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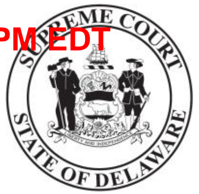

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TYWAAN JOHNSON,	:	
	:	
Defendant-Below,	:	
Appellant,	:	**No. 164, 2015**
	:	
v.	:	
	:	
STATE OF DELAWARE,	:	**Case below No. 1007020056**
	:	
Plaintiff-Below,	:	
Appellee	:	

APPELLANT'S OPENING BRIEF

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Dated: May 18, 2015

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PROCEDURAL HISTORY

On August 2, 2010, Tywaan Johnson[1] was indicted for two counts of Murder First Degree, Robbery First Degree, Conspiracy Second Degree, three counts of Possession of a Firearm During the Commission of a Felony and a single count of Possession of a Deadly Weapon by a Person Prohibited. DE 3.[2] Trial commenced on September 7, 2011 and Mr. Johnson was found Guilty on all counts. DE 79, 83.

Mr. Johnson was declared a habitual offender and sentenced to life in prison on March 21, 2012. DE 99, 100. On direct appeal, the Delaware Supreme Court affirmed Mr. Johnson's conviction on October 1, 2012. DE 105.

On September 12, 2013, Mr. Johnson filed a *pro se* motion for post conviction relief. DE 109. Counsel was assigned to represent Mr. Johnson on October 24, 2013. DE 111. On June 17, 2014, Mr. Johnson filed an Amended Motion for Post Conviction Relief. DE 124 On March 3, 2015, the Superior Court summarily dismissed in part and denied in part, Mr. Johnson's Amended Motion for Post Conviction Relief. DE 133, A23.

On April 2, 2015, Mr. Johnson filed a timely notice of appeal. This is Mr. Johnson's Opening Brief on Appeal.

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[1] He is also known as John Nurse.

[2] The Superior Court Docket Sheets are attached as A1-A23 and assigned DE #.

SUMMARY OF THE ARGUMENTS

1. The Superior Court erred by denying Mr. Johnson's claim of ineffectiveness for failing to adequately cross examine Gregory Napier concerning the ongoing and future benefit that Mr. Napier would receive from the State due to signing a substantial assistance agreement. As Mr. Napier was the sole witness to identify Mr. Johnson as being one of the robbers who carried a firearm, a proper cross examination would have revealed to the jury Mr. Napier's additional bias towards the State.

2. The Superior Court erred by denying Mr. Johnson's claim of ineffectiveness for failing to object to the admission of Mr. Napier's police interview which was admitted under 11 *Del. C.* § 3507. Mr. Napier's statement was involuntary due to the interviewing detective's multiple references to Mr. Napier's family in the form of veiled threats. Thus, Mr. Napier's recorded statement should not have been admitted but for Trial Counsel's ineffectiveness.

3. The Superior Court erred by denying Mr. Johnson's claim of ineffectiveness for failing to request a mistrial when a State's witness impermissibly commented on Mr. Johnson's constitutional right to counsel. The State elicited testimony that while the detective conducted a police interview with Mr. Johnson, the detective testified that Mr. Johnson terminated the interview. This permitted the jury to impermissibly view Mr. Johnson in a negative light as he stopped the interview.

4. The Superior Court erred by denying Mr. Johnson's claim of ineffectiveness for failing to investigate the actions of an individual named Jamal. Jamal drove Mr. Napier to the drug buy and according to Mr. Johnson, was one of the three robbers. There was no documentation of an investigation of Jamal. A proper investigation would have revealed both impeachment and exculpatory information.

5. The Superior Court erred by denying Mr. Johnson's claim of a *Brady* violation by failing to disclose information regarding "Jamal." The record does not include an adequate basis to support the State's claim and the Superior Court's adoption that there was not any *Brady* information concerning Jamal to disclose.

6. The Superior Court erred by denying Mr. Johnson's claim of cumulative due process error. While the above listed errors on their own warrant reversal for a new trial, the combined errors aggregated so as to collectively rise to a violation of due process as Mr. Johnson was deprived of a fair trial.

7. The Superior Court erred by denying Mr. Johnson's request for an evidentiary hearing in relation to Mr. Napier's 3507 statement as both Mr. Napier and Detective Gifford' testimony was needed to create a record as to the circumstances of the interview to allow the Superior Court to determine the voluntariness of Mr. Napier's statement. A hearing was also required concerning the *Brady* violation as it is unknown what information Detective Gifford discovered concerning Jamal.

STATEMENT OF FACTS

On June 12, 2010, Tywaan Johnson arranged a drug "buy" between Luis Sierra and Anthony Bing to purchase marijuana in Wilmington, Delaware. Mr. Bing was driven to the buy by Christopher Plunkett[3] while Mr. Johnson arrived on foot and directed Mr. Sierra to the buy. A123. Also at the buy was Gregory Napier, an acquaintance of Mr. Sierra who was driven to the area by a man named "Jamal." A115. According to Mr. Napier, Jamal only dropped Napier off, A115, but Mr. Johnson testified that Jamal accompanied Mr. Napier to the buy. A125.

At the buy, Mr. Napier claimed that Mr. Johnson and Mr. Sierra pulled out guns and demanded Mr. Bing to hand over the marijuana. A111. Mr. Napier also claimed that Mr. Johnson ordered him at gun point to remove the car keys from Mr. Plunkett's car and to search the trunk for the drugs. A111. Mr. Johnson however testified that it was Mr. Sierra, Mr. Napier, and Jamal who drew guns and that Mr. Johnson was not involved in the robbery. A125-126. Mr. Napier and Mr. Johnson both agreed that after the drugs were taken, Mr. Sierra shot Mr. Bing multiple times while everyone else was fleeing the scene, resulting in his death. A111, A126.

Mr. Plunkett viewed three photo arrays containing a picture of Mr. Johnson, Mr. Napier, and Mr. Sierra. A106-107. While Mr. Plunkett identified Mr. Napier and

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[3] A102-104.

Mr. Sierra as two of the individuals who were at the buy, he did not identify Mr. Johnson as one of the robbers. *Id.* Mr. Plunkett described suspect 1, Mr. Sierra, as having something wrapped around his head, chin strap beard, light skin, Hispanic, wearing a white short sleeve t-shirt; he described suspect 2 as having a bald head, wearing a short sleeved, button downed Hawaiian shirt and suspect 3, Mr. Napier, as skinny, wearing a white t-shirt and fitted blue hat. A104-105.

On June 15, 2010, Mr. Napier was arrested and interviewed by Detective Gifford of the Wilmington Police Department. A24. During the interview, Mr. Napier initially denied any involvement in the crime. A24-59. However, Detective Gifford made multiple references to Mr. Napier's family in the form of veiled threats when Mr. Napier did not tell him the story that he wanted to hear concerning the events of the shooting.[4] After the repeated pressuring, Mr. Napier admitted that he

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[4] Detective Gifford (DG) told Mr. Napier (GN), "Work with us, we'll work with you. You gotta talk us through this, you gotta talk us through this man. Don't let us drag your whole family through this." A28; DG: "You talk us through this dude. We didn't come tearing, I mean, the look on your mom's face when we just left there. That is so disheartening, and we don't want to continue to drag her through this." A28; DG: "Q69 How old are your kids? GN: A69 I told you, they one and one month. DG: Q70 When's the next time you plan on seeing them?" A44; DG: "Q80 Then you gotta tell us what happened. Don't let it fall on you. Don't let it fall on you, alright? You didn't pull this trigger, and you happen to be caught up in something that might have been something simple and easy alright thinking, okay I'm gonna make a couple quick bucks whatever, alright, and move on my way. And you didn't, and no man, I don't want to fall with that. I don't want to go down like that. I got 2 kids, 2 kids that are very young. You know what they tell me about little girls, and I know this because I got little girls. Little girls need their fathers, and you know why? Because they won't take it...." A47; DG "They're gonna put themselves there, but they're not gonna put the gun in their hands. They're gonna put it in your hands. And guess what, your family is gonna go through this again." A50.

was at the buy but that Mr. Johnson and Mr. Sierra were the robbers. A60-79.

On July 21, 2010, Gregory Napier signed a substantial assistance agreement that in addition to the guilty plea agreement he previously signed, which outlined that in exchange for Mr. Napier cooperation with police on other cases, the State would file a motion in the future to recommend a reduction in Napier's sentence to five years. A82-83. After the substantial assistance agreement was signed, Mr. Napier was again interviewed by police on August 27, 2010. A84. During the second interview with police, Mr. Napier stated that he was driven to the area where the drug buy was supposed to happen by a man named Jamal. A86. According to Mr. Napier, Jamal did not stay for the buy. *Id.* Mr. Napier again described how Mr. Sierra and Mr. Johnson were the robbers. A85-100.

Trial commenced on September 8, 2011. On direct examination of Mr. Napier, the State referenced some of the details of Mr. Napier's plea agreement but only mentioned the substantial assistance agreement in very broad terms. A113. Trial Counsel did not cross examine Mr. Napier concerning the substantial assistance agreement. A120-121. The substantial assistance agreement was not entered into evidence.

On the fourth day of trial, the trial prosecutor asked Detective Harris, "[a]nd at some point in time did [Mr. Johnson] terminate that interview?" which resulted in

the answer of "yes". A121-22. Defense counsel moved for a sidebar concerning the statement as it touched upon Mr. Johnson's request for counsel but did not make an official objection, nor was a curative instruction asked for or given. A122.

After the State rested, Mr. Johnson took the stand in his own defense. On direct examination, Mr. Johnson admitted to being at the buy but denied being a part of the robbery or shooting. A125. Mr. Johnson testified that Mr. Napier, Mr. Sierra, and an unknown fourth individual met up with him for the buy and that all three of them pulled out guns and committed the robbery. A125. Mr. Johnson described the fourth man as having peanut butter color skin, bald head, goatee, shirt with flowers on it, light blue shorts, and a pair of sneakers. A123-124. This matched the description of suspect 2 given by Mr. Plunkett. A104-105.

During the State's closing, the prosecutor discussed the interview of Mr. Johnson with Detective Harris when he argued "you have the defendant's interview in evidence. You also heard that the defendant ended the interview." A127. Defense Counsel objected to this statement which was denied by the Trial Judge. A127.

In response to Mr. Johnson's Rule 61 claims of ineffective assistance of counsel, both Trial Counsels denied any claim of ineffectiveness in their respective affidavits. A128-131.

CLAIM I. THE SUPERIOR COURT ERRED IN DENYING TYWAAN JOHNSON'S CLAIM OF INEFFECTIVENESS FOR TRIAL COUNSEL'S FAILURE TO ADEQUATELY CROSS EXAMINE GREGORY NAPIER IN VIOLATION OF U.S. CONST. VI AND XIV AND DEL. CONST. ART. I, §§ 4, AND 7.

QUESTION PRESENTED

Did the Superior Court err in denying Mr. Johnson's claim that Trial Counsel was ineffective for failing to adequately cross examine Gregory Napier? Preserved as it was raised in the Amended Motion for Post Conviction Relief. A149.

SCOPE OF REVIEW

This Court reviews ineffective assistance of counsel claims *de novo*. *Swan v. State*, 28 A.3d 362, 391 (Del. 2011). Questions of law are reviewed *de novo*. *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996). Claims of a constitutional violation are reviewed de novo. *Hall v. State*, 788 A.2d 118, 123 (Del. 2001).

MERITS OF THE ARGUMENT

The Superior Court erred in denying Mr. Johnson's claim that Trial Counsel was ineffective for failing to adequately cross examine Gregory Napier. The Superior Court held that the "Defendant has not set forth sufficient evidence to show that if Napier's testimony on cross-examination were further developed, there is a reasonable probability that the jury would have disregarded his testimony as lacking

credibility and the proceeding would have had a different outcome." Denial pg. 6.[5] The Superior Court's conclusion is erroneous as the Trial Court did not take into proper account the fact that Trial Counsel failed to elicit testimony concerning Mr. Napier's future and ongoing benefit with the State. As Mr. Napier was the State's star witness, this crucial information was needed for impeachment purposes.

Gregory Napier was Mr. Johnson's co-defendant and a witness for the State who received a very favorable plea agreement and substantial assistance agreement to testify against Mr. Johnson and Mr. Sierra in their separate trials. While the State introduced testimony about the plea agreement during direct examination, the State only mentioned the substantial assistance agreement[6] in very broad terms and emphasized that Mr. Napier not received any benefit from the agreement. A113. Additionally, the agreement was not introduced as an exhibit at trial and Trial Counsel did not question Mr. Napier concerning the future benefit he could receive through the substantial assistance agreement. A119-120; *see* agreement at A82-83.

The United States Supreme Court has held that a defendant's right to confront

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[5] The March 2, 2015 Superior Court denial of Mr. Johnson's Amended Motion for Postconviction Relief is attached as Exhibit A and cited as Denial pg. #.

[6] A82-83. The agreement outlines that in exchange for Mr. Napier's cooperation, a *nolle prosequi* would be entered on the remaining Delaware charges in relation to this case. The letter also noted that Mr. Napier would cooperate with Delaware law enforcement officers in the prosecution of three unsolved homicides. It further noted that upon Mr. Napier's future cooperation and testimony, the State will file a motion under 11 *Del. C.* § 4200, recommending a reduction of level V time to five years for Mr. Napier's assistance.

the witnesses against the defense under the Confrontation Clause of the Sixth Amendment is applicable to state criminal proceedings by virtue of the Due Process Clause of the Fourteenth Amendment.[7] The United States Supreme Court found that "...no one experienced in the trials of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." *Id.* at 404. The Supreme Court also noted that cross-examination has been characterized as "the greatest legal engine ever invented for the discovery of truth."[8]

The Trial Court erred when it held that Trial Counsel's cross examination of Mr. Napier was not ineffective as the court failed to adequately consider the fact that the substantial assistance agreement was evidence of a future benefit that Mr. Napier would receive. In denying this claim, the Superior Court erroneously held that *Moore*[9] was distinguished from Mr. Johnson's case when the court reasoned that there was a lengthy line of questioning concerning Mr. Napier's plea agreement, charges, and original prison exposure." Denial pg. 5. The Superior Court's reasoning is misplaced as *Moore* is applicable to this case as the Third Circuit held that Moore's counsel was ineffective in part for failing to fully impeach a witness concerning his plea deal with the State. *Id.* at 182. In both cases, trial counsel failed to cross

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[7] *Pointer v. Texas*, 380 U.S. 400, 403 (1965).
[8] *California v. Green*, 399 U.S. 149, 158 (1970).
[9] *Moore v. Sec'y Pennsylvania Dept. Of Corr.*, 457 Fed.Appx. 170 (3d Cir. 2014).

examination the State's key witness on the benefits of the plea agreement with the State. *Moore*, 457 Fed. Appx. at 182; A120-121. In *Moore*, the deal was a reduction in sentence, while here, the deal was a potential reduction in sentence for future cooperation. *Id.* As the jury was not made aware of the future benefit with the State, Trial Counsel was ineffective and *Moore* is applicable.

Trial Counsel's failure to introduce Mr. Napier's substantial assistance agreement or question Mr. Napier concerning the future benefits he would receive from the State fell below the objective reasonable standard under *Strickland*.[10] A119-120. Furthermore, there could be no arguable trial strategy for not introducing the agreement as it would show the jury an ongoing motive for Mr. Napier to cooperate with the State in order to receive the five year sentence reduction recommendation. As such, Trial Counsel was ineffective under *Strickland* for failing to introduce evidence of the benefit of Mr. Napier's future cooperation.

The Superior Court further erred by holding that even if Trial Counsel was ineffective, Mr. Johnson was not prejudiced. Denial pg. 6. The Court's holding is erroneous as Mr. Johnson was prejudiced by Trial Counsel's failure to cross examine Mr. Napier concerning the substantial assistance agreement as Mr. Napier was the

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[10] *Moore*, 457 Fed. Appx. at 170.

State's only witness to testify that Mr. Johnson had a gun during the shooting.[11] A 111. A cross examination that complied with the prevailing professional norms would have revealed Mr. Napier's bias towards the State because of the substantial assistance agreement and how Mr. Napier's story changed once he got the substantial assistance agreement.[12] The jury would then have been aware of Mr. Napier's ongoing deal with the State for a further sentence reduction in the form of a possible five year re-sentence. Introducing this evidence would have tainted Mr. Napier's testimony and there would have been a reasonable chance that the jury would have chosen not to believe him.[13] Without Napier's testimony, there would have been no other evidence that placed Mr. Johnson with a gun in his hand or was actively involved in the murder. As such, Mr. Johnson was prejudiced by Trial Counsel's ineffectiveness.

For the foregoing reasons, Mr. Johnson's convictions must be reversed and remanded for a new trial.

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[11] Mr. Plunkett, the victim's driver, gave a description of the three men but was only able to identify Mr. Napier and Mr. Sierra. A104-105.

[12] *See Moore*, 457 Fed.Appx. at 182 (Holding trial counsel was ineffective for failing to impeach a State's key witness concerning the benefits of the plea agreement with the State).

[13] Conversely, the jury might have believed Mr. Johnson who testified that it was Mr. Sierra, Mr. Napier and a fourth individual who committed the robbery. A125.

CLAIM II. THE SUPERIOR COURT ERRED IN DENYING TYWAAN JOHNSON'S CLAIM OF INEFFECTIVENESS FOR TRIAL COUNSEL'S TRIAL COUNSEL'S FAILURE TO OBJECT TO THE ADMISSION OF GREGORY NAPIER'S 3507 STATEMENT IN VIOLATION OF U.S. CONST. VI AND XIV AND DEL. CONST. ART. I, §§ 4, AND 7.

QUESTION PRESENTED

Did the Superior Court err in denying Mr. Johnson's claim that Trial Counsel was ineffective for failing to object to the admission of Gregory Napier's 3507 statement? This issue was preserved as it was raised in the Amended Motion for Post Conviction Relief. A155.

SCOPE OF REVIEW

This Court reviews ineffective assistance of counsel claims *de novo*. *Swan*, 28 A.3d at 391. Questions of law are reviewed *de novo*. *Dawson*, 673 A.2d at 1190. Claims of a constitutional violation are reviewed de novo. *Hall*, 788 A.2d at 123.

MERITS OF THE ARGUMENT

The Superior Court erred in denying Mr. Johnson's claim that Trial Counsel was ineffective for failing to object to Gregory Napier's 3507 statement. The Superior Court held that Trial Counsel was not ineffective for failing to object as the court found the statement to be voluntary. Denial pg. 7. The Superior Court's reliance on Mr. Napier's trial testimony that his statement was voluntary is misplaced as Mr. Napier was still dependant on the State for a future sentence reduction

recommendation.[14] As Mr. Napier would not do or say anything that could jeopardize his deal with the State, the Court's rationale is erroneous.

"The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'"[15] Any testimonial evidence offered against the defendant by the State is subject to the defendant's confrontation rights that are guaranteed by the Sixth Amendment of the United States Constitution.[16]

The Sixth Amendment requires an entirely proper foundation, if the prior statement of a witness is to be admitted under section 3507 as independent substantive evidence against an accused.[17] "Section 3507 provides in pertinent part that [i]n a criminal prosecution, 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."[18] The State must prove that under the totality of circumstances, the witness' statements were the product of a rational mind and free will.[19] The trial judge must focus his attention on the

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[14] *See* the Substantial Assistance Agreement. A82-83.
[15] *Idaho v .Wright,* 497 U.S. 805, 812 (1990).
[16] *Demby v. State*, 695 A.2d 1152, 1162 (Del. 1997) (citing *Wright,* 497 U.S. 805 (1990)).
[17] *Blake v. State*, 3 A.3d 1077, 1083 (Del. 2010).
[18] *Roth v. State* 788 A.2d 101,107 (Del. 2001)(Citation and internal quotations omitted).
[19] *Id*. at 108 (Citation omitted).

behavior of the interrogators, as well as the mental/physical makeup of the individual being interrogated, to determine whether the individual's will was so overborne that the statements produced were not the product of a rational intellect and free will.[20] This Court has recognized several factors that indicate a statement is involuntary: 1) failure to advise the witness of his constitutional rights;[21] 2) lies "about an important aspect of the case...;"[22] 3) threats that the authorities will take the witness's child away;[23] 4) extended periods of detention without food;[24] 5) extravagant promises or inducements.[25]

During the June 15, 2010 police interview of Gregory Napier, Detective Gifford made multiple references to Mr. Napier's family in the form of veiled threats when Mr. Napier did not tell him the story that he wanted to hear. A24-28; A43-50; A59-81. The result was an involuntary statement by Mr. Napier.

The Superior Court erred when it found that "the questioning by the detective in this case was not so coercive as to render Napier's will overborne." Denial pg. 7. In denying this claim, the Superior Court noted that the Detective suggested that cooperation would put less strain on Mr. Napier and that Mr. Napier himself testified

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[20] *Id.*
[21] *Baynard v. State*, 518 A.2d 682, 690 (Del. 1986).
[22] *Id.*
[23] *Roth,*788 A.2d at 108; *see also Lynumn v. State of Illinois*, 372 U.S. 528, 534 (1963).
[24] *State v. Rooks*, 401 A.2d 943, 948 (Del. 1979).
[25] *Flowers v. State*, 858 A.2d 328, 330-31 (Del. 2004).

at trial that his statement was voluntary. *Id.* This holding is erroneous as Detective Gifford's pressuring and repeated reference to Mr. Napier's family and the consequences that would result if Mr. Napier did not tell the officer what he wanted to hear overpowered Mr. Napier's will.[26] The use of Mr. Napier's family was not in the form of one overt threat like in *Roth*, but consistent throughout the interview.[27] Detective Gifford repeatedly applied pressure by stating that if Mr. Napier does not cooperate, that his family will suffer due to police involvement in their life. A28,44,50,58. Furthermore, Mr. Napier had an incentive not to do or say anything that could jeopardize his deal with the State, as he risked losing out on a possible future sentence reduction. A82-83. Thus, Mr. Napier's statement was involuntary and his statement should not have been admitted at trial.

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[26] *See Roth,* 788 A.2d 101, 107 (De. 2001) (Threats to a witness' family could render a statement involuntary).

[27] Detective Gifford (DG) told Mr. Napier (GN), "Work with us, we'll work with you. You gotta talk us through this, you gotta talk us through this man. Don't let us drag your whole family through this." A28; DG: "You talk us through this dude. We didn't come tearing, I mean, the look on your mom's face when we just left there. That is so disheartening, and we don't want to continue to drag her through this." A28; DG: "Q69 How old are your kids? GN: A69 I told you, they one and one month. DG: Q70 When's the next time you plan on seeing them?" A44; DG: "Q80 Then you gotta tell us what happened. Don't let it fall on you. Don't let it fall on you, alright? You didn't pull this trigger, and you happen to be caught up in something that might have been something simple and easy alright thinking, okay I'm gonna make a couple quick bucks whatever, alright, and move on my way. And you didn't, and no man, I don't want to fall with that. I don't want to go down like that. I got 2 kids, 2 kids that are very young. You know what they tell me about little girls, and I know this because I got little girls. Little girls need their fathers, and you know why? Because they won't take it...." A47; DG "They're gonna put themselves there, but they're not gonna put the gun in their hands. They're gonna put it in your hands. And guess what, your family is gonna go through this again." A50.

The Superior Court further erred by denying Mr. Johnson's claim of ineffective assistance of counsel as Mr. Johnson was prejudiced by the admission of Mr. Napier's statement. As there was a basis to object to the admission of Mr. Napier's statement, there is no reasonable trial strategy for not objecting to the statement as Mr. Napier implicates Mr. Johnson in the murder of Mr. Bing and places a gun in his hand. Failing to object to the admission of the statement under voluntariness grounds falls below an objective standard of reasonableness.[28] Without this statement, the only evidence that Mr. Johnson had a gun would have been Mr. Napier's testimony and the lack of any prior consistent statement on that issue would have hurt Mr. Napier's credibility. As there was no physical evidence tying Mr. Johnson to a gun, this case came down to the credibility of Mr. Napier. Thus, there is a reasonable probability of a different outcome in the case under *Strickland*.

For the foregoing reasons, Mr. Johnson's convictions must be reversed and remanded for a new trial.

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[28] *Strickland*, 466 U.S. at 688.

CLAIM III. THE SUPERIOR COURT ERRED IN DENYING TYWAAN JOHNSON'S CLAIM OF INEFFECTIVENESS FOR TRIAL COUNSEL'S FAILURE TO REQUEST A MISTRIAL IN VIOLATION OF U.S. CONST. VI AND XIV AND DEL. CONST. ART. I, §§ 4, AND 7.

QUESTION PRESENTED

Did the Superior Court err in denying Mr. Johnson's claim that Trial Counsel was ineffective for failing to request a mistrial? This issue was preserved as it was raised in the Amended Motion for Post Conviction Relief. A164.

SCOPE OF REVIEW

This Court reviews ineffective assistance of counsel claims *de novo*. *Swan*, 28 A.3d at 391. Questions of law are reviewed *de novo*. *Dawson*, 673 A.2d at 1190. Claims of a constitutional violation are reviewed de novo. *Hall*, 788 A.2d at 123.

MERITS OF THE ARGUMENT

The Superior Court erred in denying Mr. Johnson's claim that Trial Counsel was ineffective for failing to request a mistrial. The Superior Court held that Trial Counsel's decision to not request a curative instruction was a reasonable trial strategy as to avoid bringing further attention to the issue. Denial pg. 8. This holding was erroneous as Detective Harris's comment prejudiced Mr. Johnson by allowing the jury to impermissibly view Mr. Johnson in a negative light.

During the testimony of Detective Harris concerning his police interview with

Mr. Johnson, the trial prosecutor asked the Detective, "[a]nd at some point in time did [Mr. Johnson] terminate that interview?" which resulted in the answer of "yes". A121-22. Defense counsel moved for a sidebar concerning the statement but did not make an official objection nor was a curative instruction asked for or given. A122. Additionally, in the State's closing argument the prosecutor touched on Detective Harris's testimony when he said "you have the defendant's interview in evidence. You also heard that the defendant ended the interview." A127. Trial Counsel objected to this statement which was denied by the trial judge as the court reasoned that the term "terminate" did not infer a request for counsel. A127.

The United States Supreme Court has held that the right to remain silent is derived from the Fifth Amendment's privilege against self-incrimination.[29] The U.S. Supreme Court further held in *Miranda* that a defendant has a right to counsel and that once invoked, all questioning must cease.[30] This Court has held that while the State may not put a penalty on the exercise of a constitutional right, every reference to the exercise of the right to remain silent does not mandate reversal.[31] This Court has ruled that under *Hughes*[32] and *Hunter*,[33] improper comments by the prosecutor

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[29] *Miranda v. Arizona*, 384 U.S. 436, 442 (1966).

[30] *Id.* at 469-473.

[31] *Revel v. State*, 956 A.2d 23, 27-28 (Del. 2008) (citation and internal quotations omitted).

[32] *Hughes v. State*, 437 A.2d 559 (Del. 1981).

[33] *Hunter v. State*, 815 A.2d 730 (Del. 2002).

and it's witnesses are evaluated under a three part test: 1) the closeness of the case; 2) the centrality of the issues affected by the error; 3) the steps taken to mitigate the effects of the error.[34]

The Superior Court erred when it held that the issue was not central to the case, that Trial Counsel took corrective actions during both times the topic was brought up, and that the phrase "Defendant terminated the interview" did not suggest that Mr. Johnson requested an attorney. Denial pg. 8. This holding is erroneous as the case came down to whether the jury believed Mr. Napier's version of events or Mr. Johnson's.[35] As Mr. Napier was the State's only witness to testify that Mr. Johnson had a gun and no physical evidence was presented to tie Mr. Johnson to the shooting, the credibility of Mr. Napier and Mr. Johnson was critical to the case. The improper comment by Detective Harris struck at the heart of the case as it impermissibly relayed to the jury that Mr. Johnson did not want to speak to the police because Mr. Johnson invoked his constitutional right to an attorney. As no curative instruction was given, the impermissible comment gave the impression that Mr. Johnson was

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[34] *Hunter*, 815 A.2d at 737 (citing *Hughes*, 437 A.2d at 571); *see* also *Putney v. Rosin*, 791 A.2d 902, 905 (Del. 2001).

[35] Mr. Johnson testified that Mr. Napier, Mr. Sierra, and an unknown fourth individual met up with him for the buy and that the three of them pulled out guns and committed the robbery. Mr. Johnson maintained that he was not involved in the robbery or shooting. A125.

hiding something as opposed to Mr. Napier who never ceased speaking to police.[36] Given the above factors, the comments by Detective Harris and the prosecutor in closing were impermissible and warranted exclusion under *Hughes* and *Hunter*.

Additionally, Trial Counsel's decision[37] to not request a mistrial or curative instruction should be given no *Strickland* deference as Trial Counsel objected to the prosecutor's comment on the testimony during closing arguments. A127. This second objection shows that Trial Counsel believed the comment was improper and thus should have been objected to in the first instance with Detective Harris's testimony. The jury was thus free to impermissibly judge Mr. Johnson for ending his interview abruptly while Mr. Napier never ceased speaking to police.[38] Given the above factors, Trial Counsel was ineffective and Mr. Johnson suffered prejudiced.

For the foregoing reasons, Mr. Johnson's convictions must be reversed and remanded for a new trial.

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[36] *See Revel,* 956 A.2d at 27-28 (The State may not put a penalty on the exercise of a constitutional right).

[37] Denial pg. 8.

[38] *See* Gregory Napier's June 15, 2010 and August 27, 2010 police interviews. A24,84.

CLAIM IV. THE SUPERIOR COURT ERRED IN DENYING TYWAAN JOHNSON'S CLAIM OF INEFFECTIVENESS FOR TRIAL COUNSEL'S FAILURE TO INVESTIGATE THE PERSON IDENTIFIED AS "JAMAL" IN VIOLATION OF U.S. CONST. VI AND XIV AND DEL. CONST. ART. I, §§ 4, AND 7.

QUESTION PRESENTED

Did the Superior Court err in denying Mr. Johnson's claim that Trial Counsel was ineffective for failing to investigate "Jamal"? This issue was preserved as it was raised in the Amended Motion for Post Conviction Relief. A168.

SCOPE OF REVIEW

This Court reviews ineffective assistance of counsel claims *de novo*. *Swan*, 28 A.3d at 391. Questions of law are reviewed *de novo*. *Dawson*, 673 A.2d at 1190. Claims of a constitutional violation are reviewed de novo. *Hall*, 788 A.2d at 123.

MERITS OF THE ARGUMENT

The Superior Court erred in denying Mr. Johnson's claim that Trial Counsel was ineffective for failing to investigate the actions of an individual named "Jamal." The Superior Court held that Trial Counsel was not ineffective for failing to investigate as Mr. Johnson did not offer any evidence that additional information about Jamal would have helped the defendant. Denial pg. 10.

There is nothing in Rule 61 Counsel's file to indicate that Trial Counsel investigated the identity of the "4th man," Mr. Napier's friend known only as Jamal.

Mr. Napier testified that Jamal was the driver who brought him to the meeting but did not accompany the three of them to the buy. A115-116. However, Mr. Johnson testified that Jamal did in fact accompany them to the buy and was an active participant in the robbery with Mr. Sierra and Mr. Napier. A123-125. Mr. Johnson described Jamal in the same manner that Christopher Plunkett did. A123-124. While Trial Counsel submitted in his affidavit that he attempted to investigate Jamal,[39] there is nothing in Rule 61 Counsel's file to indicate that an investigation into Jamal was performed by Trial Counsel.

The U.S. Supreme Court in *Strickland* explained that an attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[40] Decisions not to investigate "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id*. The defendant's own statements and actions are critical in determining the reasonableness of investigation decisions, because the attorney's actions "are usually based, quite properly, on informed strategic choices made by the defendant and on information provided by the defendant." *Id*.

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[39] A129, 131.
[40] *Strickland*, 466 U.S. at 691.

The Superior Court erred when it held that even if Trial Counsel was ineffective for failing to investigate, Mr. Johnson has not offered any evidence to show that more information concerning Jamal would have led to a different result at trial. Denial pg. 9-11. The Superior Court's holding is erroneous as the identity and role of Jamal was critical to the case. Jamal's relationship with Mr. Napier was a crucial component of Mr. Napier's testimony concerning how he got to the drug buy and Mr. Johnson's testimony that Jamal was one of the gunmen that Mr. Plunkett observed. If the identity of Jamal matched the description of the second gunmen given by Mr. Plunkett,[41] then Mr. Napier's credibility would have been diminished and the jury would have more likely believed Mr. Johnson's version of events that he was not involved in the crime. As Trial Counsel had no reason not to investigate the identity of Jamal and his relationship with Mr. Napier, Trial Counsel's conduct fell below a reasonable standard under *Strickland*. Thus, the Superior Court erred in denying this claim.

For the foregoing reasons, Mr. Johnson's convictions must be reversed and remanded for a new trial.

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[41] A104-105.

CLAIM V. THE SUPERIOR COURT ERRED IN DENYING TYWAAN JOHNSON'S CLAIM OF A *BRADY* VIOLATION IN VIOLATION OF U.S. CONST. VI AND XIV AND DEL. CONST. ART. I, §§ 4, AND 7.

QUESTION PRESENTED

Did the Superior Court err in denying Mr. Johnson's claim that the State committed a *Brady* violation? This issue was preserved as it was raised in the Amended Motion for Post Conviction Relief. A171.

SCOPE OF REVIEW

Questions of law are reviewed *de novo*. *Dawson*, 673 A.2d at 1190. Claims of a constitutional violation are reviewed de novo. *Hall*, 788 A.2d at 123.

MERITS OF THE ARGUMENT

The Superior Court erred in denying Mr. Johnson's claim that the State committed a *Brady* violation as the Superior Court erroneously held that the State did not commit a *Brady* violation as the police did not obtain any evidence concerning Jamal to disclose. Denial. Pg. 10-11. As the Superior Court lacked an adequate basis to deny this claim, its holding is erroneous.

The State was well aware of Jamal, the 4th man at the crime scene and Mr. Napier's friend as Mr. Napier told Detective Gifford that Jamal rented a car and gave him a ride to the drug buy. A79, A86; A115-116. Detective Gifford investigated Jamal as he told Mr. Napier that he wanted to talk to Jamal and "get something" from

the car that was used to transport Mr. Napier to the drug buy. A79. However, Mr. Johnson testified that Jamal was at the buy and was one of the gunmen.[42] A123-125.

The United States Supreme Court in *Brady v. Maryland* held that "suppression by the prosecution of evidence favorable to an accused violates due process when the evidence is material to either guilt or punishment, irrespective of good faith or bad faith of the prosecutor."[43] *Brady* requires that the prosecutor disclose all materially exculpatory evidence. *Id*. A *Brady* violation requires: 1) exculpatory or impeaching evidence exists that is favorable to Defendant; 2) "that evidence is suppressed by the State;" and 3) Defendant is prejudiced by the suppression. If each of these prongs are met, a *Brady* violation has occurred and the verdict must be vacated.[44]

The Superior Court erred in denying this claim as it did not have an adequate record concerning the State's actions to obtain discovery *Brady* material. Detective Gifford did not submit an affidavit to the Superior Court indicating that all *Brady* information was provided to the prosecutors. Nor did the trial prosecutors, John Downs and Joseph Grubb, submit affidavits denying that they know Jamal's full name or whether they satisfied their obligations under *Brady* to seek out impeachment

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[42] Mr. Johnson described Jamal in the same manner that Mr. Plunkett did. Compare Mr. Plunkett's description of suspect 2 on A104-105 to Mr. Johnson's description on A123-124.

[43] *Brady*, 373 U.S. at 87; *U .S. v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154, (1972).

[44] *Starling v. State*, 882 A.2d 747, 756 (Del. 2005) (citations omitted).

and exculpatory information from members of the prosecution team including law enforcement officers in the case.[45] A79. Although the State did indicate that law enforcement and the prosecutor did not have any information about Jamal, they provided no details as to what actions were performed to satisfy *Brady*.

If the State had at the very least disclosed Jamal's identity, then Mr. Johnson would have been able to investigate Jamal's relationship with Mr. Napier being either family or a close friend which would have then allowed Trial Counsel to expose Mr. Napier's bias in protecting Jamal. Additionally evidence that Jamal was an active participant in the robbery would have helped to exonerate Mr. Johnson.

Lastly, the Superior Court erred when it held that this claim is procedurally barred under Rule 61(i)(3). Denial pg. 10-11. This Court has previously held that a colorable claim of a *Brady* violation falls under the exceptions to the procedural bars under Rule 61(i)(5).[46] As the Superior Court lacked an adequate foundation to deny the *Brady* claim, the procedural bar of Rule 61(i)(3) does not apply.

For the foregoing reasons, the Trial Court erred in denying this claim due to an inadequate record concerning the State's obligation under *Brady*.

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[45] *See Youngblood v. West Virginia,* 547 U.S. 867, 870 (2006); s*ee also Smith v. Cain*, 132 S.Ct. 627, 629-30 (2012) (finding a *Brady* violation for the failure to disclose the lead detectives notes containing impeachment evidence); *Kyles v. Whitley*, 514 U.S. 419, 434-435 (1995).

[46] *State v. Wright*, 67 A.3d 319, 324 (Del. 2013); s*ee also Jackson v. State*, 770 A.2d 506, 515-516 (Del. 2001).

CLAIM VI. THE SUPERIOR COURT ERRED IN DENYING TYWAAN JOHNSON'S CLAIM OF CUMULATIVE DUE PROCESS ERROR IN VIOLATION OF U.S. CONST. XIV AND DEL. CONST. ART. I, §§ 4, AND 7.

QUESTION PRESENTED

Did the Superior Court err in denying Mr. Johnson's claim that his right to a fair trial was denied due to cumulative due process error? Mr. Johnson preserved this issue as it was raised it the Amended Motion for Post Conviction Relief. A176.

SCOPE OF REVIEW

Ineffective assistance of counsel claims are reviewed *de novo*. *Swan* , 28 A.3d at 391. Questions of law are reviewed *de novo*. *Dawson*, 673 A.2d at 1190. Claims of a constitutional violation are reviewed de novo. *Hall,* 788 A.2d at 123.

MERITS OF THE ARGUMENT

The Delaware Supreme Court erred by denying Mr. Johnson's claim of cumulative due process violation. Denial pg. 12. As outlined in Claims I through V *supra*, Mr. Johnson submits that he has presented multiple claims of ineffective assistance of counsel and a *Brady* violation, all claims that individually warrant reversal. However, in the event that this Court finds otherwise, the cumulative effect of all these errors violates due process, warranting reversal.

Where there are several errors in a trial, a reviewing court must weigh the cumulative impact to determine whether the defendant was deprived of his right to

a fair trial.[47] Cumulative impact of errors at trial may be the basis for reversing a conviction even when one error, standing alone, would not be the basis for reversal.[48] The cumulative effect of the alleged errors may violate due process under the Fourteenth Amendment of the United States Constitution.[49]

The Superior Court erred when it held that there was no cumulative error as all of Mr. Johnson's ineffective claims were denied. Denial pg. 12. As outlined in Arguments I through V *supra*, Mr. Johnson has alleged multiple Constitutional violations due to Trial Counsel's ineffectiveness and the State's *Brady* violation under the Sixth and Fourteenth Amendments of the United States Constitution and Article I §§ 4 and 7 of the Delaware Constitution.

Mr. Johnson submits that the cumulative effect of the above described errors "operated to deprive the defendant of a fair trial."[50] The cumulative effect of these errors resulted in Trial Counsel failing to fully investigate the critical facts of the case

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[47] *Wright v. State*, 405 A.2d 685, 690 (Del. 1979).

[48] *Id; see also Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2007) (holding that petitioner could not show that the cumulative prejudice of trial errors "undermined the reliability of the verdict"); *Fahy v. Horn*, 516 F.3d 169, 205 (3d Cir. 2008) (holding that individual errors that do not entitle a petitioner to relief may do so when combined, if cumulatively the prejudice resulting from them undermined the fundamental fairness of his trial and denied him his constitutional right to due process. Cumulative errors are not harmless if they had a substantial and injurious effect or influence in determining the jury's verdict, which means that a habeas petitioner is not entitled to relief based on cumulative errors unless he can establish actual prejudice).

[49] *U.S. ex rel. Sullivan v. Cuyler*, 631 F.2d 14, 17 (3d Cir. 1980).

[50] *Wright,* 405 A.2d at 690.

or protect Mr. Johnson's constitutional rights at trial. Furthermore, the State's failure to disclose all *Brady* information it possessed concerning Jamal denied Mr. Johnson the ability to present both impeachment and exculpatory evidence by showing that it was Mr. Napier, Mr. Sierra and Jamal who committed the crime.

For the foregoing reasons, Mr. Johnson's convictions should be reversed and remanded for a new trial.

CLAIM VII. THE SUPERIOR COURT ERRED BY NOT HOLDING AN EVIDENTIARY HEARING IN VIOLATION OF U.S. CONST. XIV AND DEL. CONST. ART. I, § 7.

QUESTION PRESENTED

Did the Superior Court err in denying Mr. Johnson's request for an evidentiary hearing? Mr. Johnson preserved this issue as he raised it in his Amended Motion for Post Conviction Relief. (A111)

SCOPE OF REVIEW

The Delaware Supreme Court reviews the Superior Court's denial of a request for an evidentiary hearing for abuse of discretion. *Outten*, 720 A.2d at 551.

MERITS OF THE ARGUMENT

While Mr. Johnson submits that reversal of all counts of conviction and a remand for a new trial is warranted due to the arguments raised in Claims I through VI, Mr. Johnson alternatively asserts that the Superior Court erred by refusing to grant an evidentiary hearing.

An evidentiary hearing[51] is needed in order to comply with due process[52] when raised claims require a forum for a defendant to compel testimony so as provide a defendant a meaningful opportunity to present witnesses and evidence. Due process

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[51] An evidentiary hearing may be ordered pursuant to Superior Court Criminal Rule 61(h).
[52] Pursuant to U.S. Const. XIV and Del. Const. Art. I, § 7.

was shortchanged by the Superior Court's denial of an evidentiary hearing.[53] An evidentiary hearing is of further critical importance as there is no right to discovery in a Rule 61 review setting.[54]

In relation to Claim I that the Superior Court erred in denying Mr. Johnson's claim of ineffectiveness for failing to object to the admission of Gregory Napier's 3507 statement, the Superior Court further abused its discretion by denying Mr. Johnson's request for an evidentiary[55] hearing. Denial pg. 11. An evidentiary hearing would have allowed the Superior Court to hear the testimony and weigh the credibility of both Mr. Napier and the Detective Gifford.[56] Mr. Napier and Detective Gifford would have testified to the events of the interview and allowed the court to determine the voluntariness under the totality of circumstances.[57] As Mr. Johnson has made out a *prima facie* showing that Mr. Napier's statement was involuntary due to Detective Gifford's repeated use of Mr. Napier's family to pressure him to talk, an

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[53] *Townsend v Sain*, 372 U.S. 293, 313 (1963) (requiring federal courts to grant evidentiary hearings when, "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing or there is a substantial allegation of newly discovered evidence"), overruled in part on other grounds by *Keeney* v. *Tamayo-Reyes,* 504 U. S. 1, 5 (1992); *Marshall*, 307 F.3d at 116 (remanded for further factual development when the record has been inadequate to make a proper legal determination of an ineffective assistance of counsel claim raised on habeas appeal despite prior requests for an evidentiary hearing); *Lee v. Glunt*, 667 F.3d 397, 406 (3d Cir. 2012) (remanded case for a federal evidentiary hearing as the State's denial of an evidentiary hearing deprived petitioner of a further opportunity to investigate).

[54] *See Dawson v. State*, 673 A.2d 1186, 1197 (Del. 1996).

[55] Pursuant to Del. Super. Ct. Crim. R. 61(h).

[56] A162.

[57] *Roth,* 788 A.2d at 107-108.

evidentry hearing should have been held on the matter.

The Superior Court also abused its discretion by denying Mr. Johnson's request for an evidentiary[58] hearing in relation to Mr. Johnson's claim of a *Brady* violation when it relied solely on Detective Gifford's testimony that he attempted to track down Jamal but did not find anything. Denial pg. 10-11. This was in error as it is unknown if the Detective could not in fact find any information, or simply stated that he did not find any useful information concerning Jamal. An evidentiary hearing was needed to determine if Detective Gifford discovered, during his investigation, any information regarding Jamal that was required to be disclosure pursuant to *Brady*. A175. Brady information could have been a fact such as where Jamal allegedly rented a car, where he possibly lived, who he was friends with, essentially any fact that would have allowed the defense to identify and interview Jamal.[59] A hearing was also needed to determine the magnitude of the *Brady* violations,[60] and to determine what

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[58] Pursuant to Del. Super. Ct. Crim. R. 61(h).

[59] It is critical to note that Jamal is not a figment of anyone's imagination as he is a person whom the State's critical witness, Mr. Napier, claimed drove him to a drug deal.

[60] *See Williams v. Ryan*, 623 F.3d 1258, 1268 (9th Cir. 2010) (holding that "the district court erred by not further developing the factual record of the *Brady* claim" and remanding the *Brady* claim in order for the district court to decide, on the basis of an appropriate record, whether there were witnesses who could have provided material evidence favorable to" the defendant at trial); *Gaither v. United States*, 759 A.2d 655, 664 (D.C. 2000) (remanding "for the court to make complete findings of fact" as the trial judge "was in a far better position than we are to assess the atmospherics of the case' and determine whether the failure to disclose materially prejudiced the defendant") (quoting *Edelen v. United States*, 627 A.2d 968, 972 (D.C. 1993)); *Farley v. United States*, 694 A.2d 887, 890 (D.C. 1997) (remanding for an evidentiary hearing to determine whether a civilian complaint to a review board "was *Brady* material and, if

remedy is appropriate.[61] As such, the Superior Court's reliance on Detective Gifford's testimony is an insufficient basis to dismiss this claim.

A case of such extreme importance such as this, in which Mr. Johnson was sentenced to life in prison without the possibility of parole, essentially a judicial mandate that he die in a State prison, requires an evidentiary hearing to allow Mr. Johnson to fully develop a record through compelled testimony and compelled production of evidence. This Court has previously remanded Rule 61 cases and ordered that an evidentiary hearing be held.[62]

For the foregoing reasons, this case should be remanded for an evidentiary hearing.

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so, whether had it been disclosed to the defense, there is a possibility that the result of the trial would have been undermined").

[61] *United States v. Struckman*, 611 F.3d 560, 577 (9th Cir. 2010) (recognizing "that dismissal with prejudice may be an appropriate remedy for a *Brady* or *Giglio* violation using a court's supervisory powers where prejudice to the defendant results and the prosecutorial misconduct is flagrant") (citing *United States v. Williams*, 547 F.3d 1187, 1202 (9th Cir. 2008); *United States v. Chapman*, 524 F.3d 1073, 1077, 1086 (9th Cir. 2010)); *Chapman*, 524 F.3d at 1086 (holding that the district court did not abuse its discretion in dismissing the indictment); *Gov't of Virgin Is. v. Fahie*, 419 F.3d 249 (3d Cir. 2005) (holding "that dismissal for a Brady violation may be appropriate in cases of deliberate misconduct because those cases call for penalties which are not only corrective but are also highly deterrent"); *United States v. Miranda*, 526 F.2d 1319, 1324 n.4 (2d Cir. 1975) (sanctions for a *Brady* violation include, "in exceptional circumstances, dismissal of the indictment or the direction of a judgment of acquittal") (citing *United States v. Heath*, 147 F.Supp. 877 (D. Hawaii 1957); *United States v. Jackson*, 508 F.2d 1001, 1005-08 (7th Cir. 1975); *United States v. Banks*, 374 F.Supp. 321, 328 n.2 (D.S.D. 1974)).

[62] *See Weedon v. State*, 750 A.2d 521, 528-9 (Del. 2000) (Rule 61 denial reversed and remanded for an evidentiary hearing on recanted testimony issue.)

CONCLUSION

WHEREFORE, based on the foregoing, Mr. Johnson respectfully requests that this Court reverse and remand Mr. Johnson's convictions and grant all appropriate relief.

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