial, I told him that.")).

[60] *See* A456-69 (10/14/03 Gaines's DELJIS rapsheet along with Trial Counsel's handwritten notes summarizing Gaines's criminal history); *see also* A1722-23 (1/8/2013 Malik Tr. at 10:3-11:15).

[61] *See* A1725 (1/8/13 Malik Tr. at 13:21-22).

[62] *See* A468-69 (Trial Counsel's handwritten notes).

According to the Superior Court, the fact that Gaines was shot in Chester prevented Starling from impeaching Gaines with evidence that the State dismissed his probation violation:

> Trial Counsel properly avoided making this presentation to the jury which would have implicated Starling in another shooting. Indeed, Trial Counsel and the State agreed not to mention the Chester shooting, which led to Gaines' violation of probation because if the Chester shooting was mentioned at trial, then Starling's involvement in the Chester shootings would also have been mentioned. Therefore, Trial Counsel not only was aware of the discharge of the violation of probation, but specifically chose as part of Trial Counsel's strategy not to question Gaines about the violation or the Chester shooting. This was sound strategy.[63]

The Superior Court did not provide any citations to support its conclusions that: (1) Trial Counsel knew that the VOP was dismissed; (2) Trial Counsel and the State agreed not to mention the Chester shooting at trial; (3) it was the Chester shooting that led to Gaines's VOP; and (4) Trial Counsel deliberately chose not to question Gaines's about the discharge of the probation violation. Thus, it is unclear upon what evidence the Superior Court based its conclusions. However, the Superior Court is wrong on all counts.

First, and foremost, as discussed above, Trial Counsel was told by the State's lead prosecutor that Gaines's VOP was *pending* at the time of Starling's

[63] A2411-12 (9/5/14 Order at 12-13).

trial, and Trial Counsel relied upon this information. Trial Counsel never knew that the VOP had been dismissed.

Second, Trial Counsel and the State never agreed not to mention the Chester shooting at trial. In fact, the Chester shooting *was* mentioned at trial in a manner intended to bolster the State's case. The State had a Chester police detective testify that Gaines was shot in Chester on April 7, 2001.[64] Immediately after that testimony, Gaines took the stand and testified that it was only after being shot and almost dying in Chester that he decided to tell the police about the barbershop shooting.[65] The only agreement between Trial Counsel and the State was that Gaines could not testify that Starling was the person who shot him in Chester. The State proposed the agreement because it did not want Trial Counsel to be able to cross-examine Gaines on the events that led to the Chester shooting, namely that Gaines had shot Starling's acquaintance the prior day.[66] Trial Counsel entered this agreement not knowing that the State had already had Gaines's VOP dismissed.

Third, Gaines did not violate his probation because he was shot in Chester. Gaines violated his probation because he left Delaware without permission,

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[64] *See* A524-26 (10/16/03 Trial Tr. at 36:4-41:9).

[65] *See id.* at A537 (85:7-88:23).

[66] *See* A445, 450 (10/10/03 Trial Tr. at 19:4-18, 39:18-41:11).

violated his curfew, and possessed illegal narcotics.[67] The Chester shooting was the reason that Gaines was *caught* violating his probation, but he would have been in violation of his probation had he not been shot. Thus, just as the State was able to refer to the fact of the Chester shooting to establish Gaines's purported motive for incriminating Starling, Trial Counsel would have been able to refer to the fact that Gaines had violated his probation—and the State had the VOP dismissed—in order to impeach Gaines's testimony. Neither required discussion of whether Starling was involved in the shooting of Gaines.

Finally, contrary to the Superior Court's unsupported assertion that Trial Counsel intentionally exercised "sound strategy" by not impeaching Gaines with the information that the State withheld, Trial Counsel specifically testified that he was unaware that Gaines's VOP had been dismissed and that he *would have* impeached Gaines with this information had the State not suppressed it.[68]

3. The State committed a Brady violation by not disclosing that it had Gaines's capias and VOP dismissed.

With respect to Starling's actual *Brady* claim, the State's failure to inform Starling that one of Starling's prosecutors intervened on Gaines's behalf in order to prevent Gaines from being extradited and to ensure that the VOP against him was

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[67] *See* A184-90 (4/18/01 Capias related to Gaines's VOP).

[68] *See* A1729 (1/8/13 Malik Tr. at 17:6-23).

dismissed represents a *Brady* violation that undermines the confidence in Starling's conviction.

In order to establish a *Brady* violation: "'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.'"[69] "Evidence [that] the defense can use to impeach a prosecution witness by showing bias or interest . . . falls within the *Brady* rule."[70] For example, in *Michael v. State*, the State did not disclose to defense counsel that it reduced the victim's traffic charges prior to the victim testifying at trial.[71] The Supreme Court held that "the dropping of a charge against a State's witness is clearly relevant to the issue of bias" and "falls within the *Brady* rule."[72] In finding that the State's lack of disclosure amounted to a *Brady* violation, the Supreme Court explained the scope of the State's obligation:

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[69] *Atkinson v. State*, 778 A.2d 1058, 1062-63 (Del. 2001) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

[70] *See Jackson v. State*, 770 A.2d 506, 515 (Del. 2001) (holding that "it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

[71] *See Michael v. State*, 529 A.2d 752, 756 (Del. 1987).

[72] *Id.* (citing *Van Arsdall v. State*, 524 A.2d 3 (Del. 1987) and *Giglio v. United States*, 405 U.S. 150 (1972)).

"Whenever the State reduces any pending charges (related or not) or makes any arrangement with any State witness, disclosure is mandatory."[73]

Here, there is no doubt that the State withheld information that Starling could have used to impeach Gaines and that the State was required to disclose it. Gaines violated his probation, his probation officer recommended that he be sentenced to prison, and he was ordered to be extradited to Delaware upon release from prison in Pennsylvania in order to appear for his VOP. The only reason that Gaines was never extradited and his VOP was dismissed is because one of Starling's prosecutors intervened on his behalf. By any standard, this was a benefit that Gaines received from the State. To find otherwise would suggest that somehow Gaines would have preferred to have been extradited to Delaware to face the very real possibility of returning to prison. *Brady* cannot countenance the suppression of such benefits without eviscerating the very integrity of the trial process that *Brady* and its progeny have sought to protect.

Moreover, Starling's claim is not contingent upon the existence of a *quid pro quo* agreement between the State and Gaines, nor has the State or the Superior Court cited a case to support such a proposition. The fact is that Gaines could have been impeached with evidence that he benefited from incriminating Starling—namely, evidence that one of Starling's prosecutors intervened on Gaines's behalf

[73] *Id.*

and ensured that Gaines was not extradited and sentenced for his VOP. Trial Counsel needed no agreement to argue that Gaines's true motivation for implicating Starling was to get out of Gaines's own legal problems.

There is also no doubt that the State suppressed this information from Starling. Not only did the State fail to inform Trial Counsel that one of Starling's prosecutors had had Gaines's VOP dismissed, its lead prosecutor incorrectly told Trial Counsel that the State was not going to do anything with Gaines's VOP until after Starling's trial.[74]

Finally, the State does not even deny that the information that it withheld from Starling could have been devastating to its case, conceding that "[i]n many cases, such a cross-examination of a State witness would be an *extremely effective attack on the credibility of the witness*, and *perhaps even fatal to the State's case*."[75] Here, the prejudice that Starling suffered is particularly acute because the State went to great lengths to support Gaines's credibility.

Knowing that its case depended almost entirely on Gaines's uncorroborated testimony, the State presented Gaines as a believable witness whose only purported motive for testifying against Starling was to provide closure to the victims'

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[74] *See* Section I.B, *supra.*

[75] A2116-17 (9/6/13 Answer at 12-13 (emphasis added)). The only reason the State argues that the *Brady* information in this case would not have been fatal to its case is the State's erroneous position that Trial Counsel would have been precluded from actually using it against Gaines.

grieving families. The State elicited testimony from Gaines that contradicted his prior statements but served to bolster the State's argument that Gaines's only motive for incriminating Starling was out of concern for the victims' families. For example, prior to trial, Gaines repeatedly told the police he went home and immediately fell asleep after the barbershop shooting.[76] At trial, however, Gaines testified that he was so upset that he could not eat or sleep when he got home[77] and that the death of the little boy had been weighing on his mind.[78]

Based on Gaines's testimony, the State argued that the jury should find Gaines credible because of his selfless motivation for incriminating Starling:

> [Gaines] made a decision to try and give some peace to a couple of families of murder victims and come forward with what he said. You saw Alfred Gaines testify. It is your judgment on credibility that most matters.[79]

The State not only presented Gaines as a credible witness with no reason to lie, it also affirmatively told the jury that the State did not withhold any information about Gaines's criminal history that could bear upon his credibility:

> When Alfred Gaines, when Alfred Gaines took the stand, did we hide anything about him from you? Was he — did you learn all about his criminal past?[80]

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[76] A220-21, 238 (4/25/01 Gaines Tr. at 29:A263, 30:A266, 47:A417).

[77] *See* A535 (10/16/03 Trial Tr. at 79:15-19).

[78] *See id.* at A537-38 (88:10-89:20).

[79] A645 (10/22/03 Trial Tr. at 53:1-4).

[80] *Id.* at A662 (122:22-123:1).

In fact, the jury did *not* have all of the relevant information upon which it could properly assess Gaines's credibility. The jury was never told that at the time Gaines came forward and first incriminated Starling, he was facing the very real prospect of being returned to prison for violating his probation or that one of Starling's prosecutors had Gaines's VOP dismissed, because the State withheld this information. Thus, Starling was unable to impeach the State's claim that the only reason Gaines incriminated Starling was to provide closure to the grieving families of the two victims.

This Court has emphasized the importance of ensuring the right of a defendant to impeach a witness' credibility.[81] The State denied Starling the ability to impeach the credibility of the chief witness against him when it withheld information concerning the benefits it provided Gaines. As such, Starling must be granted a new trial.[82]

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[81] 770 A.2d 506, 515 (Del. 2001) (footnotes omitted) (quoting *Michael v. State*, 529 A.2d 752, 756 (Del. 1987).

[82] Though the prejudice to Starling from each of the constitutional errors set forth herein requires a new trial, a new trial is also required by the cumulative effect of the prejudice Starling incurred due to those errors. *See generally Wright v. State*, 91 A.3d 972, 985 (Del. 2014).

II. Starling was denied a fair trial because Trial Counsel provided ineffective assistance of counsel by failing to object to the admission of a highly prejudicial out-of-court statement despite the statement being involuntary and the state failing to meet any of the procedural requirements for admission under Delaware Code Section 3507, in violation of the Sixth Amendment of the United States Constitution.[83]

A. Question presented: Did Trial Counsel provide ineffective assistance of counsel by failing to object to prejudicial statement with no exculpatory value that was inadmissible under Delaware Code Section 3507? (A1968-77 (6/12/13 Supp. Am. Pet. at 29-38); A2240-60 (10/29/13 Reply to State's Answer to Supp. Am. Pet. at 45-65)).

B. Scope of review: *See supra*, Section I(B).

C. Merits of argument: After Gaines implicated Starling in the barbershop shootings, the police attempted to corroborate Gaines's account of the shootings. They were unable to do so. There was no physical evidence connecting Starling to the shootings, the police had not established a motive, and several witnesses had contradicted Gaines.

Needing some corroboration for Gaines's account, nearly two months after the shooting, several police officers showed up unannounced at Starling's brother's (Michael Starling's) place of work, put him into a police car, drove him to the

[83] In addition to failing to object to the admission of the Michael Starling recording, Trial Counsel provided ineffective assistance throughout his representations of Starling. Starling's claims for relief based on ineffective assistance of counsel are set forth in Section VI below.

police station, and took away his cellphone. Over the next two hours, two detectives repeatedly told Michael Starling that they needed him to say that Starling had told him he was sorry about shooting the little boy. They threatened Michael with being charged with the barbershop shootings and crimes that did not exist, they told him he could spend the rest of his life in jail for something he did not do, they told him he could not leave until he repeated back what they wanted him to say, they ignored his requests to see his mother, they lied to him that other witnesses had corroborated Gaines, and they told him Starling had confessed. Finally after two hours, Michael repeated back to the detectives that Starling said he was sorry about the little boy.

Despite failing to meet any of Delaware Code Section 3507's strict requirements for admission of an out-of-court statement, the State admitted Michael Starling's recorded statement into evidence at trial. Trial Counsel never even objected, despite recognizing that the Michael Starling statement was "involuntary . . . that it was the product of police suggestion, that it wasn't a knowing statement, that it wasn't a voluntary and intelligent description of the alleged events"[84] and believing "it was the most damaging piece of evidence in the case, because it sort of corroborated and—it did corroborate what Gaines said and

[84] A1802 (1/9/13 Malik Tr. at 16:16-22)

it gave it credibility."[85] In his Rule 61 Petition, Starling demonstrated that Trial Counsel provided ineffective assistance of counsel by failing to object.

1. The Superior Court erred by ruling that Trial Counsel did not provide ineffective assistance by failing to object to the Michael Starling statement.

The Superior Court denied Starling's claim, ruling without citation or further explanation that (1) Starling cannot argue that Trial Counsel was ineffective for failing to object to the admission of the Michael Starling recording "because Trial Counsel introduced the tape himself"; and (2) Trial Counsel's introduction of the tape "was not objectively unreasonable because Michael's taped interview permitted the jury to consider the credibility of Michael's confession, thus providing potentially exculpatory evidence for Starling."[86] The Superior Court's ruling is premised on two asserted facts that are not true: (1) that Trial Counsel introduced the Michael Starling recording and (2) that he did so because it was affirmatively helpful to Starling's defense.

First, Trial Counsel did *not* introduce the Michael Starling recording. The State introduced the recording through Detective Conner, several witnesses after

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[85] *Id.* at A1801 (15:17-21).

[86] A2427 (9/5/14 Order at 28).

Michael testified.[87] It is unclear why the Superior Court believed that Trial Counsel introduced the Michael Starling recording, as Starling's Supplemental Petition specifically stated that the State introduced the recording during the examination of Detective Conner and cited the relevant portion of the trial transcript, a fact never contested by the State.[88]

Second, Trial Counsel did not use the Michael Starling recording as exculpatory evidence. The *only* use that Trial Counsel made of the recording was to show that Michael's statements were coerced—and Trial Counsel did so only after the State introduced the recording. If the Michael Starling recording had not been introduced into evidence, there would have been no reason for Trial Counsel to use the recording to show the statements were coerced. The evidence of coercion in the recording was only "exculpatory" to the extent it minimized the prejudice from the recording itself.

The Superior Court did not identify any support for the premise that the Michael Starling recording was potentially exculpatory. Nor is there any. The recording contained a statement by Michael Starling—albeit coerced—that corroborated Gaines's testimony and included multiple false statements by the

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[87] A582 (10/17/03 Trial Tr. at 56:9-12). As explained below, the State's proffer of the Michael Starling recording into evidence through Detective Conner, rather than at the conclusion of Michael Starling's testimony, was procedurally improper.

[88] *See* A1992 (6/12/13 Supp. Pet. at 53).

detectives that others had corroborated Gaines. Nothing in the recording was helpful to Starling. Trial Counsel testified that he believed the Michael Starling recording "was the most damaging piece of evidence in the case."[89] In short, there was no independent reason for Trial Counsel to use the recording.

Because the Superior Court mistakenly believed that Trial Counsel had introduced the recording and that he had done so because it was potentially exculpatory, the Superior Court never addressed the real issue: that the recording was inadmissible under Delaware Code Section 3507.[90]

2. The Michael Starling statement was inadmissible.

a. Section 3507 Requirements

Section 3507 provides that "the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value."[91] If the out-of-court prior statement was involuntary, the statement is *not admissible*.[92] "A statement is involuntary if the totality of the circumstances demonstrate that the witness's will was overborne."[93] To be voluntary, a statement must be "the product

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[89] A1801 (1/9/13 Malik Tr. at 15:17-21).

[90] In fact, the Superior Court's opinion does not even cite Section 3507.

[91] Del. Code Ann. tit. 11, § 3507(a) (2015).

[92] *Taylor v. State*, 23 A.3d 851, 853 (Del. 2011).

[93] *Id.*

of a free and deliberate choice rather than intimidation, coercion and deception."[94] "[C]oercion can be mental as well as physical . . . ."[95] It is the offering party's burden to "establish that the out-of-court statement was voluntary either during the direct examination of the witness or, if the witness denies that the statement was voluntary, on *voir dire*."[96]

In addition to the requirement that the statement be voluntary, Section 3507 contains other strict requirements before an out-of-court statement can be admitted, as this Court succinctly described in a recent opinion:

> A statement offered under *Section 3507* must be offered before the conclusion of the direct examination of the declarant. The prosecutor must inquire about the voluntariness of the statement during the direct examination of the declarant, and the judge must make a ruling on whether the declarant made the statement voluntarily before the statement may be submitted to the jury for consideration.[97]

These requirements are not mere formalities. As this Court has underscored, the requirements are necessary to ensure that criminal trials are "consistent with

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[94] *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

[95] *Miranda v. Arizona*, 384 U.S. 436, 448 (1966) (citation and internal quotation marks omitted).

[96] *Woodlin v. State*, 3 A.3d 1084, 1087 (Del. 2010).

[97] *Dunn v. State*, 2014 Del. LEXIS 423, at *6 (Del.); *see also Gomez v. State*, 25 A.3d 786, 795 (Del. 2011) (reviewing the foundational requirements the Court has established in the 41 years since Section 3507 was enacted); *Woodlin*, 3 A.3d at 1088 (for the out-of-court statement to be admitted, "the trial judge 'must be satisfied that the statement was voluntarily made, and must render an explicit determination on the issue before admitting it for the jury's consideration.'" (quoting *Hatcher v. State*, 337 A.2d 30, 32 (Del. 1975)) .

the values that underlie Anglo-American criminal proceedings, because the evidence against a defendant will be presented in what is traditionally considered the most reliable form, that of direct testimony in open court."[98]

b. The Michael Starling statement was involuntary

On April 27, 2001, police arrived at Michael's place of employment and insisted that he go to the Wilmington Police Station.[99] At the station, the police took Michael's cell phone and told him he was not allowed to make any phone calls.[100] Two detectives, Mullins and Sullivan, then questioned him for more than two hours. Michael was 23 years-old at the time and had no criminal history.[101] He was not given his *Miranda* rights at any point.

Attempting to corroborate Gaines's story, detectives Mullins and Sullivan asked Michael if while at Miller's house, his brother had "expressed that he was sorry about what he had did."[102] Michael denied that Starling had done so.[103]

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[98] *Gomez*, 25 A.3d at 796-97 (citations and internal quotation marks).

[99] *See* A575 (10/17/03 Trial Tr. at 25:5-16). Michael Starling had been arrested, held in custody for six to seven hours, and then released by the Wilmington Police several days earlier. *See id.* at A574 (23:8-24:10).

[100] *See id.* at A574 (22:21-23).

[101] *See* A265, 269 (4/27/01 M. Starling Tr. at 2, 6). In addition to the transcript, the audio recording of the Michael Starling interrogation is also included in the appendix (A350).

[102] *Id.* at A283 (20).

[103] *Id.*

Michael's statement did not end the detectives' questioning, however. In fact, it was only the start of two hours of intense interrogation by the detectives.

According to Detective Mullins, Michael's initial statement that Starling had not said he was sorry about the little boy was unacceptable because it contradicted Gaines's story.[104] The detectives were not interested in statements that differed from the story Gaines had given them.[105] The detectives intended to end the interrogation only if and when Michael gave the statement that corroborated Gaines's story—that Starling had said he was sorry about the little boy.[106]

Because Michael's initial statement did not corroborate Gaines's story, the detectives took steps to compel the statement they wanted.[107] How Michael went from telling the detectives that his brother had never said anything about being sorry for something he did to hours later agreeing with the detectives that his brother said he was sorry about the little boy, makes clear that Michael Starling's statement was involuntary.

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[104] *See* A1593, 1599 (11/29/12 Mullins Tr. at 23:16-20 (testifying that Michael Starling's statement was not good enough because it was a lie), 29:14-22 (testifying that Michael Starling's statement was a lie because "[o]bviously it was contradictory to what Alfred Gaines had told us.")).

[105] *See id.* at A1592, 1599 (22:15-18 ("Q. So you wanted a particular statement which you viewed as the truth? A. I wanted what we believed the truth was."), 29:14-22 (testifying that anything that contradicted Gaines's story was a lie)).

[106] *See id.* at A1600 (30:6-9 (testifying that the purpose of the interview was to corroborate Gaines's story)).

[107] *See id.* at A1594 (24:20-23 ("Q. And when Michael then repeated what you wanted him to say, that he was sorry about the little boy, you ended the interview, right? A. Correct.")).

First, the detectives told Michael exactly what they wanted him to say. Gaines had told Wilmington detectives that while at Vickie Miller's house, Starling had said he was sorry about the little boy. The detectives repeated this portion of Gaines's story over and over again to Michael:

- "I know what was said okay? And he's sorry for what happened and I'll give him that, he's sorry for it, but the bottom line is I need to hear it from you." A289 (4/27/01 M. Starling Tr. at 26).
- "It's over with . . . he knows it, he's sorry for it, no one intended for that little kid to get killed but it happened." *Id.* at A294 (31).
- "You don't follow me on this, he's already told us what happened, he said he was sorry, I need to know what he told you!" *Id.* at A302 (39).
- "[W]e already know what happened, we know the story, but we know that he told you that he was sorry for I just need to hear it from you!" *Id.* at A310 (47).
- "[W]e know what he said he was sorry for . . . .this isn't about anybody else right now, this is about the death of a five year-old little boy, that's all this is about now, a five year-old little boy who was in a chair trying to get a cut, now is not the time to forget something" *Id.* at A317 (54).
- "[E]ven your own brother that night said he was sorry, what that tell 'ya, wasn't meant to be, little boy caught . . . it was an accident." *Id.* at A319 (56).
- "Exactly is that there's a five year-old boy dead, and that your brother was involved in it. That's exactly!" *Id.* at A310-21 (57-58).
- "You don't forget about those types of things especially when you went there that night knowing a kid got killed." *Id.* at A325 (62).

- "You knew going there that night there was a little boy dead and then when you got there, you probably heard something that made you sick to your stomach! He's sorry for, the other ones gave it up, no one, no one will ever forget this!" *Id.* at A326 (63).

- "I know what he's sorry for cause he told me and I have more respect for him, for him being sorry, he was man enough to say he was sorry. . . ." *Id.* at A327 (64).

- "He said he was sorry Mike, he said he fucked up, now what did he tell you he was sorry for I'm gone . . . ." *Id.* at A332 (69).

- "Alright, I know everybody could care less about drug dealers and this and that, but everybody does care about one thing in life, and that's kids, alright, and that is the reason in itself why your brother admitted because just like he said that night, he was sorry, he fucked up!" *Id.* at A344 (81).

- "I don't think you want to see what he's sorry for," at which point the detectives showed him pictures of the crime scene. *Id.* at A319 (56); A619 (10/21/03 Trial Tr. 76:12-23).

At the evidentiary hearing, Detective Mullins confirmed that he and Detective Sullivan had told Michael what they wanted him to say.[108] When Michael veered from the story, the detectives corrected him.[109] As Detective

[108] *See* A1584, 1586 (11/29/2012 Mullins Tr. at 14:12-14 (Michael Starling was told about the five-year-old little boy), 16:13-15 (Michael Starling was told that Chauncey Starling was sorry for what happened), 16:16-19 (Michael Starling was told that Chauncey was sorry and no one intended for the little boy to be killed)).

[109] *See* A285, 286, 293, 302 (4/27/2001 M. Starling Tr. at 22 ("Michael, you're not listening to me!"), 23 ("Think about the questions we asked you here today . . . ."), 30 ("I think you're confused."), 39 ("You don't follow me on this . . . .")).

Mullins testified, the interrogation ended only when Michael "repeated what [the detectives] wanted him to say, that [Starling] was sorry about the little boy."[110]

Second, the detectives threatened Michael with being charged with the barbershop shootings and spending the rest of his life in prison, even though the detectives knew that he had no involvement whatsoever.[111] At the start of the interrogation, the detectives threatened Michael with getting dragged into the barbershop shooting—"You are not a suspect in anything, but don't get dragged into something that you weren't there for cause that's what's gonna happen."[112] When Michael insisted he did not know the information the detectives wanted, the detectives expressly threatened him with going to jail for the barbershop shootings. They said "Nobody wants to go to jail for something they didn't do Michael, and I hope you're on the same page."[113] Michael believed the threat. At one point, he asked "[w]ill I go to jail?"[114] The detectives responded "I'm not charging you Michael! You are not a suspect in anything," but then a few moments later they intensified their threats—"[t]he bottom line is don't drag yourself down the sewer when you weren't even there! Unless you want to get charged? I don't think

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[110] A1594 (11/29/2012 Mullins Tr. at 24:20-23).

[111] *See id.* at A1590 (20:4-10 ("Q. Did you or did Detective Sullivan threaten Michael with being criminally charged in connection with something he didn't do? . . . A. Yeah I guess.")).

[112] A284 (4/27/01 M. Starling Tr. at 21).

[113] *Id.* at A287 (24).

[114] *Id.* at A289 (26).

you're that you know, you're not that stupid are you? You don't want to take a charge for something you didn't do? Particularly when you don't have to."[115] The detectives made it clear that if Michael told them what they wanted to hear—the story they had repeated to him over and over again—then he would go free.[116] And they made it equally clear, that if Michael did not tell them what they wanted to hear, he would be charged in connection with the murders.[117]

Third, in addition to threatening Michael Starling with being charged with the barbershop shootings, Detectives Mullins and Sullivan threatened Michael with being charged with obstruction of justice and hindering a police investigation.[118] However, at the evidentiary hearing, Detective Mullins admitted that Michael could *not* have been charged because obstruction of justice was not even a criminal offense at the time.[119] The State then asked Detective Mullins whether Michael

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[115] *Id.* at A289, 291 (26, 28); *see also id.* at A290 (27 ("I know, but the thing is don't . . . involve yourself in a double murder investigation. You got no reason to ruin your life Michael.").

[116] *See id.* at A292 (29 ("All I need, Michael, all I need to know is tell me what happened, that way it's sures up what he told us and it sures up what the other people told us, and that's the end of the story man, you walk out the door!")).

[117] *Id.* at A285, 294, 336 (22 ("[W]e need you to tell us so we can say Michael's not involved in this. Alright? You're not helping yourself Michael . . . ."), 31 ("Mike, you are a smart young man, don't throw your life away for something you weren't involved in."), 73 ("[W]e explained it to you, and I explained it to you fr[o]m the beginning, don't get jammed up in this.")).

[118] *See id.* at A281, 285 (18 ("Now don't be pretty sure cause a lot of that's gonna depend on whether or not you're hindering okay a police investigation and that's not good. . . ."), 22 ("You ever heard of obstruction of justice?")).

[119] A1606 (11/29/12 Mullins Tr. at 36:2-5 ("Q. At what point can they be charged, if they provided false information to the police? A. They couldn't back in 2001, it wasn't a criminal offense.")).

could have been charged with hindering a police investigation. Detective Mullins made it clear that Michael could not have been charged with that or any other crime: "Michael had not by—had not committed a criminal violation."[120]

Fourth, despite Michael's repeated requests to speak to his mother, the detectives refused to end the questioning. Asking repeatedly for one's mother during police questioning is equivalent to invoking one's right to remain silent.[121] As Detective Mullins conceded at the evidentiary hearing, Michael asked to speak to his mother several times during the questioning.[122] The detectives did not end the questioning at these requests.[123] Instead, the detectives told him "I don't know where your mother is, but you're a grown man and you're sittin' in a room with me!"[124] The detectives made it clear to him that the only way he would be able to end the questioning and see his mother was to give the statement they wanted.[125]

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[120] *Id.* at A1606 (37:3-4); *see also id.* at A1590 (20:11-14 ("Q. You didn't believe Michael Starling was actually involved in the barbershop shootings, did you? A. No, I know he wasn't involved.")).

[121] *Draper v. State*, 49 A.3d 807, 811 (Del. 2002) (holding that the defendant unambiguously invoked his right to remain silent by asking to speak to his mother).

[122] *See, e.g.*, A293, 326, 328 (4/27/01 M. Starling Tr. at 30 (A. "Can I talk to my mom?" Q. "Yeah." A. "Why can't I talk to her now?"), 63 ("Can I see my mom?"), 65 ("My mom out there?")).

[123] *See* A1591 (11/29/12 Mullins Tr. at 21:5-7).

[124] A328 (4/27/01 M. Starling Tr. at 65).

[125] *See id.* at A305 (42 ("Once this is all said and done with, if you want to go sit with your mom and maybe get a hug or a word in, I'll ask.")); *see also id.* at A332 (69 ("Mike when we're done, when we're done you can call [your mom].")).

Fifth, Michael did not believe he could leave until he gave the statement the detectives demanded. Michael did not voluntarily go to the police station to answer the detectives' questions. Rather, police officers unexpectedly showed up at Michael's place of employment.[126] He was told that he had a female visitor who had brought him lunch; when he went to meet her, he was confronted with "a hallway full of cops," who told him that he had to go immediately to the police station with them.[127] At the police station, the police took his cell phone and told him he was not allowed to make any phone calls.[128] He was then questioned for two hours by the detectives. He was never read his *Miranda* rights.[129]

During the interrogation, Michael believed that he "had no choice but to speak to [the detectives.]"[130] He pleaded with the detectives, "Why I am here? I don't understand, why am I here? I told you I wasn't there."[131] The detectives made it clear that he was there to give them the statement they demanded, and that he could not leave until he gave it to them. The detectives told him that he needed to give a statement that "sures [sic] up what the other people told us" and then

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[126] A575 (10/17/03 Trial Tr. at 25:5-9).

[127] *Id.* at A574 (22:2-16).

[128] *Id.* at A574 (22:21-23).

[129] The failure to inform a witness of his or her constitutional rights weighs against finding a statement voluntary. *Davis v. North Carolina*, 384 U.S. 737, 741 (1966).

[130] A579 (10/17/03 Trial Tr. at 41:19-20).

[131] A285 (4/27/01 M. Starling Tr. at 22).

"boom, you go out the door, no one's got charges on you!"[132] He again pleaded with the detectives, "I don't understand why I'm here right now."[133] And again, the detectives told him that "you know what the conversation is, we need to hear it from you, and you're walking out the door!"[134] This pattern continued throughout the interrogation. Michael would indicate that he did not know what the detectives wanted him to say and he wanted the interrogation to end, at one point even begging to take a lie detector test.[135] The detectives would then tell him that he was only leaving once he gave the statement they wanted to hear—that Starling said he was sorry about the little boy.[136]

In sum, the Michael Starling statement was not voluntary. Rather, it was the statement of a frightened individual who finally repeated back to the detectives

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[132] *Id.* at A292 (29).

[133] *Id.* at A293 (30).

[134] *Id.*

[135] *Id.* at A311 (48).

[136] *See id.* at A294, 301, 302, 310, 321, 322, 325, 327, 338, 340, 343, 344-45 (31 ("Michael, just tell your story and we're done."), 38 ("but only we just need to know what he told you and we're done"), 39 ("I just need to know what he said I'm sorry for whatever he said, that's it! And we're done!"), 47 ("we already know what happened, we know the story, but we know that he told you that he was sorry for I just need to hear it from you! And we're done!."), 58 ("I just need to hear it from you and we're done!"), 59 ("I want you to tell us because I want you to walk out the door . . . ."), 62 ("Mike, we do know that you know . . . so don't jam yourself up now . . . ."), 64 ("Now if you want this over with like I want it over with, let's get it over with."), 75 ("I need you to tell me in your own words what did he say he was sorry for? That's it! We're done."), 77 ("I want to hear it from you and we're done! Vick[ie] walked out the door."), 80 ("What was he sorry for and we're done."), 81-82 ("I'm sorry for . . . finish the sentence for me Mike and we're done. Finish it man, go ahead.")).

what they had told him over and over again, after he was repeatedly threatened with being charged with murder and other crimes for which the detectives knew they had no basis for charging him. Michael's will was overcome by the overly suggestive and threatening questions, and he eventually made the statement he believed he needed to make to avoid prison and end the interrogation.

c. The State failed to meet any of Section 3507's requirements for admission of the Michael Starling statement

As described above, for an out-of-court statement to be admitted at trial under Section 3507, the offering party must establish that the out-of-court statement was voluntary "either during the direct examination of the witness or, if the witness denies that the statement was voluntary, on *voir dire*."[137] Here, the State never established through direct examination of Michael Starling that his out-of-court statement was voluntary—nor could it. The State never even questioned Michael about the voluntariness of the statement. On cross-examination, Michael specifically testified that the statement he made to the detectives was not voluntary and that he "just told them what they wanted to hear because I was scared."[138]

In addition to failing to establish that Michael's statement was voluntary, the State failed to introduce the Michael Starling statement by the conclusion of

[137] *See Woodlin*, 3 A.3d at 1087 (reaffirming the requirement that the offering party must establish that the statements were voluntary); *accord Dunn*, 2014 Del. LEXIS 423, at *6.

[138] A579 (10/17/03 Trial Tr. at 42:13-14).

Michael's direct examination. Delaware law is clear that a party offering an out-of-court statement into evidence under Section 3507 must do so by the conclusion of the party's direct examination of the declarant.[139] The State did not offer the Michael Starling statement into evidence until its examination of Detective Conner, who testified *after* Michael.[140]

Because the State failed to either establish at trial that his statement was voluntary or move for its admission by the conclusion of Michael's direct examination, the statement was inadmissible for those reasons alone. In addition, the Trial Court never made a ruling that the Michael Starling statement was voluntary and therefore admissible. This Court has been clear that "the judge must make a ruling on whether the declarant made the statement voluntarily before the statement may be submitted to the jury for consideration."[141] Thus, the Michael

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[139] *See Dunn,* 2014 Del. LEXIS 423, at *6 ("A statement offered under *Section 3507* must be offered before the conclusion of the direct examination of the declarant.").

[140] A582 (10/17/03 Trial Tr. at 56:9-12). The State's decision to offer the Michael Starling statements into evidence through Detective Conner, rather than at the conclusion of Michael Starling's testimony, is particularly suspect because Detective Conner was not even present when Michael Starling made the out-of-court statements.

[141] *Dunn,* 2014 Del. LEXIS 423, at *6; *see also Gomez*, 25 A.3d at 795-96 (stating that the Court must be "'satisfied that the statement was voluntarily made'" and "'render an explicit determination on the issue before admitting it for the jury's consideration'" (quoting *Hatcher v. State*, 337 A.2d 30, 32 (Del. 1975)).

Starling statement should never have been admitted for the additional reason that the Trial Court never ruled on the voluntariness of the statement.[142]

3. *Trial Counsel's failure to move to suppress or object to the admission of the Michael Starling recording was unreasonable*

At the time of trial, Trial Counsel understood two key things about the Michael Starling statement. First, the statement "was involuntary . . . that it was the product of police suggestion, that it wasn't a knowing statement, that it wasn't a voluntary and intelligent description of the alleged events."[143] Second, it "was the most critical piece of evidence and it was the most damaging piece of evidence in the case, because it sort of corroborated and—it did corroborate what Gaines said and it gave it credibility."[144]

Despite recognizing that the coerced Michael Starling statement was involuntary and prejudicial, and thus inadmissible under 11 Delaware Code Section 3507, Trial Counsel inexplicably failed to take the basic step of moving to suppress the statement before trial, even after his client, Starling, specifically

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[142] At the November 2012 evidentiary hearing, Judge Herlihy, who oversaw the trial, expressed surprise that Trial Counsel had not objected to admission of the statement at trial. When the State began asking Detective Mullins a series of questions about Michael's mental health and whether he was under the influence of any drugs at the time the detectives questioned him, the Court interjected, "Why are we asking these questions now? I assume this was explored the time the statement was introduced in order for me to determine whether it was voluntary." A1608 (11/29/12 Mullins Tr. at 38:17-20). Counsel advised the Superior Court that a voluntariness determination was never made. *Id.* at A1608-09 (38:22-39:12).

[143] A1802 (1/9/13 Malik Tr. at 16:16-22).

[144] *Id.* at A1801 (15:18-21).

directed him to do so, or to object to the statement's admission at trial.[145] Thus, the Trial Court never ruled—nor had the opportunity to rule—with respect to whether the statement was voluntary and admissible under Section 3507. Trial Counsel's failure to move to suppress or object to the admission of the Michael Starling statement fell well below the standard of reasonableness.

As explained above, the Michael Starling statement was involuntary and therefore inadmissible, a fact Trial Counsel recognized. Trial Counsel argued to the jury both during his opening statements and closing arguments that it should ignore the Michael Starling statement because it was involuntary.[146] Trial Counsel later testified that he played the entire Michael Starling statement at trial for the very purpose of showing that the "statement was involuntary . . . that it was the product of police suggestion, that it wasn't a knowing statement, that it wasn't a voluntary description of the alleged events."[147]

In addition to recognizing that the Michael Starling statement was involuntary, Trial Counsel considered the statement to be entirely unfavorable to Starling's case. At the January 2013 evidentiary hearing, Trial Counsel testified

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[145] *See id.* at A1852-53 (66:23-67:3 ("Q. Okay. Did you ever file such a motion in this case? Did you ever ask the judge to rule on the voluntariness of the Michael Starling tape? A. No. No, I did not.")); A582 (10/17/03 Trial Tr. at 56:13-14 (responding "No objection, Your Honor" to the admission of the Michael Starling statement recordings)).

[146] *See* A1800, 1811 (1/9/13 Malik Tr. at 14:13-16; 25:3-12).

[147] *Id.* at A1802 (16:16-23).

that he believed that Michael's statement "was the biggest problem with the defense case . . . and that was the best part of the prosecution's case."[148] He continued, "to me, that was the most critical piece of evidence and it was the most damaging piece of evidence in the case . . . ."[149]

Prior to trial, Starling instructed Trial Counsel, in writing, to move to suppress the Michael Starling statement as involuntary.[150] At the evidentiary hearing, Trial Counsel testified that "obviously, he wrote a letter to me and he asked to suppress that statement."[151]

Faced with an involuntary and inadmissible witness statement that was "the most damaging piece of evidence in the case," and with the basis for moving to suppress having been brought directly to his attention, a reasonable attorney would have objected to the admission of the statement. Courts have regularly held that the failure to move to suppress or object to the admission of a statement or testimony when there is a reasonable basis to do so is objectively unreasonable.[152]

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[148] *Id.* at A1800-01 (14:23-15:3).

[149] *Id.* at A1801 (15:17-21).

[150] A434 (5/23/03 letter from C. Starling to J. Malik).

[151] A1811 (1/9/13 Malik Tr. at 25:1-2).

[152] *See, e.g., Thomas v. Varner*, 428 F.3d 491, 501 (3d Cir. 2005) (holding "that failure to move to suppress or otherwise object to an in-court identification by the prosecution's central witness, when there are compelling grounds to do so, is not objectively reasonable representation, absent some informed strategy" (citations omitted)); *Oliva v. Hedgpeth*, 600 F. Supp. 2d 1067, 1079-81 (C.D. Cal. 2009) (finding that counsel's decision not to file a motion to suppress identification evidence that was unconstitutionally suggestive was objectively unreasonable); *United States v.*

There was no tactical reason for Trial Counsel not to object to the Michael Starling statement, and Trial Counsel never suggested one. Trial Counsel's failure to move to object to the admission of the statement was a not a decision that "'might be considered sound trial strategy,'"[153] or the "result of reasonable professional judgment."[154] Trial Counsel played the complete recording of the statement to show the jury that the statement was involuntary.[155] But doing so only would have made sense if the Court had already ruled that the statement was admissible. Even the most compelling argument from Trial Counsel could not have substituted for suppression of the statement. And there would have been no disadvantage to first objecting to the statement. Even if the Court denied the objection, Trial Counsel could still argue that the statement was involuntary.

Instead, Trial Counsel played the entire recording to the jury. Although the State argued that the decision was tactical, the reality is that it was a huge and decisive procedural blunder. Trial Counsel failed to take the most basic step that

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Cavitt, 550 F.3d 430, 441 (5th Cir. 2008) (finding that the failure to file a motion to suppress was objectively unreasonable); *see also* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Commentary to Guideline 10.8 (Duty to Assert Legal Claims) (2003) (stating that one of the most fundamental duties of an attorney defending a capital case is preserve errors through appropriate motions and objections).

[153] *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (quoting *Michel v. Louisiana*, 350 U.S. 91, 2012 (1955))

[154] *Id.* at 690.

[155] A1802, 1853 (1/9/13 Malik Tr. at 16:13-18 ("Q. You wanted to show that it was involuntary; correct? A. Yes."), 67:4-6 ("Q. So, you just relied on the jury to find the statement involuntary? A. Yes.")).

any reasonable attorney would have taken by objecting.[156] Trial Counsel's failure to move to suppress or object to the statement was not based on an informed strategy and is the definition of ineffective assistance.

4. Starling was prejudiced by the admission of the Michael Starling recording.

There is a reasonable probability that had Trial Counsel moved to suppress or objected to the admission of the Michael Starling statement under Section 3507, the outcome of the trial would have been different.

First, Starling unquestionably was prejudiced by Michael's coerced statement that Starling said he was sorry about the little boy,[157] which, again, Trial Counsel considered to be "the biggest problem with the defense case."[158] Without the statement, the State would have had to rely entirely on Gaines's uncorroborated testimony. Gaines's testimony standing alone was not believable. He did not report the murders to the police until weeks after the barbershop shootings when he was found with crack cocaine in his pocket in Chester, Pennsylvania. Gaines was an admitted drug dealer with a long list of prior convictions. And he had substantial motivation to falsely accuse Starling and Frink of the murders—he had

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[156] A1852-53 (1/9/13 Malik Tr. at 66:23-67:3 (Q. "Okay. Did you ever file such a motion in this case? Did you ever ask the judge to rule on the voluntariness of the Michael Starling tape?" A. "No. No, I did not.")).

[157] A348 (4/27/01 M. Starling Tr. at 85).

[158] A1800-01 (1/9/13 Malik Tr. at 14:23-15:2).

been charged for drug possession in Pennsylvania, and, unbeknown to Trial Counsel or the jury, the Delaware Attorney General's Office had arranged for Gaines to avoid being returned to prison for violating his probation by being found out-of-state in possession of drugs.[159] Without the Michael Starling statement, Gaines's testimony was simply not credible.

In fact, without any evidence to corroborate Gaines's testimony, the Court could have granted an acquittal. *See Bland v. State*, 263 A.2d 286, 289 (Del. 1970) (holding that the evidence was insufficient to support a conviction where the testimony of two accomplices was uncorroborated). At the very least, the jury should have been given a *Bland* instruction regarding Gaines's uncorroborated testimony. *See Brooks v. State*, 40 A.3d 346, 350 (Del. 2012) (holding that it is plain error for a court not to give a *Bland* instruction when an accomplice testifies, whether charged as an accomplice or not).

Second, in questioning Michael Starling, the detectives repeatedly— and falsely—stated that Starling had confessed and that Vickie Miller corroborated Gaines's statement about the night of the shootings.[160] Those statements were

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[159] *See* Section I, *supra.*

[160] *See, e.g.*, A285-86, 305, 324, 334, 338, 346 (4/27/01 M. Starling Tr. at 22-23 ("Chauncey's being arrested, he is cooperating . . . ."), 42 ("[Y]our brother said he was sorry, your brother had said that he had fucked up, okay we know that, we also know one other or two other things actually that were said, and that came from everyone who was in the house, not just one person, and the only one left is you!"), 61 ("But you were there that night, he was there, Alf was there, Vicki[e] was there. Everyone's already told their story, you cover everything up until that point,

untrue—Starling did not confess and Miller did not corroborate Gaines's story. But that is exactly what the jury heard repeated over and over again.

Trial Counsel attempted to mitigate the harm from the detectives' comments that Starling had confessed by calling Detective Mullins as a witness and asking him if the representations he made to Michael about Starling confessing were true, to which Detective Mullins admitted that they were not.[161] But Trial Counsel did not question Detective Mullins, or anyone else, about whether it was true that Miller had corroborated Gaines's statement to police. Thus, the jury was left to believe, incorrectly, that Miller had corroborated Gaines's story.

Allowing the jury to believe that Miller had corroborated Gaines's testimony was highly prejudicial to Starling. Miller had not corroborated Gaines's story in any way—in fact, she directly contradicted Gaines's account of the night of the shootings.[162] Through the detectives' comments, however, the State was able to introduce the invented Miller "statement." Because Miller was not actually called as a witness, that was the only statement the jury heard from Miller, giving it

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what he was sorry for."), 71 ("We already have their statement . . . Vick[ie] came in and lied the first time, okay and then we got her lying and she figured she wasn't doing no time for something she didn't do, and that's the same thing I told you in the beginning, didn't I?" (alteration in original)), 75 ("I've heard his side of the story, I've heard Alf's side of the story, . . . they all jive . . . ."), 83 ("The only other one that tried to pay a little bit of a game was Vick[ie] and when she got caught lying and she was told what the repercussions were . . . she came off it like that.")).

[161] *See* A626 (10/21/03 Trial Tr. at 103:16-23).

[162] *See infra* Section III.

uncontested credibility. Thus, the jury could reasonably believe that Gaines's story had to be true since Starling's girlfriend had corroborated it and Trial Counsel had not called Miller as a witness to say otherwise. Essentially, the State was able to manufacture a witness statement to fit its case, admit the fabricated statement into evidence through recorded comments made by the detectives, and not even have to contend with cross examination of the "testifying" witness.

Finally, the jury heard the detectives refer to either Michael or Starling being criminally charged for doing something in Chester.[163] Starling had shot Gaines during an altercation in Chester, but the State and Trial Counsel had agreed not to inform the jury that Starling was involved in the Chester shooting because of the prejudice that would result.[164] Allowing the jury to hear the detectives refer to the charge for "the thing" in Chester invited the jurors to speculate that Starling was involved in shooting Gaines.

For these reasons alone, Starling was materially prejudiced and should be granted a new trial. But as described below, the prejudice was greatly compounded by the State's failure to produce Miller's exculpatory statement.

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[163] *See* A295 (4/27/2001 M. Starling Tr. at 32 ("The thing you're charged with in Chester and now this . . . ."). At trial, the jury learned that Gaines had been shot in Chester, Pennsylvania. *See* A537 (10/16/03 Trial Tr. 85:7-14).

[164] *See* A445 (10/10/03 Trial Tr. at 20:7-13 ("[I]t can be done in a non-prejudicial way by not targeting Chauncey Starling—or not mentioning that Chauncey Starling was the shooter in Chester.")).

III. Starling was denied a fair trial because the State failed to disclose an exculpatory witness statement that contradicted its key witness's pretrial statement and testimony about the night of the shooting, in violation of the Due Process Clause and Fourteenth Amendment of the United States Constitution, as well as the State's *Brady* obligation.

A. Question presented: Can the State withhold exculpatory statements by witnesses under *Brady* if the witness is accessible to the defendant's counsel and available to be called as a witness at trial? (A2044-52 (6/12/13 Supp. Am. Pet. at 105-13); A2293-301 (10/29/13 Reply to State's Answer to Supp. Am. Pet. at 98-106)).

B. Scope of review: *See supra*, Section I(B).

C. Merits of argument: Vickie Miller, Starling's girlfriend at the time, told the police in a recorded interview that the only time Starling said anything about the barbershop shootings was while they were watching the news together sometime after the shootings. Miller told police that Starling said only that the police should catch whoever committed the shootings. Her statement directly contradicted Gaines. Even though—or perhaps because—Miller's statement contradicted Gaines, the State never disclosed Miller's statement or produced the recording to Trial Counsel, as required by *Brady*. In his Rule 61 Petition, Starling argued that he was denied a fair trial because the State withheld the recorded Miller statement.

1. The Superior Court erred by ruling that Starling was not prejudiced by the State's failure to produce Miller's exculpatory statement to police.

The Superior Court denied Starling's claim, but it did not rule that the Miller statement was not *Brady* material or that the State did not violate *Brady* by failing to disclose the statement prior to trial. Instead, the Superior Court ruled only that Starling had not established prejudice because Miller "was an available witness and Trial Counsel had the opportunity to interview her before trial."[165] The Superior Court was incorrect that Starling was not prejudiced merely because he could have interviewed Miller and Miller was an "available witness."

The prejudice that Starling described in his Supplemental Petition was not Trial Counsel's inability to interview Miller; in fact, Trial Counsel's investigator did interview Miller. Nor does Starling contend that Miller was not "available" as a witness – she admittedly was available to be called. Rather, as Starling explained in his Supplemental Petition, the State's failure to disclose the Miller Statement was prejudicial because (a) he could not introduce Miller's exculpatory statement at trial under Delaware Code Section 3507, (b) the State caused Trial Counsel to believe that Miller had made a statement to police that was harmful to Starling's defense, resulting in Trial Counsel not calling Miller as a witness, and (c) Trial Counsel was unable to try to mitigate the prejudicial (and false) statements by

[165] A2407 (9/5/14 Order at 8).

detectives that Miller had corroborated Gaines's story about the night of the shooting, which were played to the jury as part of the Michael Starling recording. The prejudice to Starling is described in detail below, *infra.* First, the exculpatory nature of the Miller statement must be explained.

2. *The Miller statement was exculpatory and should have been produced.*

Gaines told the Wilmington police, and testified at trial, that shortly after the barbershop shootings, Starling, Gaines, Michael Starling, and Miller all met at Miller's house.[166] According to Gaines, in the presence of Miller (and Gaines and Michael), Starling said he had "fucked up" and that "the little boy man, I shot a little boy!"[167]

On April 19, 2001, the Wilmington detectives interviewed Miller and attempted to corroborate Gaines's statement about the events the night of the barbershop shootings. In an attempt to corroborate Gaines's statement that Starling had said he "fucked up" and "shot a little boy," the detectives asked Miller if Starling had ever said anything about the barbershop shootings. Miller said that the *only* thing that Starling ever said about the barbershop shootings was "that's fucked up" and "they need to catch that mother fucker," when Miller and Starling

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[166] A222-24 (4/25/01 Gaines Tr. at 31-33); A535-36 (10/16/03 Trial Tr. at 80:4-81:5).

[167] *See* A224 (4/25/01 Gaines Tr. at 33:A293-A299 (Q. "She hears him say this?" A. "Yup.")); A536 (10/16/03 Trial Tr. at 82:22-83:2).

saw a news report about the shooting.[168] Miller told the detectives that was the "[o]nly thing he's ever said." Below is a transcription of this portion of the interview:

> Q. Do you remember the day after [inaudible] Saturday, say March 10th, did you see a paper where [inaudible] article about a little five year old boy that was killed?
>
> A. Mmhm
>
> Q. Ok. Will that help you think about the develop . . . . him being at your house, I mean [Starling]. Saying, man it's a shame about that kid. Does that help you remember something?
>
> A. He was always sad if we was there and then like something would come up about it on TV, like this [inaudible] catch the mother fucker and this and that and the third. [inaudible]
>
> Q. Was that, was that meant in reference to the, the adult and the little boy you see killed in the barbershop?
>
> A. Yea, yea he'd be like they need to catch the motherfucker and this that [inaudible] and that's fucked up and that's fucked up. [inaudible]
>
> Q. Ok, well what I'm asking you is, we've got to help you refresh your memory. Maybe he was there that Friday night at your house. And he read the article that Saturday or heard about it on the news, would that help you remember he was there that night or came in that night?
>
> A. He might of.

[168] *See* A191 (4/29/01 V. Miller recording (9:40-12:00)).

Q. Maybe he came in? Did he ever say you know I need to use your phone or did he talk on the phone for a long time?

A. No.

Q. Did he seem upset about anything?

A. He would just say "That was fucked up" cuz I was like "that's fucked up how somebody gonna use the little boy as a shield." And then he was like "I know hon. That's fucked up isn't it." and that was the end of the conversation

Q So between that night in March and today, have you had any conversation with him or anybody that knows him in reference to that barbershop homicide?

A. That was it. And then after we seen America's Most Wanted because I taped it for my brother because he had to work late. So I taped it for him, and we watched it when he got off of work. That was like, they aired that what the 17th? Or was it the 24th?

Q. 17th I believe it was the 17th

A. He was there the 17th and we watched it.

Q. The person you know as Bishop, Chauncey. What was he saying when you were watching it?

A. He just kept saying that was fucked up. They need to catch that mother fucker. Only thing he's ever said.[169]

Miller's statement directly contradicts Gaines's statement that Starling, Gaines, Michael starling, and Miller were all at Miller's house right after the shootings, at which time Starling supposedly said, "I fucked up . . . I shot a little

[169] *Id.*

boy!"[170] Because Miller contradicted Gaines about the night of the barbershop shootings, Miller's statement was exculpatory and should have been disclosed to Trial Counsel.[171]

3. Starling was prejudiced by the State withholding the Miller Statement.

Because Trial Counsel did not have access to the Miller statement, (1) he was unable to admit her statement under Delaware Code Section 3507, (2) he chose not to call Miller as a witness because he believed that Miller's statement to police may have corroborated Gaines, and (3) he was unable to mitigate the prejudice caused when, through the Michael Starling tape, the jury heard the detectives repeatedly state (falsely) that Miller had corroborated Gaines's story. These domino effects from the State's failure to disclose the Miller statement caused Starling extreme prejudice.

What the jury actually heard regarding Miller and what the jury should have heard—had the State properly disclosed the Miller statement—are very different. At trial, the jury heard that Miller had corroborated Gaines's story about what happened the night of the barbershop shootings—i.e. that Starling, Gaines, and Michael Staring were at Miller's house shortly after the shootings and that Starling

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[170] A224 (4/25/01 Gaines Tr. at 33:A293-A299); A536 (10/16/03 Trial Tr. at 82:22-83:2).

[171] *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (the State must disclose exculpatory evidence to the defense); *United States v. Bagley*, 473 U.S. 667, 676 (1985) (evidence that may be used to impeach a witness falls within *Brady* material).

had talked about being sorry for shooting the little boy. As explained *supra* Section II, at trial, the entire Michael Starling interview recording was admitted into evidence and a recording of it was played in full to the jury. During the two-hour interrogation, the detectives repeatedly stated that Miller's statement was consistent with Gaines's statements about the night of the shooting.[172] Miller never testified at trial, her actual statement was never played to the jury, and the detectives' statements were never otherwise contested. Thus, through the improperly admitted Michael Starling recording, the jury "heard" both Miller and Michael confirm Gaines's account of the night of the shootings.

The jury should have never heard the detectives' false statements that Miller had corroborated Gaines, and as explained above, *supra* Section II, such statements were highly prejudicial. Even worse—and compounding the prejudice to Starling—the jury was improperly denied evidence that Miller had in fact *contradicted* Gaines's testimony.

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[172] A305, 324, 334, 346 (4/27/01 M. Starling Tr. at 42 ("[Y]our brother said he was sorry, your brother had said that he had fucked up, okay we know that, we also know one other or two other things actually that were said, and that came from everyone who was in the house, not just one person, and the only one left is you!"), 61 ("But you were there that night, he was there, Alf was there, Vicki[e] was there. Everyone's already told their story, you cover everything up until that point, what he was sorry for."), 71 ("We already have their statement . . . Vick[ie] came in and lied the first time, okay and then we got her lying and she figured she wasn't doing no time for something she didn't do, and that's the same thing I told you in the beginning, didn't I?" (alteration in original)), 83 ("The only other one that tried to pay a little bit of a game was Vick[ie] and when she got caught lying and she was told what the repercussions were . . . she came off it like that.")).

Delaware Code Section 3507 allows the admission of voluntary out-of-court statements. If the State had disclosed Miller's exculpatory statement to Starling, Trial Counsel could have introduced the statement at trial under Section 3507. Trial Counsel could also have called Miller as a witness to testify that the only thing Starling every said about the shootings was that the police should catch the shooter. Miller's statement and testimony would have been powerful evidence that Gaines's testimony was untrue.

Although Trial Counsel was able to interview Miller prior to trial and Miller was available to be called as a witness, those facts do not diminish the prejudice that Starling incurred. First, and most obviously, Trial Counsel could not have introduced Miller's favorable statement to police into evidence *because he did not have it.*

Second, despite Miller's availability, the State effectively precluded Trial Counsel from calling her as a witness by withholding the statement she had made to the police. An attorney's decision to call or not call a witness at trial must be based on the available information as to what the witness will testify—it is weighing risks and reward. Here, Trial Counsel had his investigator interview Miller, and Miller favorably told the investigator that the first she heard of the barbershop shooting was when she and Starling were watching the news

together.[173] She told the investigator that Starling told her that "whoever did it deserves to die" and that he never indicated that he was involved in the shooting.[174]

While Miller gave a favorable statement to Trial Counsel's investigator, Trial Counsel did not know what Miller had told the police and had reason to fear Miller had reversed her statement and given a statement that corroborated Gaines. Because the State did not produce Miller's statement prior to trial, Trial Counsel believed that at best, Miller had made a neutral statement to the police, and at worst, Miller made statements helpful to the State. Trial Counsel had to assume Miller's statements to the police was not helpful to Starling's defense, since the State would have been obligated to produce Miller's statements if they were exculpatory.

Not only did the State's actions indicate that Miller's statement to police were not helpful to Starling's defense, Trial Counsel in fact had reason to believe that Miller had first given an account to police consistent with what she told Trial Counsel's investigator, but then, after police pressure, changed her account to instead corroborate Gaines. On the Michael Starling recording, which the State did produce to Trial Counsel, the detectives told Michael, "Vick[ie Miller] came in and lied the first time, okay and then we got her lying and she figured she wasn't

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[173] A426 (4/8/03 Shannon Investigative Rpt. at 2).

[174] *Id.* (internal quotation marks omitted).

doing no time for something she didn't do . . . ."[175] Later during the recording, the detectives told Michael, "[t]he only other one that tried to pay a little bit of a game was Vick[ie] and when she got caught lying and she was told what the repercussions were . . . she came off it like that."[176] Having heard these statements by the detectives, Trial Counsel reasonably believed that Miller may have changed her account of the night of the shooting in giving a statement to police.

Given the information available to Trial Counsel—that the State did not produce the Miller statements as *Brady* material and the detectives' statements during the Michael Starling interview that Miller had changed her account about the night of the shootings—Trial Counsel made the decision to not call Miller as a witness at trial. As Trial Counsel recalled at the Rule 61 evidentiary hearings:

> I was interested in what, if anything, [Miller] may have said to the police when she was interviewed. Because I was concerned about calling her if there was a situation where she was—where she said something that was 180 degrees different [than what she told Trial Counsel's investigator.] So, yeah, that's the reason why she wasn't called.[177]

Had the State properly disclosed the favorable Miller statement to Trial Counsel, Trial Counsel's assessment of whether to call Miller as a witness would have been dramatically different. He would have known that she was consistent in

[175] A334 (4/27/01 M. Starling Tr. at 71).

[176] *Id.* at A346 (83).

[177] A1901-02 (1/9/13 Malik Tr. at 115:19-116:2).

her accounts to both his investigator and the police—a favorable statement that contradicted Gaines's story about Starling, Michael, Starling, Miller, and Gaines being at Millers house the night of the shooting. In that case, there would have been no reason not to call Miller as a witness.

The combination of Trial Counsel's failure to object to the admission of the Michael Starling recording and the State's failure to disclose the favorable Miller statement to Trial Counsel had a compounding prejudicial effect. The jury should have heard Miller—through both her statement to police and testimony—contradict Gaines's testimony. With no evidence corroborating Gaines's testimony, and both Miller and Michael contradicting Gaines's testimony, there is a significant likelihood that the jury would have found reasonable doubt that Starling committed the barbershop shootings. Instead—due to Constitutional failures by both the State and Trial Counsel—the jury convicted Starling based on Michael's coerced and inadmissible statement that Starling had said he was sorry about the little boy and the detectives' repeated and false statements that Miller had corroborated Gaines. In these circumstances, Starling's conviction must not stand.

4. Starling's claim that the State violated Brady by withholding the Miller statement is not procedurally barred.

The procedural bars do not apply to a "colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to

the judgment of conviction."[178] As described above, Starling was denied a fair trial because the State withheld Miller's exculpatory statement—a violation of Starling's constitutional rights under *Brady*. Thus, the procedural bars are simply inapplicable to the claim.[179]

Furthermore, the procedural bar is inapplicable because the State did not disclose the Miller statement until after trial. Given the time restrains for a direct appeal, Starling was prejudiced by the State's belated disclosure. To the extent Trial Counsel was expected to identify the exculpatory Miller statement and raise the argument in his direct appeal, Trial Counsel provided ineffective assistance for failing to do so. Either way, the procedural bar does not apply.[180]

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[178] Del. Super. Ct. Crim. R. 61(i)(5).

[179] *Id.* at 986 n.28 ("When the *Brady* rule is violated, postconviction relief cannot be barred by Rule 61(i)(3) because a *Brady* violation undermines the fairness of the proceeding leading to the judgment of conviction. Because *Brady* violations strike at the core of a fair trial, the consequences of a failure to comply with *Brady* must be examined carefully." (quoting and citing *Jackson v. State*, 770 A.2d 506, 515-16 (Del. 2001)).

[180] Del. Super. Ct. Crim. R. 61(i)(3) (The procedural bar does not apply where the defendant shows "(A) Cause for relief from the procedural default and (B) Prejudice from violation of the movant's rights.").

IV. Starling was denied a fair trial because the State failed to disclose exculpatory cellphone records of starling's co-defendant, which contradicted the statements and testimony of the State's key witness, in violation of the Due Process Clause and Fourteenth Amendment of the United States Constitution, as well as the State's *Brady* obligation.

A. Question presented: Did the State violate Brady by withholding phone records that contradicted critical aspects of its key witness's testimony? (A2019-38 (6/12/13 Supp. Am. Pet. at 80-99); A2276-96 (10/29/13 Reply to State's Answer to Supp. Am. Pet. at 81-96))

B. Scope of review: *See supra*, Section I(B).

C. Merits of argument: Prior to Starling's trial, the State produced the cellphone records belonging to Starling but did not produce the cellphone records belonging to Starling's co-defendant, Richard Frink, despite Starling's Rule 16 and *Brady* requests.[181] The State only produced Frink's cellphone records after the Superior Court ordered their production during post-conviction discovery. After receiving Frink's cellphone records, Starling supplemented his post-conviction petition to include a claim that the State committed a *Brady* violation by withholding Frink's cellphone records prior to trial.[182] Nonetheless, in denying Starling's petition for post-conviction relief, the Superior Court completely ignored Starling's claim that the State's failure to produce Frink's cellphone records

[181] *See* A1177 (3/22/12 Malik Aff. ¶ 6).

[182] *See* A2008-38 (6/12/13 Supp. Pet. at 69-99); *see also* A2281-87 (10/29/13 Reply at 86-92).

constituted a *Brady* violation that required the court to reverse Starling's conviction.[183] The Superior Court's decision not to address Starling's *Brady* claim was reversible error.

1. The Superior Court should have granted Starling a new trial because the State withheld Richard Frink's exculpatory cellphone records in violation of its Brady obligation.

Richard Frink was Starling's original co-defendant. According to Gaines's uncorroborated testimony, Gaines was: (1) with Starling and Frink for a two to three-hour period prior to arriving at the barbershop the night of the shooting;[184] (2) with Starling and Frink in Frink's car when Starling allegedly saw Darnell Evans in the barbershop and said he was going to shoot him;[185] (3) sitting next to Frink in Frink's car during the 15-minute period when Gaines alleged that Starling had left Frink's car and committed the barbershop shooting;[186] and (4) there when Starling returned to Frink's car and allegedly confessed to shooting Evans and Damon Gist, Jr.[187] Frink's cellphone records impeach Gaines's testimony that he was in Frink's car at any of these critical points. If Gaines's testimony that he was in Frink's car

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[183] Because the State withheld Frink's cellphone records until after trial, Starling's *Brady* claim is not procedurally barred. *See* Del. Super. Ct. Crim. R. 61(i)(3) (The procedural bar does not apply where the defendant shows "(A) Cause for relief from the procedural default and (B) Prejudice from violation of the movant's rights.").

[184] *See* A531-32 (10/16/2003 Trial Tr. at 64:3-65:3).

[185] *See id.* at A532-33 (65:21-72:16).

[186] *See id.* at A534, 550 (75:21-76:10, 137:20-138:2).

[187] See *id.*

during this critical period had been impeached, the State's entire case would have fallen apart. Starling was denied the opportunity to impeach Gaines's testimony because, despite Trial Counsel's Rule 16 and *Brady* requests, the State refused to provide Starling with a copy of Richard Frink's cellphone records.

2. *Frink's phone records impeach Gaines's testimony that he was with Starling and Frink during the period before the shooting*

Gaines testified that Starling and Frink picked up Gaines in the early evening on March 9, 2001, while it was still light out, and drove around in Frink's car until the time of the barbershop shooting.[188] Prior to trial, although specifically asked what he, Starling, and Frink did while driving around that evening, Gaines never told the police that they stopped the car and spoke to anyone.[189] During this period when Gaines claims he, Starling, and Frink were together in Frink's car, Starling called Frink's cellphone *eight times*, including the call that Starling placed to Frink's cellphone at 8:55 pm on March 9, 2001, just 15 minutes after the barbershop shooting when Gaines claimed that Frink and Starling were driving Gaines back to his house.[190] At trial, however, Gaines claimed for the first time that he, Starling, and Frink made repeated stops and went their separate ways

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[188] *See id.* at A531-32 (64:3-65:3).

[189] *See* A197 (4/25/01 Gaines Tr. at 6:A49, A52); *see also* A376 (3/5/2002 Trial Tr. 55:13-18).

[190] *See* A102-03 (Phone Records at 20-21 (On March 9, 2001, Starling, using Michael's cellphone, called Frink's cellphone number—302-218-5201—at 5:29 pm, 5:46 pm, 6:01 pm, 6:23 pm, 6:24 pm, 7:47 pm, 7:57 pm, and 8:55 pm)).

during the period he claimed the three men were together. The lead prosecutor relied on Gaines's story as the *only* explanation for why Starling would call Frink *eight times* when Gaines had claimed they were together in the same car:

> And what do they have to attack [Gaines with]? Well, they'll say [Starling's] phone records attack him. Because why would these two guys make phone calls between one another when they're actually together? And Mr. Gaines tells you, for the first bit of time that they're together nothing's happening. They're riding around. . . . [a]s he explains, well, I mean, riding around is they stop off, they go their way, I go my way, we might all go separately, then we got to meet up at the car, go do something else, go meet other people. Does that sound incredible? *And when you look at the amount of traffic on that cell phone that Chauncey Starling has, any really big surprise that, in fact, he might call the dude down the block and say let's meet at the car?* Shocking?[191]

Although Trial Counsel had Starling's cellphone records, which he introduced as evidence that Starling called Frink during the period they were allegedly together, Trial Counsel did not have Frink's cellphone records, which show that Frink did not even answer several of Starling's calls. Starling, therefore, could not impeach the State's argument about why Starling repeatedly called Frink.

According to Gaines's trial testimony, during the period when he claimed he was driving around Wilmington with Starling and Frink, one of the three men would see someone they recognized, Frink would stop the car, the three would then

[191] A644 (10/22/03 Trial Tr. 50:18-51:19 (emphasis added)).

become physically separated because "we would all go see whoever we were going to see and meet back at the car before we're getting ready to leave."[192] Gaines claimed that Frink stopped the car and the three went their separate ways *four or five* times on the night of the shooting, even though Gaines could not recall the location of any of these stops or identify any of the people he, Starling, and Frink met during any of these stops.[193]

Gaines's new story, which he first told the State's lead prosecutor the morning he testified,[194] provided the State's only explanation for why Starling called Frink's cellphone *eight times* during the period they were allegedly together. According to the State, the reason Starling repeatedly called Frink is because Starling and Frink became physically separated during each of the four or five stops and Starling needed to call Frink to "say let's meet at the car."[195]

The State's argument needed only to be consistent with Starling's cellphone records, because those are the only records the jury saw. The problem is that the State's argument is *inconsistent* with Frink's cellphone records. For example,

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[192] The State's lead prosecutor confirmed that this was interpretation of Gaines's trial testimony. A1384-85 (11/27/12 Wallace Tr. 110:14-111:1).

[193] *See* A548 (10/16/03 Trial Tr. at 131:20-132:9 (Gaines testifying that "I knew we stopped a few places/ I wouldn't say what particular place we stopped, but I know we was all over.")); *see also id.* at A540 (99 (Gaines testifying that "I don't even remember actually who we stopped and talked to, but I know during that day we stopped maybe like four or five times.")).

[194] A1385 (11/27/12 Wallace Tr. 111:8-15).

[195] A644 (10/22/03 Trial Tr. 50:18-51:19).

during his closing statement, Trial Counsel referred to five of the calls that Starling placed to Frink when they were supposed to be together—calls occurring at 5:29 pm, 5:46 pm, 6:01 pm, 6:23 pm, and 6:24 pm—and argued that the calls were evidence that refuted Gaines's testimony:

> Now, if they're riding around together like [Gaines] initially said, why does Chauncey have to be calling Richard Frink, when, according to Gaines, Chauncey's in the passenger's seat and Frink is driving the vehicle? It makes no sense. And the phone records refute and rebut Gaines' claim that he was with these individuals.[196]

The State responded by telling the jury that Starling called Frink to say let's meet back at the car.[197] However, Frink's cellphone records provide compelling evidence that undermines the State's argument.

Specifically, Frink did not answer his cellphone when Starling called him at 5:29 pm and 5:49 pm. Thus, Starling did not say *anything* to Frink during these calls, let alone "let's meet at the car." Furthermore, if the State's theory is that Starling called Frink at 5:29 pm to tell him to meet at the car, knowing that Frink did not answer Starling's call, it does not make sense that Starling would wait another twenty minutes to call Frink back. And knowing that Frink also did not answer Starling's call at 5:49 pm, it again makes no sense that Starling, if he was trying to get Frink back to the car, would wait until 6:01 pm to call Frink again.

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[196] *See id.* at A652 (81:1-20).

[197] *Id.* at A644 (50:18-51:19 (emphasis added)).

Finally, based on Frink's cellphone records that the State withheld, we know that Frink *did* answer Starling's call at 6:01 pm but Frink *did not* answer Starling's call just 22 minutes later at 6:23 pm. If Starling indeed spoke to Frink at 6:01 pm and told Frink to meet him back at the car, then why is Starling calling Frink again at 6:23 pm and why does Frink not answer his cellphone?

The answer is that Starling and Frink were not together during this period. The jury never knew this because the State withheld Frink's cellphone records from Starling.

3. Frink's phone records impeach Gaines's testimony that he was with Starling and Frink when he claims that they discussed shooting Darnell Evans the night of the shootings.

The combination of Frink's and Starling's cellphone records also impeach Gaines's testimony about what allegedly occurred when Gaines claims they drove by the barbershop the night of the shooting. According to Gaines's testimony:

- sometime after 8:00 pm on March 9, 2001, Starling saw Darnell Evans seated in the barbershop as the car carrying Gaines, Starling and Frink traveled past the barbershop on West Fourth St.;
- after Starling told Frink that he spotted Evans in the barbershop, the two debated whether the person was actually Evans;
- Starling placed a call on his cellphone and said that Evans is in the barbershop;
- Frink drove several blocks down West Fourth Street, turned around in the McDonald's parking lot and headed back toward the barbershop to confirm that the person in the barbershop was Darnell Evans;

- Frink confirmed that the person in the barbershop was Evans and said, "Don't look over there";
- Frink asked Starling if he "want[s] to get him," and Starling said he is "going to put in some work"; and
- Frink turned right onto Market Street, made a U-turn, drove back up Market Street, turned left at Fifth Street and parked the car directly behind the barbershop.[198]

In addition, Gaines specifically told the police that nothing else was being said during this period because "[Starling] knew what he had to do."[199]

Frink's cellphone records, along with those belonging to Starling, impeach Gaines's uncorroborated claim that he was with Starling and Frink that evening during this critical period. According to Frink's records, during the period when Gaines claimed that it was quiet in the car except for Starling and Frink discussing Evans, Frink was on his cellphone *five* separate times.[200] During that same period, Starling was also on his cellphone *five* separate times.[201] Thus, Starling and Frink were using their cellphones repeatedly during the period when Gaines claimed they were only discussing Evans. If Starling and Frink had actually been in the same car during this period and *had Gaines actually been with them*, then Gaines would have known that they were repeatedly making calls during this period.

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[198] *See* A532-33 (10/16/03 Trial Tr. at 65:21-72:16).

[199] *See* A203 (4/25/01 Gaines Tr. at 12:Q&A 103).

[200] *See* A2035-38 (6/12/13 Supp. Pet. at 96-99).

[201] *See id.*

Gaines never mentioned that Starling and Frink were on their cellphones throughout this critical period immediately prior to the barbershop shootings because Gaines was not with Starling and Frink at the time. The detective who led the barbershop investigation agreed that Gaines would have known that Starling and Frink were on their phones during this period if Gaines had actually been with them at the time.[202] But Starling was unable to impeach Gaines's uncorroborated testimony because the State withheld Frink's cellphone records.

4. Frink's phone records impeach Gaines's testimony that he and Frink were waiting in a car behind the barbershop at the time of the shootings and that Starling confessed to being the shooter.

According to Gaines's testimony, immediately prior to the barbershop shooting, Gaines, Starling, and Frink parked on the street directly behind the barbershop and Starling then exited the car and headed around the corner in the direction of the barbershop.[203] Gaines testified that Starling returned to the car about 15 to 20 minutes later, got back into the car and said "I got him. I got him. I think I got a little boy too."[204] Gaines said that during the entire time that Starling was away from the car, Frink was on his cellphone talking with a female friend.[205] Gaines also testified that Frink was still on the phone talking to the same friend

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[202] *See* A1675 (1/7/13 Conner Tr. at 56:2-10).

[203] *See* A534 (10/16/03 Trial Tr. at 75:12-17).

[204] *See id.* at A534-35 (76:1-77:14).

[205] *See id.* at A534 (75:21-76:10).

when Starling returned and got back into the car.[206] We now know from Frink's phone records that Gaines's testimony was completely untrue.

Frink's cellphone records prove that Frink was *not* on his cellphone talking to *anyone* for the 15 to 20-minute period when Gaines claimed Starling was away from the car.[207] Frink's cellphone records also prove that Frink was *not* on his cellphone when, according to Gaines, Starling returned from the barbershop and confessed. If Gaines had been there, he would have known that Frink was not using his cellphone at the time. Gaines was able to repeat this claim without fear of impeachment only because the State never disclosed Frink's cellphone records.

The Superior Court failed to address the exculpatory evidence that the State suppressed when it withheld Frink's cellphone records prior to trial, even though Starling established each element of the State's *Brady* violation. To establish a *Brady* violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[208]

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[206] *See id.* at A534, 550 (75:21-76:10, 137:20-138:2). Gaines told the police that Frink was on the phone when Starling returned to the car because Frink did not know how long Starling was going to be away from the car. *See* A214 (4/25/01 Gaines Tr. at 23:Q&A208-209).

[207] *See* A2033-35 (6/12/13 Supp. Pet. at 94-96).

[208] *Atkinson v. State*, 778 A.2d 1058, 1063 (Del. 2001) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

As shown above, Frink's cellphone records are favorable to Starling because they impeach Gaines's uncorroborated testimony that he was with Starling and Frink directly before the barbershop shooting, that he was with Frink during the barbershop shooting, and that he was with Frink when Starling returned from the barbershop shooting and confessed to the barbershop shooting.

Starling has also established that Frink's cellphone records were withheld by the State. Trial Counsel and the State's lead prosecutor agree that the *only* phone records that the State produced to Trial Counsel were *Starling's* own cellphone records for March 2001.[209] Indeed, Trial Counsel testified that because the State refused to produce Frink's cellphone records, he attempted to have a private investigator obtain them immediately before Starling's trial and that the private investigator was unsuccessful because the request came too late.[210] The State produced Frink's cellphone records only after the Superior Court ordered it to do so in response to Starling's *post-conviction* discovery motion.

Finally, having established a *Brady* violation, the defendant must also show prejudice by meeting a materiality standard. Proving materiality "does not require demonstration by a preponderance that disclosure of the suppressed evidence

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[209] *See* A1390-91 (11/27/12 Wallace Tr. at 116:3-117:15); A920 (3/16/08 Malik Aff. ¶ 4); A1177 (3/22/12 Malik Aff. ¶ 6). The State's lead prosecutor specifically testified that he has no recollection of ever providing Starling a copy of Frink's cellphone records. *See* A1391 (11/27/12 Wallace Tr. at 117:4-7).

[210] *See* A1735-36 (1/8/13 Malik Tr. at 23:8-24:23).

would have resulted ultimately in the defendant's acquittal."[211] Rather, reversing a conviction only requires that there be a reasonable probability of a different result, which is "shown when the government's evidentiary suppression undermines confidence in the outcome of the trial."[212]

Here, the prejudice suffered by Starling as a result of the State's *Brady* violation cannot be overstated. Quite simply, the State withheld evidence that could have shown that: Gaines was not with Starling and Frink immediately prior to the barbershop shooting; Gaines was not with Frink behind the barbershop while Starling was allegedly committing the barbershop shootings; and Gaines was not with Frink when Starling allegedly returned to Frink's car and confessed to the barbershop shooting. There is no physical evidence of any kind that Starling was anywhere near the barbershop the night of the shooting. The only evidence that places Starling at the barbershop is Gaines's uncorroborated testimony. Therefore, evidence that impeaches Gaines's testimony casts doubt on the only evidence that Starling was at the barbershop the night of the shooting and undermines any confidence that this Court can have in the outcome of Starling's trial.

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[211] *See Jackson v. State*, 770 A.2d 506, 516 (Del. 2001) (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

[212] *Id.* (citing *United States v. Bagley*, 473 U.S. 667, 678 (1985).

V. Starling was denied a fair trial because the State committed prosecutorial misconduct when it falsely told the jury that starling ignored the incoming calls to his cellphone around the time of the shootings, in violation of the Due Process Clause and Fourteenth Amendment of the United States Constitution.

A. Question presented: Did the State commit prosecutorial misconduct when it told the jury during rebuttal argument that Starling ignored the incoming calls to his cell phone during the time of the barbershop shooting?[213] (A2008-19 (6/12/13 Supp. Am. Pet. at 69-80); A2261-75 (10/29/13 Reply to State's Answer to Supp. Am. Pet. at 66-80)).

B. Scope of review: *See supra*, Section I(B).

C. Merits of argument: The barbershop shootings occurred at 8:40 pm on March 9, 2001. Starling's cellphone records admitted at trial show that Starling answered incoming calls at 8:33 pm, 8:41 pm, 8:45 pm, and 8:49 pm on March 9, 2001.[214] Starling's conviction thus relies on an inference that someone engaged in a tense double homicide—who was literally chased down the street from the barbershop—answered his phone in the middle of the act. The State committed prosecutorial misconduct when it told the jury during its rebuttal closing statement that these one-minute incoming calls represented calls that Starling had actually

[213] To the extent that the Frink cellphone records provide evidence supporting Starling's claim that the State committed prosecutorial misconduct, the State also violated its *Brady* obligation by withholding Frink's cellphone records.

[214] *See* A103 (Phone Records at 21).

chosen *to ignore* because he was out of Frink's car and committing the barbershop shooting.[215]

> Let's think about it, first of all, during the time that he probably would have been out of the car or otherwise occupied, such that he's not really answering the phone, he's not really taking calls, he's not really placing calls, *they are all incoming so he can just ignore them.*

In other words, without any factual basis—and directly contrary to the evidence—the State took what was exculpatory evidence—Starling *answered* his cellphone around the time of the barbershop shooting—and improperly used it to incriminate Starling.

In its decision, the Superior Court abused its discretion when it did not directly address this particular prosecutorial misconduct claim.[216] However, in denying Starling's claim that Trial Counsel was ineffective for failing to obtain Frink's cellphone records—which Starling used to prove that Starling had actually *answered* the incoming calls around the time of the shooting—the Superior Court reaches the following conclusion:

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[215] *See* A665 (10/22/03 Trial Tr. at 133:9-14 (emphasis added)).

[216] Although the Superior Court did not address this particular claim, it did rule that Starling's other claims of prosecutorial misconduct are procedurally barred because the claims were never presented at trial or on direct appeal pursuant to Rule 61(i)(3). *See* A2438 (9/5/14 Order at 39). However, the Superior Court improperly failed to consider Rule 61(i)(5), which exempts the procedural bars to relief for "a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."

> Evidence that Starling answered his cell phone very shortly after the time of the shootings does not establish that Starling did not also commit the shootings and are therefore not dispositive of whether Starling committed the crimes.[217]

Thus, not only did the Superior Court err in ignoring Starling's prosecutorial misconduct claim, it misstated the relevant materiality standard when it concluded that the evidence must prove that Starling did not commit the crime in order for Starling to have suffered prejudice.

1. The prosecutor's misconduct should be reviewed for plain error.

Because Trial Counsel did not object to the State's improper rebuttal statement, the Court should review the prosecutor's misconduct for plain error,[218] as articulated in *Torres v. State*:

> In a plain error review of prosecutorial misconduct, we first review the record *de novo* to determine whether misconduct occurred. If we determine that no misconduct occurred, our analysis ends. If, however, the prosecutor did err, the next step of our analysis is to apply the *Wainwright* [*v. State*, 504 A.2d 1096, 1100 (Del. 1986)] standard, which requires the error to be "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the *trial* process." Further, we find plain error only for "material defects which are apparent on the face of the record, which are basic, serious, and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice." If we determine that plain error occurred under the *Wainwright* standard, we

[217] A2419 (9/5/14 Order at 20).

[218] *See Torres v. State*, 979 A.2d 1087, 1093-94 (Del. 2009) (footnotes omitted).

> will reverse without reaching the third step of our analysis.[219]

The standard upon which the Court reviews claims of prosecutorial misconduct— "material defects which are apparent on the face of the record, which are basic, serious, and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice" —is entirely consistent with Rule 61(i)(5), which exempts from Rule 61's procedural bars to relief "a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction." Thus, to the extent the Court determines that the State committed prosecutorial misconduct under the *Wainwright* standard, Starling's claim cannot be barred.

2. *The State engaged in prosecutorial misconduct when the lead prosecutor told the jury that Starling ignored the incoming calls around the time of the barbershop shooting*

As Starling alleged in his Amended Petition, not only was there no evidence to support the State's argument that Starling ignored the incoming calls on his cellphone around the time of the barbershop shooting, the fact that Starling was billed for the incoming calls was evidence that Starling had indeed *answered* the

[219] *Id.* at 1094 (footnotes omitted).

calls[220] because the cellphone company only bills for incoming calls that the user answers. In response, the State argued that "there is no evidence to support that statement."[221] The State was wrong. *Frink's* cell phone records, which the State had in its possession and withheld from Starling, prove that Starling was only billed for incoming calls that he actually answered.

A simple comparison of the cellphone records for Starling and Frink (from the same carrier, Nextel) refutes the State's claim that Starling ignored the incoming calls to his cell phone. For example, according to *Starling's* cellphone records, on March 9, 2001, from about 5:30 pm through 8:55 pm (approximately fifteen minutes after the barbershop shooting), Starling placed eight calls to Frink's cell phone.[222] According to the State's theory, Frink should have been billed for each of these incoming calls regardless of whether Frink answered his cellphone. But that is not the case. According to *Frink's* cellphone records, Frink was only billed for *five* of the eight calls that Starling placed to Frink during this period,[223] which confirms that Nextel users were only billed for incoming calls that they

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[220] *See* A991 (4/1/08 Am. Pet. at 53).

[221] *See* A1049 (10/17/08 Answer at 19).

[222] *See* A102-103 (4/8/01 Phone Records at 20-21 (On March 9, 2001, Starling, using his brother Michael's cellphone, called Frink's cellphone number—302-218-5201—at 5:29 pm, 5:46 pm, 6:01 pm, 6:23 pm, 6:24 pm, 7:47 pm, 7:57 pm, and 8:55 pm)).

[223] *See* A83-84 (4/8/01 Frink's cellphone records).

answered. As a result, the incoming calls on Starling's cellphone records represent calls that Starling *answered*.

During the evidentiary hearing, when confronted with Starling and Frink's billing records, the State prosecutor testified that he would not have made his argument unless he had a good faith basis[224] and that it was his recollection that he had Lead Detective Conner contact the cellphone company to determine whether Starling in fact answered his cellphone.[225] Detective Conner, however, testified that he was never asked to investigate whether the incoming calls on Starling's cellphone records indicated whether Starling had answered those calls.[226]

The State simply had no basis to rebut exculpatory evidence that Starling *answered* his cellphone around the time of the barbershop shooting by arguing that Starling's cellphone records showed that Starling actually ignored these calls. As a result, the State engaged in prosecutorial misconduct when it made this unfounded critically unfounded argument.

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[224] *See* A1403-05 (11/27/12 Wallace Tr. at 129:23-131:2 ("I mean, *I'm sure I had some good-faith basis to believe that what I was arguing is true*, and whether—and to whom I spoke to, I can't recall.") (emphasis added)).

[225] *See id.* at A1405-06 (131:12-132:10).

[226] *See* A1467 (11/28/12 Conner Tr. at 18:12-17).

3. *The State's prosecutorial misconduct is plain error and requires reversal.*

The prosecutor's misconduct in misstating the evidence during rebuttal argument was a material defect so clearly prejudicial to Starling's substantial rights that it constituted a manifest injustice. It is apparent on the face of the record that evidence that Starling answered his cellphone around the time of the barbershop shooting would have been devastating to the State's case. One of the incoming calls that Starling answered was at 8:41 pm on March 9, 2001, just a minute after the masked shooter, with a hooded sweatshirt over his head, entered the barbershop that evening. After the shots that killed Mr. Evans and Damon Gist, Jr. were fired, the owner of the barbershop chased the shooter out the door, around the corner and half-way down the block. It is unfathomable that someone who just shot two people, wearing a mask over his face and a hooded sweatshirt over his head, carrying a weapon in one hand, and being chased down the street would answer his phone. That scenario is precisely what twelve jurors would have had to agree happened to convict Starling had the State not improperly told the jury that Starling did not actually answer his incoming calls during this period.

The idea that Starling would have answered his cellphone at 8:41 pm the night of the barbershop shooting is so preposterous that even the State's lead prosecutor could not definitively rule out the possibility that the reason Starling

answered his cellphone at 8:41 pm was because Starling was not actually the person fleeing from the barbershop that night:

> Q. And so, for example, with the 8:41 p.m. incoming call, you would agree that it would be pretty ridiculous for Mr. Starling to be running back to the car with a mask covering his face, hears his cellphone ring and says to himself I better take this call, let me answer it. Would you believe that?
>
> A. Sir, I have seen a lot of people do a lot of things that are wholly inexplicable.
>
> Q. *In truth Mr. Starling answered that call because he wasn't running back to the car, isn't that true?*
>
> A. *Sir, I have no idea.*[227]

The Superior Court did not rule directly on Starling's prosecutorial misconduct claim. It nonetheless could not conclude that Starling was not prejudiced by the fact that the jury was improperly told that Starling ignored his cellphone around the time of the shooting. Rather, the Superior Court merely concluded that "[e]vidence that Starling answered his cell phone very shortly after the time of the shootings *does not establish* that Starling did not also commit the shootings and *are [sic] therefore not dispositive of whether Starling committed the crime*."[228] Whether or not evidence is dispositive of the defendant's alleged role in committing a crime, however, is not relevant to Starling's misconduct claim.

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[227] A1406 (11/27/12 Wallace Tr. at 132:11-23 (emphasis added)).

[228] *See* A2419 (9/5/14 Order at 20 (emphasis added)).

Rather, Starling must prove that "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[229] Here, there was no physical evidence of any kind placing Starling at the scene of the crime; therefore, any exculpatory evidence—such as phone records indicating that Starling was answering his cellphone when the actual killer was fleeing the barbershop—greatly undermined the State's case against Starling.

It was profoundly unfair for the State prosecutor to take evidence that tended to exculpate Starling and use it improperly as evidence to inculpate him. Such conduct deprived the trial process of fundamental fairness and integrity and warrants a new trial.

[229] *Torres v. State*, 979 A.2d 1087, 1094 (Del. 1999).

VI. Starling was denied a fair trial because the State provided ineffective assistance of counsel throughout the investigation, trial, and sentencing, in violation of the Sixth Amendment of the United States Constitution.

A. Questions presented: Did Trial Counsel provide ineffective assistance of counsel by

- (1) failing to conduct any physical examination of the crime scene or interview witnesses (A2073-81 (6/12/13 Supp. Am. Pet. at 134-42); A2312-15 (10/29/13 Reply to State's Answer to Supp. Am. Pet. at 117-20));
- (2) failing to object to an unreliable surprise "eye[]" identification and the State's subsequent argument that stressful circumstances cause memories to be "seared" into a witness's mind (A2053-72 (6/12/13 Supp. Am. Pet. at 114-33); A2302-11 (10/29/13 Reply to State's Answer to Supp. Am. Pet. at 107-16));
- (3) failing to elicit exculpatory evidence from Lawrence Moore (A2082-85 (6/12/13 Supp. Am. Pet. at 143-46); A2316-19 (10/29/13 Reply to State's Answer to Supp. Am. Pet. at 121-24));
- (4) failing to interview Starling's family members, failing to hire a neuropsychologist, and failing to timely obtain Starling's school records (A1000-07 (4/1/08 Am. Pet. for Post-Conviction Relief at 62-69); A1159-63 (3/17/09 Reply in Support of Def.'s Am. Pet. for Post-Conviction Relief at 67-71)); and
- (5) failing to object to the State's use of Starling's potential anti-social personality disorder ("ASPD") as an aggravating factor (A1003-07 (4/1/08 Am. Pet. for Post-Conviction Relief at 65-69; A1161-1162 (3/17/09 Reply in Support of Def.'s Am. Pet. for Post-Conviction Relief at 69-70).

B. Scope of review: *See supra*, Section I(B).

C. Merits of argument: As described above, Trial Counsel provided ineffective assistance of counsel by failing to object to the admission of the Michael Starling recording. This failure fundamentally undermined the fairness of Starling's trial and requires he be granted a new trial. In addition, as explained below, Trial

Counsel's representation from the pretrial investigation through sentencing was pervaded with ineffective assistance that, coupled with the State's failure to disclose *Brady* materials and other instances of misconduct, ensured that Starling did not receive a fair trial, either in the guilt phase or sentencing phase.

1. Trial Counsel failed to conduct an appropriate pre-trial investigation.

The Superior Court erred in not sustaining Starling's claim regarding Trial Counsel's failure to conduct an appropriate pre-trial investigation. In fact, the Superior Court never addressed that claim.

a. Trial Counsel failed to investigate the crime scene.

At the Rule 61 evidentiary hearing, Trial Counsel effectively conceded that he did not undertake a meaningful investigation of the crime scene, nor did he engage anyone—such as a forensic or ballistics expert—to make such an investigation. Although Trial Counsel visited the barbershop once prior to trial, he went there alone, and "literally just walked the outside of it."[230] He did not go inside, nor did he take any pictures, make any sketches, or record any measurements. Trial Counsel thus had no physical information available to him other than his own observation from having walked past the exterior of the site.[231]

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[230] A1794 (1/9/13 Malik Tr. at 8:14-16). Trial Counsel was unable to say if the investigator had even visited the site, but apparently if so it would only have been to interview or serve subpoenas on witnesses, not to conduct an investigation of the scene. *Id.* at A1795 (9:5-9).

[231] *Id.*

The failure at least to investigate possibly exculpatory evidence constitutes ineffective assistance.[232] The responsibility to undertake an adequate investigation is fundamental in all criminal cases, but is especially critical in a capital case.[233] Trial Counsel's failure to investigate the crime scene was constitutionally deficient representation.[234]

b. Trial Counsel failed to investigate witnesses.

Trial Counsel was also defective in failing to identify and interview a number of important witnesses. In his pre-trial statement to the police, Gaines claimed to have been at Vickie Miller's mother's home the night of the barbershop shootings.[235] In her pre-trial statement to trial counsel's investigator, Miller also asserted that Starling was at Miller's mother's house the night of the barbershop shootings. According to Miller, she and Starling were alone watching television in a bedroom, and nothing seemed out of the ordinary. She also said that there were a number of other people in the house, including, among others, Miller's mother,

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[232] *See United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989) ("Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made.").

[233] ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Section 10.7 (Investigation) and commentary (2003).

[234] *See State v. Spell*, Nos. 2002 Del. Super. LEXIS 46, at *11 (Del. Super. Ct.) ("[T]he failure to investigate a critical source of potentially exculpatory evidence may present a case of constitutionally defective representation."), *aff'd*, 803 A.2d 429 (Del. 2002).

[235] *See* A222 (4/25/01 Gaines Tr. at 31:Q&A281).

brother, and three children.[236] Alfred Gaines was not among the individuals named by Miller as those who were at the house that night.

Despite Miller's statement, Trial Counsel did not even attempt to test the veracity of Gaines's police statement prior to trial. Trial Counsel did not interview any of the persons who Miller claimed was at her house on the night of the shootings, nor did he have his investigator do so.[237] Any one of those individuals could have confirmed that Gaines was *not* at the house that night. His failure to have done so constitutes a textbook case of ineffective assistance.[238]

2. *Trial Counsel failed to object to an unreliable "eye" identification and the prosecutor's related improper closing arguments.*

Prior to trial, the State had represented, on the record, that there were no witnesses who could identify the shooter: "The truth of the matter is that not one of these persons identified Starling or any other person. Nobody says I know who this is. They simply say this is what I saw, which was the description I gave of this person."[239] At trial, however, the State called Shalynn Flonnory, the girlfriend of

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[236] *See* A426 (4/8/03 Shannon Investigative Rpt. at 2).

[237] See A1835 (1/9/13 Malik Tr. at 49:7-15).

[238] *Anderson v. Johnson*, 338 F.3d 382, 392 (5th Cir. 2003) (holding that trial counsel's failure to interview a witness was ineffective assistance of counsel); *United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989) ("Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made.").

[239] A409 (11/1/02 Trial Tr. at 9:9-13).

Evans (one of the victims), who claimed that Starling's eyes matched those of the shooter's.[240] Flonnory then identified Starling, the only person, besides defense counsel, who was then sitting at the defense table.[241]

Flonnory had never previously claimed that she could identify the shooter based on his eyes, or that she even had seen the shooter's eyes.[242] Her in-court identification was made more than two and one half years after the barbershop shootings. And Flonnory acknowledged that she knew Starling was the defendant.[243] Despite the unreliability of the surprise "eye" identification, Trial Counsel stood silent.

During closing arguments, the State compounded the prejudice to Starling from the unreliable identification. The prosecutor made the baseless assertion to the jury that due to the stress of the shootings, the image of the shooter's eyes were "seared" into Flonnory's memory and thus her identification was even more reliable.[244] Despite the baseless assertion, Trial Counsel again stood by silently.

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[240] A592 (10/17/03 Trial Tr. at 94:23-95:8).

[241] *See id.* at A592 (94:23-95:11)

[242] *See* A55-64 (3/9/01 Flonnory Statement).

[243] *See* A599 (10/17/03 Trial Tr. at 123:19-124:13)

[244] *See* A663 (10/22/03 Trial Tr. at 125:2-6, 126:10-19).

a. The Superior Court erred by denying Starling's claim.

The Superior Court denied Starling's claim, reasoning that Trial Counsel cross-examined Flonnory and that even if Trial Counsel had objected to the identification "there remains a reasonable likelihood that the Trial Court would have admitted the identification and that Starling still would have been found guilty considering other evidence of Starling's guilt."[245] The Superior Court erred.

First, Trial Counsel's cross-examination of Flonnory did not compensate for Trial Counsel's failure to object to the identification. The Third Circuit has held that the "failure to move to suppress or otherwise object to an in-court identification by the prosecution's central witness, when there are compelling grounds to do so, is not objectively reasonable representation, absent some informed strategy."[246] Trial Counsel's failure to move to suppress the surprise in-court identification was not based on an informed strategy. Trial Counsel candidly admitted at the evidentiary hearing that had he "[thought] of it at the time," he could have objected to the Flonnory eye identification based on its unreliability.[247] Trial Counsel acknowledged that he simply "didn't think of any of that, so, that

[245] A2423 (9/5/14 Order at 24).

[246] *Thomas v. Varner*, 428 F.3d 491, 501 (3d Cir. 2005).

[247] *See* A1895 (1/9/13 Malik Tr. at 109:5-8 (testifying that it was a "legitimate point" but "I didn't think of it at the time. And I suppose I could have renewed that application but I didn't think of it at the time.")).

wasn't going through my mind. So I didn't raise it."[248] As Trial Counsel stated simply at the evidentiary hearing, "there's nothing to be lost and everything to be gained by filing a motion to suppress the identification."[249]

Second, the Superior Court's order does not cite any support or provide any analysis for the proposition that "there remains a reasonable likelihood that the Trial Court would have admitted the identification."[250] Because the identification was unreliable, as explained below, it was not reasonably likely the Trial Court would have admitted the identification had Trial Counsel objected.

Third, the Superior Court does not address the prejudice that Starling incurred due to the prosecutor's improper argument during closing that the shooter's eyes were seared into Flonnory's memory.

b. Flonnory's in-court identification was unreliable and should have been excluded.

Under Delaware Rule of Evidence 403, "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury." Here, Flonnory's "eye" identification was unreliable and should have been excluded. To determine whether an identification is reliable, courts consider the totality of the

[248] *Id.* at A1896-97 (110:1-111:4).

[249] A1748 (1/8/13 Malik Tr. at 36:14-17).

[250] A2423 (9/5/14 Order at 24).

circumstances, including the opportunity of the witness to initially observe the perpetrator; the accuracy of the witnesses' initial statement; the witnesses' degree of certainty; "and the length of time between the crime and the identification procedure."[251] The totality of the circumstances dictates the conclusion that Flonnory's identification was unreliable.

First, in the more than two and one half years between the shootings and trial, Flonnory never previously suggested that she could identify the shooter, even when she was interviewed by the police shortly after the shootings.[252] Second, Flonnory's overall recollection of the shooting was inaccurate. For example, Flonnory testified that she never saw or heard the shooter shoot through the window of the barbershop.[253] Yet every other witness testified that the shooter first fired from outside the barbershop, shattering the window.[254]

Third, the identification procedure employed when Flonnory made the in-court identification was unnecessarily suggestive. Starling was the only person, other than his attorney, sitting at the defense table at that time. Flonnory

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[251] *United States v. Emanuele*, 51 F.3d 1123, 1128 (3d Cir. 1995) (citations omitted).

[252] *See generally* A55-64 (3/9/01 Flonnory Statement); A595, 596 (10/17/03 Trial Tr. at 107:18-21, 111:21-112:1) (Flonnory testimony).

[253] *Id.* at A597 (114:21-115:3).

[254] *See, e.g.*, A486, 493-94, 504 (10/15/03 Trial Tr. at 67, 96-97, 139).

acknowledged that she knew Starling was the defendant,[255] even referring to him as "the defendant" when she identified him.[256]

Fourth, Flonnory based her identification on images of Starling she saw on a news report of him being arrested for the shootings, not on any observations of the shooter in real time.[257] It is improper for a witness to base an in-court identification on a highly suggestive pretrial observation of the defendant "in conditions reeking of criminality"—which include, as here, observing images of the defendant being arrested for the very crime for which he is standing trial.[258]

Fifth, further indicating that Flonnory's identification was unreliable is her complete inability to even describe the shooter's eyes:

> Q. His eyes, okay. Was there any specific characteristic of the shooter's eyes that you remember, Ms. Flonnory?
>
> A. No.
>
> Q. Sometimes people have big round eyes. Sometimes people have eyes that are more almond shaped. I take it you didn't notice – some people have sleepy eyes. Did you notice anything like that about the shooter's eyes.
>
> A. No.[259]

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[255] A599 (10/17/03 Trial Tr. at 123:19-124:10).

[256] *Id.* at A592 (95:9-11).

[257] *Id.* at A596 (111:11-13).

[258] *Emanuele*, 51 F.3d at 1131.

[259] A595-96 (10/17/03 Trial Tr. at 108:13-109:4).

Finally, a significant amount of time passed between the shootings and the in-court identification. The shootings occurred in March 2001. Flonnory made her in-court identification of Starling on October 17, 2003, more than 2 ½ years later. Under these circumstances, there was a substantial likelihood of misidentification and Flonnory's identification of the shooter's eyes was inadmissible.[260]

c. The State compounded the error by inappropriate argument based on the Flonnory identification.

The prejudice to Starling from Trial Counsel's error in failing to move to suppress the Flonnory identification was compounded by the State's inappropriate argument based on that identification, and Trial Counsel's failure to object to that argument. In its closing rebuttal argument at trial, the State contended that the barbershop shootings had been so traumatic for Flonnory that the image of the shooter's eyes had been "seared" or "burned" into her memory.[261] No evidence had been introduced at trial that in any way supported the contention that traumatic events become seared into a person's memory. Nevertheless, no objection was made to the improper argument, not because of any tactical or strategic decision on Trial Counsel's part, but because he "didn't think of it."[262]

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[260] *Emanuele*, 51 F.3d at 1130 (holding it unconstitutional to permit an identification by a witness who had previously been unable to identify the bank robber before trial).

[261] *See* A663 (10/22/03 Trial Tr. at 125:2-6, 126:10-19).

[262] *Id.* at A1751 (39:19-20) ("Should it have been done? Sure.").

3. *Trial Counsel failed to introduce testimony that Starling was not the shooter.*

The Superior Court erred when it denied Starling's claim that he was denied a fair trial because Trial Counsel failed to introduce exculpatory testimony from Lawrence Moore. Moore would have said that Starling was *not* the barbershop shooter. The Superior Court's decision was an abuse of discretion for two reasons. First, the Superior Court held that Trial Counsel's cross-examination was not ineffective[263] even though Trial Counsel testified that he made a mistake. Second, the Superior Court held that Starling did not demonstrate actual prejudice, despite the fact that Trial Counsel failed to elicit key exculpatory testimony.[264]

Under the *Strickland* test for ineffective assistance of counsel, the defendant must show that "counsel's representation fell below an objective standard of reasonableness"[265] and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[266] Here, Trial Counsel concedes that his representation was objectively unreasonable.

Prior to trial, Trial Counsel received two witness interview reports prepared by a private investigator retained by attorneys representing another individual that

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[263] *See* A2425 (9/5/14 Order at 26).

[264] *Id.*

[265] *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

[266] *Id.* at 694.

Gaines had implicated during his police interview. One of the reports summarized the December 20, 2001 interview of Moore.[267] During the interview, Moore told the investigator that he saw photographs of the individuals who were accused of the barbershop shootings (Starling and Frink were the only two individuals arrested for the barbershop shootings) and said that "none of those individuals had the same appearance as the shooter."[268]

Trial Counsel testified that he intended to elicit Moore's statement that neither of the individuals in the paper who were charged with the barbershop shootings matched the shooter's appearance and that his failure to do so was *not* a tactical decision.[269] Trial Counsel further testified that he unsuccessfully tried to subpoena Moore and have him come back to testify about his statement that neither of the individuals in the newspaper matched the shooter's appearance.[270] Thus, the Superior Court's conclusion that Trial Counsel's cross-examination of Moore was not ineffective contradicts Trial Counsel's own admission that it was a mistake not to elicit Moore's exculpatory testimony.

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[267] *See* A360-62 (12/21/01 Memo re L. Moore).

[268] *See* A360-62 (12/21/01 Memo re L. Moore).

[269] *See* A1840 (1/9/13 Malik Tr. at 54:1-17).

[270] *See id.* at A1840-42 (54:18-56:12 (reiterating: "I should have asked those questions. It wasn't a tactical decision and I wanted to get him back there to try to ask those questions.")).

Starling was clearly prejudiced as a result of Trial Counsel's mistake. Moore saw Starling's picture in a newspaper and ruled him out as the Barbershop shooter. Moore's testimony would have been dramatic and contradicted Shalynn Flonnory's specious in-court identification. Trial Counsel's mistake prevented this from happening. As a result, Starling was denied his fundamental right to effective assistance of counsel and must be given a new trial.

4. Trial Counsel failed to sufficiently obtain and present mitigation evidence.

Claims of ineffective assistance at capital sentencing are grounded on the crucial role of mitigating evidence and the capital defendant's "constitutionally protected right . . . to provide the jury with the mitigating evidence" that exists.[271] Because full consideration of mitigating evidence is essential to the fairness and reliability of capital sentencing, counsel must "'conduct a thorough investigation of the defendant's background.'"[272]

The Eighth Amendment requires the jury to consider all available mitigating evidence for a sentencing decision to be reliable.[273] Delaware law also mandates

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[271] *Williams v. Taylor*, 529 U.S. 362, 393 (2000).

[272] *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting *Williams*, 529 U.S. at 396 (citing 1989 1 *ABA Standards for Criminal Justice* 4–4.1, commentary at 4–55 (2d ed. 1980)).

[273] *Eddings v. Oklahoma*, 455 U.S. 104, 110–12 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604, 684 (1978); *Flamer v. State*, 585 A.2d 736, 754 (Del. 1990).

that the jury consider all relevant mitigating evidence.[274] Trial Counsel was ineffective for failing to timely investigate, obtain, and present mitigating evidence and records, including the following:

- Failing to obtain testimony from Starling's biological father, Thomas Boyer, and Starling's paternal aunts. Trial Counsel made no attempt to interview Starling's biological father or aunts. Had he done so, he would have learned of and been able to present evidence of significant events affecting Starling's development in utero and as a young child. *See* A924-25 (3/24/08 T. Boyer Aff.); A926 (3/24/08 Mitchell Aff.); A927 (3/24/08 D. Boyer Aff.)

- Failing to have a neuropsychologist examine Starling. Organic injuries and head trauma are mitigating evidence for sentencing purposes. *See Williams*, 529 U.S. at 398 (organic brain injury is a mitigating factor); *Abdul-Kabir v. Wuarterman*, 127 S. Ct. 1654, 1661 (2007) (central nervous system damage was mitigating factor for the jury to consider). Starling has a long history of head trauma. As a child, he hit his head on the corner of a coffee table, necessitating a visit to the hospital. *See* A903-11 (2/25/08 Dr. Armstrong Neuropsychological Evaluation). Additionally, he was hit in the head by a falling iron as a child. *Abdul-Kabir,* 127 S. Ct. at 1661. As a teenager, Starling was knocked unconscious during a fight at a roller rink, leading to his hospitalization. *Id.* Trial Counsel failed to properly investigate the effects of these head injuries, although he was well aware of the trauma. Indeed, Trial Counsel wrote in a memorandum after a meeting with Starling that "[i]t should be noted that I should follow up on the potential head injury that [Starling] mentioned." *See* A406 (5/22/02 Notes of Social History Interview at 8).

  Trial Counsel should have employed a neuropsychologist or other doctor trained in the assessment of brain functioning. Starling's post-conviction counsel retained a neuropsychiatrist, Dr. Carol Armstrong, who reviewed Starling's files and tested Starling's

[274] Del. Code Ann. tit. 11, §§ 4209(c)(1) & 4209(c)(3)(a)(2) (2015).

brain function. Dr. Armstrong's findings reveal powerful mitigation evidence that should have been presented at the sentencing phase of Starling's trial. *See* A903-11 (2/25/08 Dr. Armstrong Neuropsychological Evaluation).

- Failing to timely obtain Starling's school records. Trial counsel obtained Starling's school records only days before the sentencing phase of the trial began, and provided them to his mitigation expert, a psychiatrist, only the day before she testified. *See* A819 (10/30/03 Trial Tr. at 285:6-12 (Dr. Parrish testimony that she received the records the day before testifying)). Trial Counsel's last minute access to the records left insufficient time to assess the mitigating evidence that they contained. *See* A1-30 (School Records).

The Superior Court erred by ruling that Trial Counsel's failures during the sentencing phase did not fall below an objective level of reasonableness. In denying Starling's claim, the Superior Court ruled that "[o]bjectionably reasonable representation did not require Trial Counsel to call every possible witness to establish mitigating evidence" and that "even if additional witnesses were called to testify, there remains a significant likelihood that the jury would have recommended death, especially where the jury had already heard very similar mitigating evidence."[275] The Superior Court's ruling was error for several reasons.

First, the ruling addresses only Trial Counsel's failure to call certain witnesses and does not address at all Trial Counsel's failure to obtain records or retain a neuropsychiatrist. Second, Trial Counsel's ineffectiveness was not due

[275] A2429 (9/5/14 Order at 30).

merely to his failure to call certain witnesses during sentencing. Rather, Trial Counsel was ineffective because he did not even speak to certain witnesses, including Starling's biological father and other close relatives. *See United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989) ("Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made."). Third, the jury did not hear "very similar mitigating evidence"[276] to what Trial Counsel could have presented had he hired a neuropsychologist. Trial Counsel did not hire any experts who could perform a neuropsychological evaluation. In fact, the psychiatrist that Trial Counsel hired specifically wrote in her report that "I consider a neuropsychological evaluation essential for Chaunc[e]y Starling."[277] Trial Counsel did not heed such advice.

5. Trial Counsel failed to object to the use of evidence that Starling had Antisocial Personality Disorder as an aggravating factor.

The Superior Court erred in denying Starling relief based on Trial Counsel's ineffective assistance of counsel in failing to object to the use of ASPD as an aggravating factor because the Superior Court never addressed the argument. Had

[276] A2429 (9/5/14 Order at 30).

[277] A438 (6/30/20 Parrish Report at 4).

the Superior Court considered the argument, it should have found that Trial Counsel's performance was unreasonable and that Starling was prejudiced.

The State moved to introduce evidence of Starling's possible ASPD as an aggravating factor even though ASPD was not on the State's pretrial list.[278] Trial Counsel failed to object.[279] Trial Counsel again failed to object after being reminded by the Trial Court that, under the Delaware Code, it was impermissible for the State to augment its list of aggravating factors without a notice period.[280]

The United States Supreme Court has held that a State may not "attach[ ] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant, or to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness."[281] The State's use of "the defendant's psychiatric and psychological history [which] may indicate an antisocial personality disorder,"[282] as an aggravating factor thus was improper. Trial Counsel provided ineffective assistance by neither objecting to ASPD as an aggravating factor, nor using ASPD as a mitigating factor.

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[278] A852 (10/31/03 Trial Tr. at 109:15-110:15).

[279] *Id.* at A852 (110:16-111:12).

[280] *Id.* at A852 (112:21-13:19).

[281] *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (citation omitted); *see also Eddings v. Oklahoma,* 455 U.S. 104, 107, 113 (1982).

[282] A884 (11/4/03 Trial Tr. at 108:13-15).

CONCLUSION

For the reasons set forth above, this Court should remand to the Superior Court for a new trial.

Date: February 27, 2015

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