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IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN MILLER, Defendant Below-Appellant, v. STATE OF DELAWARE, Plaintiff Below-Appellee.	)	No. 37, 2021 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE ID No. 1611008842A&B

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

AMENDED OPENING BRIEF

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Dated: July 1, 2021

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules

NATURE OF THE PROCEEDINGS

On July 17, 2012, Jeremiah "Farmer" McDonald died by gunfire while standing in a cul-de-sac in Brookmont Farms, now known as Sparrow Run. The case lay dormant for some time until investigated by a cold case unit. This investigation resulted in the indictment of Kevin Miller on November 21, 2016 of three charges: Murder First Degree, Possession of a Firearm During Commission of a Felony (PFDCF), and Possession of a Firearm by a Person Prohibited (PFBPP).[1] This indictment was amended on April 23, 2018 to include a charge of Tampering with a Witness against Mr. Miller as well as the same charge against Mr. Miller's sister, Shelly Brown.[2]

The evidence of witness tampering being gathered by the State caused a continuance of the trial.[3] Then the Court granted Eugene Maurer, Esquire's sealed motion to withdraw,[4] and Anthony Figliola, Esquire was appointed to the case.[5] The change in counsel necessitated another rescheduling.

[1] A31-32.
[2] A94-96.
[3] A146-147.
[4] A14; D.I. 68.
[5] No substitution of counsel was docketed, but Mr. Figliola first appears on the docket on June 8, 2018. A14; D.I. 69.

On August 28, 2019, the Court granted the defense's unopposed motion to sever the PFBPP charge.[6] Codefendant Shelly Brown exited the case by way of a *nolle prosequi* of her charge in exchange for her testimony.[7]

This case proceeded to a jury trial. Jury selection took place on October 17, 2019,[8] and the trial began on October 21, 2019. On October 30, 2019, at the prayer conference, the trial judge granted the defense motion for judgment of acquittal as to the witness tampering charge and denied the State's request for an attempted witness tampering charge.[9] The judge also denied the State's request for a lesser-included offense of Murder Second Degree.[10]

The jury began deliberations at 12:51 PM on October 30, 2019.[11] By 4:35 PM, the jury reached a verdict, finding Mr. Miller guilty of Murder First Degree and PFDCF.[12] The trial judge found Mr. Miller guilty of PFBPP after the simultaneous bench trial on that severed charge.[13]

On February 26, 2020, the defense filed an Amended Motion for New Trial, having been given leave to amend to include references to the trial transcripts.[14]

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[6] A18; D.I. 89.
[7] A176-177.
[8] A202-256.
[9] A775-781.
[10] A782-783.
[11] A868.
[12] A874-875.
[13] A879.
[14] A883-909.

After the State's Response and a sur-reply from each side, the Court denied the motion.[15]

On December 23, 2020, the State filed a motion to declare Mr. Miller an habitual offender on both the PFDCF and PFBPP charges.[16] However, the State clarified at sentencing on January 8, 2021 that it sought habitual sentencing only on the PFDCF charge.[17] The Court granted the motion.[18] The Court then sentenced Mr. Miller to life imprisonment plus 35 years of additional unsuspended prison time.

On February 3, 2021, the undersigned attorney, now representing Mr. Miller, filed a timely Notice of Appeal. This is Mr. Miller's Opening Brief.

[15] *State v. Miller*, 2020 WL 4355557 (Del. Super. July 30, 2020).
[16] A957-961.
[17] A980.
[18] A981-982.

SUMMARY OF THE ARGUMENT

I. THE STATE COMMITTED MISCONDUCT BY INTRODUCING FALSE CONTRADICTORY ALIBI EVIDENCE, RESULTING IN A DEPRIVATION OF MR. MILLER'S SUBSTANTIAL RIGHTS.

The State played many of Mr. Miller's redacted prison calls at trial. In some calls, Mr. Miller said he was home at Frenchtown Woods in Newark at the time of the murder. In others, he said he was at a liquor store in Smyrna with his wife and the "feds" should know that because there was a GPS tracker on his car. But he was talking about two different incidents. The State asserted that if Mr. Miller wanted to establish that the "Smyrna" calls were about a different murder, he would have to take the stand and say so. When Mr. Miller was trying to decide whether the testify, the prosecutor argued that Mr. Miller being the "prime suspect" in the other murder would be revealed to the jury on cross-examination. Moreover, the prosecutor said the motive for both murders was the same: jealousy over a girlfriend that had also been the paramour of each murder victim.

The State's knowing use of calls about two separate alibis was prosecutorial misconduct that permeated the trial. The defense had to cross examine witnesses and call defense witnesses to attempt to establish that Mr. Miller was not giving two alibis for the same murder. The State described defense counsel's situation as a "conundrum," but it was one of the State's making. Moreover, the State threatened to establish Mr. Miller's status as the prime suspect in the other murder

(among many other things) if he testified. The State went on to assert in closing argument that Mr. Miller had given multiple alibis for one murder, which was not true.

Although defense counsel complained about and reacted to the misconduct while cross-examining witnesses and questioning witnesses, counsel did not specifically object or apply for a mistrial. As such, Mr. Miller respectfully seeks review under Supreme Court Rule 8. The misconduct amply meets the standards established in *Wainwright* and *Hunter*, warranting reversal.

II. THE TRIAL JUDGE ERRED IN ADMITTING TONY PRUITT'S PRIOR STATEMENT TO POLICE ON THE BASIS OF FORFEITURE BY WRONGDOING.

Mr. Miller's constitutional rights to confrontation and a fair trial were compromised when the Court admitted a statement a prior statement from Pruitt pursuant to D.R.E 804(b)(6). The trial judge impermissibly decided the application based on Mr. Miller's alleged intimidation and influence on other witnesses besides Pruitt. The State conceded there was no direct evidence that Mr. Miller had any contact with Pruitt at all. The hearsay exception applies to the declarant, not other individuals whom the defendant may have intimidated. As such, the trial judge erred in admitting the statement.

STATEMENT OF FACTS

The initial investigation.

On the night of July 17, 2012, police responded to Heron Court in the neighborhood formerly known as Brookmont Farms for a shooting.[19] Two people in the area had called 911: Warner "Gene" Wheeler and Shantell Newman. Marquita Brooks was also on the phone call with Newman.[20] Mr. McDonald was pronounced dead at the scene.[21] The Assistant Medical Examiner testified that Mr. McDonald sustained several bullet wounds that caused his death.[22]

Shantelle Newman testified that she was hanging out with her cousin Marquita Brooks and Mr. McDonald in the cul-de-sac on Heron Court that night. At one point, Mr. McDonald took her to one of the houses to use the bathroom.[23] Shortly after they returned, a male wearing a heavy coat with fur around the hood and a shiny mask approached and fired shots at Mr. McDonald.[24] She did not see the shooter's face. She noticed that the shooter was shorter than Mr. McDonald.[25] Newman attempted CPR and handed her phone to Brooks to call 911.[26] Marquita

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[19] A266.
[20] A270.
[21] A267.
[22] A395-398.
[23] A304.
[24] A305-306.
[25] A306.
[26] A307.

Brooks gave a similar account. She described the shooter as wearing a big fleece coat with fur on the hood and an animal mask.[27] The shooter ran away between nearby houses.[28] A K-9 unit established a trail of the suspect through a "cut" between two houses on Heron Court; the trail ended at 13 Teal Circle.[29]

The case yielded little in the way of relevant forensic evidence. A mask and two jackets, one with fur around the collar, were recovered at a nearby house, 6 Heron Court.[30] However, the witnesses who saw the shooter and his mask did not identify that mask as the one worn by the shooter.[31] Moreover, the witnesses and the K-9 track contradicted the possibility that the shooter had discarded a mask and jacket inside 6 Heron Court.

Key trial witnesses

The case lay dormant for some time until the investigation was re-initiated by Detective Shahan and retired Sergeant Davis of the Cold Case Unit in 2016.[32] Their reinterviews of witnesses led to the indictment and eventually the trial of Mr. Miller. Several of the witnesses were recalcitrant to appear, alleging intimidation and fear of retaliation. Early in the trial it was noted that people were coming and

[27] A298.
[28] A299.
[29] A274.
[30] A661-662, A655, A281.
[31] A657.
[32] A658, A268.

going from the courtroom.[33] Defense counsel suggested a mistrial be declared until the State could secure their witnesses. The motion was denied as premature.[34]

The following describes the relevant testimony of the civilian witnesses.

Krystal Bivings

Bivings is the mother of Mr. McDonald's daughter. However, she later began an intimate relationship with Mr. Miller.[35] She called Mr. Miller by his nickname "Chevy," as did all the other witnesses.[36] When Mr. McDonald learned of Bivings' relationship with Chevy, bad blood arose between the two men.[37] Bivings further testified that Mr. Miller contacted her to check on her the morning after the homicide. He told her that he was home in Newark at the time of the murder.[38]

James "Bocker" Watson

Watson refused to testify if anyone from Brookmont was going to be in the courtroom.[39] Citing Mr. Miller's attempts to influence witnesses, the State asked that the courtroom be cleared.[40] The State asserted that people who were in the

[33] A311.
[34] *Id.*
[35] A312.
[36] *Id.*
[37] A313.
[38] A316.
[39] A319.
[40] A320-322.

courtroom during the trial approached Watson's daughter to see if he would be testifying.[41] The defense countered that there was no evidence that anyone is trying to tamper with Mr. Watson or influence his testimony.[42] Ultimately, the judge declined to clear the courtroom but suggested that the State establish that Watson was there reluctantly.[43]

Watson was a recalcitrant witness. He claimed not to remember anything from the night of the murder. He also stated he did not remember giving statements to detectives in 2013.[44] He did somewhat remember his 2016 statement, but only that the detective offered him help on possibly getting out of jail early.[45] Watson said he was not truthful in 2016 and was not specifically forced to make a statement but rather was induced by promises.[46]

The State next called Detective Shahan to establish a foundation for the 2016 statement,[47] which was played for the jury pursuant to 11 *Del. C.* § 3507.[48] After the statement was played, Watson retook the stand and continued to disavow any memory of the 2013 statement.[49] The State called Shahan back to the stand,

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[41] A320.
[42] A320-322.
[43] A323.
[44] A324.
[45] A325.
[46] *Id.*
[47] Court Exhibit 3.
[48] A326.
[49] A327.

who briefly testified that he knew that the prior detective, Detective Eckerd, had taken a statement from Watson.[50] Without defense objection, apparently this was enough of a foundation to admit the statement. However, by prior agreement of the parties,[51] the statement was not played; rather, the prosecutor asked Shahan to read portions of it.[52]

The gist of Watson's account is that the night of the homicide he was hanging out with other people at Heron Court and noticed Mr. McDonald was there hanging out with a couple of females.[53] While standing at the end of a driveway, he saw someone come from the side of a house with a gray wolf mask on. This person pointed the gun at him.[54] Watson said, "stop playin'" and ran to the other side of the house.[55] From there he saw the masked person walk up on Mr. McDonald and shoot him.[56] Later in the interview, Watson told the detective that he knew it was Chevy because he had been around Brookmont all his life and knew people well from their height, shape, and gait. But at the time, he stopped short of saying "stop playin' Chevy."[57] Later in the interview he was more certain,

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[50] *Id.*
[51] A324.
[52] A327.
[53] *Id.*
[54] A328.
[55] *Id.*
[56] *Id.*
[57] A330.

saying he was sure it was Chevy by the way he was shaped and the way he was moving.[58] Watson identified Kevin "Chevy" Miller from a photograph during the 2013 statement.[59]

Upon being recalled to the stand, Watson was shown an affidavit dated July 19, 2017, with his signature at the bottom, but Watson testified it did not look like his handwriting.[60] The affidavit stated that Watson had no reason to believe Mr. Miller was the person who shot Mr. McDonald.[61] Watson denied writing it, although he acknowledged it was his signature at the bottom.[62] He similarly denied authoring a typed affidavit that was in his name but unsigned.[63]

Michael Mude

Mude, a longtime denizen of Brookmont, grew up with both Mr. Miller and Mr. McDonald.[64] Prior to the homicide, he observed Mr. Miller and Mr. McDonald in a verbal altercation in Brookmont. Mr. Miller later told Mude that he was sick and tired of seeing Farmer around.[65] Later, Mr. Miller told Mude that Farmer was disrespecting him and that Mr. Miller was going to make an example out of him.[66]

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[58] A331.
[59] A330.
[60] A335.
[61] *Id.*
[62] A339.
[63] A337.
[64] A415.
[65] A416.
[66] A417.

A few days before the murder, Mr. Miller was asking Mude where he could find Farmer.[67]

The day of the murder, Mude was with Mr. Miller, when Mr. Miller got a call. During the call, Mr. Miller said, "just keep him right there" and then left in his car.[68] A couple days after the shooting, Mude and Mr. Miller conversed again. Mr. Miller told Mude he was not worried about people who might have seen something: "Nah. Motherf***ers that seen me do it know better than to say my name, and the people that know I did it ain't going to say s**t."[69]

Mude next ran into Mr. Miller at Mr. McDonald's funeral. Mr. Miller told Mude he was just there to keep up appearances and make it look good.[70] Finally, Mude ran into Mr. Miller at a WalMart. Mr. Miller noticed the "Rest in Peace Farmer" tattoo on Mude's forearm and told him that he knew where Mude's mom lived. He further stated, "listen mother***er, you can end up just like your boy Farmer."[71]

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[67] *Id.*
[68] *Id.*
[69] A418.
[70] *Id.*
[71] A418.

Mude admitted that he finally told the police all this because he was looking for help on his own criminal charges.[72] He also agreed that he had testified as a State's witness previously, also hoping for consideration.[73]

Warner "Gene" Wheeler

Wheeler was taken into custody on a material witness warrant because he did not show up for trial.[74] The prosecutors alleged that a person contacted Wheeler's daughter to tell him not to testify, and that Wheeler himself got calls from blocked numbers warning him not to testify.[75] In one of the calls, an unknown person said, "karma may miss you but it will hit your kids."[76]

Partway through Wheeler's testimony, the Court called a sidebar to ask who had entered the courtroom.[77] The prosecutor said they were from Brookmont Farms, referring to them as "Brooksmonsters."[78] The judge noted that four individuals were making faces while Wheeler was testifying.[79] Over a defense objection and outside the presence of the jury, the judge ordered four persons removed.[80]

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[72] A419.
[73] *Id.*
[74] A443.
[75] A435-436.
[76] A443.
[77] A515.
[78] *Id.*
[79] A516.
[80] A520.

Wheeler testified he was a longtime Brookmont resident and hung out there all the time. He was familiar with Mr. Miller and Mr. McDonald.[81] On the night of the homicide, he was outside 44 Heron Court. He saw Farmer (McDonald) talking to two females and he saw Bocker (Watson) leave 6 Heron Court and walk towards Farmer.[82] Wheeler then saw Chevy walk around the corner; he was about to call out to Chevy but then saw him put on a mask.[83] Wheeler described the mask as a wolf mask with hair on it.[84]At first, Wheeler thought Chevy was joining with others who earlier in the week had been playing with paintball guns wearing masks. He watched Chevy's movements.[85] Wheeler saw Chevy shoot Mr. McDonald then run through the cut between houses.[86] Wheeler called 911.[87] He did not identify the shooter because he did not want to get involved.[88]

Wheeler testified that he was aware that Mr. Miller and Mr. McDonald were in a dispute "over a girl."[89] A few weeks before the homicide, Wheeler had broken

[81] A465.
[82] A470-471.
[83] A472.
[84] A487.
[85] A474.
[86] A474, 472.
[87] *Id.*
[88] A475.
[89] A484.

up a potential fight between the two. He testified that Mr. Miller said, "you don't have to hold him. I don't get down that way."[90]

Wheeler testified that the mask shown to him by the detective (recovered from 6 Heron Court) was not the mask he saw the shooter wearing.[91]

The State next began asking Wheeler questions about his changing stories and possible influence by Mr. Miller. Wheeler agreed he spoke to Mr. Miller on the phone often. In one call, Mr. Miller was asking about a witness the police had who was standing in front of 44 Heron Court. Wheeler did not reveal that witness was him.[92] But later, Mr. Miller asked Wheeler to go to Mr. Miller's lawyer and give a new story, which he did.[93] Mr. Miller wrote to Wheeler, often through Mr. Miller's sister, asking him to change his story to say the mask the police found was actually the one the killer wore – because that mask had other DNA on it, not Mr. Miller's.[94] Mr. Miller also wrote to Mr. Wheeler to go tell the prosecutor he was not going to testify because he had changed his story.[95] Mr. Miller asked Wheeler to write an affidavit explaining that he initially identified Mr. Miller because they were in a dispute over a girl and that Mr. Miller owed Wheeler $15,000, neither of

[90] A485.
[91] A495.
[92] A498.
[93] A499.
[94] A510.
[95] A514.

which were true.[96] Mr. Miller also wrote to Wheeler that even if he had to lie, Mr. Miller needed his help.[97]

In 2018, Wheeler went to the police, turned over the letters from Mr. Miller, and un-recanted his recantation, "because [it] seemed like I was getting too deep involved in it."[98]

Forfeiture by wrongdoing argument as to Tony Pruitt

The State argued that Pruitt's statement to police should be played due to forfeiture by wrongdoing. The State represented that he had been threatened not to come to court sometime after opening statements, when his photograph was shown.[99] The prosecutors explained that Pruitt had told his probation officer he was not going to show up to court.[100] He quit his job after five people showed up at his place of work.[101] He had someone else pick up his paycheck.[102]

Defense counsel argued there was no proof or indication that Mr. Miller had caused any of the alleged tampering or intimidation.[103] He asserted the State had not shown that Mr. Miller was behind any of the threatening phone calls or texts.[104]

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[96] A524-525.
[97] A523.
[98] A527.
[99] A435.
[100] A433.
[101] A434.
[102] *Id.*
[103] A439.
[104] A441.

Defense also noted that Pruitt had called him before the trial and told him he did not want to testify. Pruitt also said he had been in a motorcycle accident and had memory problems.[105] The prosecutor agreed that Pruitt had come to them first and said he did not want to testify, and the prosecutors told him he had to testify, despite having memory problems and being drunk and high when he gave his statement to police.[106]

The prosecutor admitted that in all the prison calls they had seized, there was no evidence that Mr. Miller threatened Pruitt; he did not mention him at all.[107] The Court found that the State did not have to prove that the wrongdoing related to Wheeler; it could be in relation to anyone who was intimidated. The Court held that the wrongdoing could "carry over" to anyone else.[108] As such, the Court permitted Pruitt's statement to come in based on forfeiture by wrongdoing.[109]

The Court's reasoning appears to have been that since Mr. Miller had tried to get Wheeler to change his story, that transferred as wrongdoing to Pruitt. Nevertheless, the judge later granted a defense motion for judgment of acquittal as

[105] A451.
[106] *Id.*
[107] A453.
[108] A454.
[109] *Id.*

to the witness tampering of Wheeler, finding that Wheeler's various stories were not the result of witness tampering by Mr. Miller.[110]

Tony Pruitt's statement

Prior to the statement being played, the Court supplemented its ruling by citing a case and finding that the State established that the defendant has done "some type of wrongdoing" in the form of witness intimidation, that the intimidation was intended to procure Pruitt's unavailability and did in fact do so.[111]

Pruitt's statement[112] was played with one of the interviewers, retired Sergeant Glenn Davis, on the witness stand. As defense counsel noted, the important parts of the statement were that Mr. McDonald had sold a .45 caliber handgun to Mr. Miller prior to the homicide, and that Mr. Miller had told Pruitt, "tell your boy Halloween is coming early."[113]

On cross-examination, Davis admitted that Pruitt was not present for the alleged gun sale, and in fact most of Pruitt's statement was hearsay except for the Halloween comment allegedly made by Mr. Miller.[114] At sidebar, the prosecutor argued that defense counsel had previously agreed the firearm sale testimony would be admissible in exchange for an officer testifying that Brookmont is a high

[110] A778-780.
[111] A614.
[112] Court Exhibit 6.
[113] A451.
[114] A616-617.

crime area and .45 caliber guns are common.[115] Defense counsel countered that he made that agreement with the understanding that Pruitt would be testifying.[116] The Court agreed to instruct the jury to disregard the portion of the statement about the gun sale and any connection of the caliber of gun that killed Mr. McDonald.[117]

Prison phone calls, affidavits, and alibis

Much of the trial focused on Mr. Miller's efforts to help his cause from prison. Through Detective Shahan, the State introduced the letters Mr. Miller had sent to Warner Wheeler.[118] One letter stated that the mask found in the "trap house," 6 Heron Court, had DNA from three different people on it.[119] Mr. Miller wanted Wheeler and others to confirm that mask was the one worn by the shooter.[120] He urged Wheeler that now that his mind is clear and time has passed, he could identify that mask as worn by the shooter.[121] Mr. Miller exhorted Wheeler, "even if you have to lie, I need your help or I'm gonna be in here forever for something I didn't do."[122] After learning Wheeler was an eyewitness, Mr.

[115] A618.
[116] A619.
[117] A619.
[118] A345.
[119] *Id.*
[120] A346.
[121] *Id.*
[122] *Id.* (Emphasis in original).

Miller wrote an affidavit for Wheeler to sign stating that he did not like Chevy at the time he made his statement and that he was coerced into identifying Chevy.[123]

Mr. Miller also made numerous calls about his case from prison, often using other inmates' identifying PIN numbers. The calls were heavily redacted for trial. Generally, the calls pertain to securing affidavits from people and trying to find out about witnesses. In one call, he is talking to Wheeler trying to find out who the eyewitness was, unaware it was Wheeler.[124] In other calls, he is exhorting Wheeler and others to sign affidavits or otherwise tell the police that the mask they found at 6 Heron Court was the mask worn by the shooter.[125]

Several calls discuss Mr. Miller's location at the time of the shooting. Mr. Miller told Wheeler that after the shooting, his baby's mother Elena Vega called him at his home down near the Elkton, Maryland line in his townhouse in Frenchtown Woods.[126] In another call to Wheeler, Mr. Miller reiterates that he was home and that both his wife Rose Epps and Vega called him at home to tell him about the homicide.[127] In a third call, Mr. Miller tells Wheeler he was "all the way down there by f***ing Elkton, Maryland and that his phone records would show

[123] A347.
[124] A348-349; State's Exhibit 58.
[125] A354.
[126] A349; State's Exhibit 58.
[127] A350; State's Exhibit 64.

that."[128] Yet the prosecutor elicited testimony from Shahan that Miller had previously said he was in Newark and was not claiming to have been in Maryland.[129]

In another call, Mr. Miller said that when "that happened," he was living in Smyrna. When he got a call from "Gate," he was at a liquor store in Smyrna with his wife. Mr. Miller went on to say that the Feds had a GPS tracker on his car, so they knew where he was.[130] In a call to Elena Vega, Mr. Miller again states that the Feds had a GPS on his car and that he was in a liquor store in Smyrna.[131] The context of that statement was redacted.

On cross-examination, defense counsel asked Shahan if he was familiar with the murder of a person named "200" and whether Mr. Miller was questioned about that murder.[132] The State requested a sidebar. Defense counsel explained to the judge that the State was trying to portray Mr. Miller as having two alibis, when in fact the Smryna liquor store alibi was about where he was during the murder of 200, not during the McDonald murder.[133]

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[128] A351; State's Exhibit 65.
[129] A351.
[130] A350-351.
[131] A352: State's Exhibit 69.
[132] A352.
[133] A353.

The prosecutor objected to the questioning, stating that if Mr. Miller wanted to explain, he could testify.[134] The prosecutor seemed to believe that the detective explaining about the other murder would be hearsay as to Mr. Miller. Defense counsel explained that he was trying to show the jury that the two alibi statements were about two different murder investigations.[135] The prosecutor replied, "but we don't know that. And if that's what Mr. Miler is telling Mr. Figliola, he's got to take the stand and say that."[136] But the prosecutor *did* know that. He had just told the judge minutes earlier that the parties had talked about trying to "carve out" things such as a DEA investigation into Mr. Miller and the other murder investigation pertaining to 200.[137] And he would later in the trial confirm that Mr. Miller was the prime suspect in the murder of the person known as 200.[138]

After the sidebar, Detective Shahan testified he "believed" that Mr. Miller was talking about the same incident when referring both to being at home and also being at a Smyrna liquor store. Then he admitted that he could not say for sure.[139]

Detective Christopher Phillips testified about numerous documents, mostly exonerating affidavits, found during a search of Mr. Miller's cell.[140] Detective

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[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] A640.
[139] A354.
[140] A356-357.

Shahan testified that additional letters and affidavits were found during a search warrant executed at Mr. Miller's sister Shelly Brown's residence.[141] In these documents, Mr. Miller is proclaiming his innocence while trying to get several people to write affidavits to establish facts favorable to him.[142] Shelly Brown testified that at Mr. Miller's request, she received and delivered letters and documents to various people.[143] She did so because she thought she was helping Mr. Miller prove his innocence.[144]

Mr. Miller's decision not to testify

Toward the end of the State's case, defense counsel indicated that Mr. Miller was planning to testify. However, defense counsel stated that "it opens a lot of doors," and wanted to know what "the State's going to be able to get into."[145] The prosecutor began listing several areas the State would question Mr. Miller about if he took the stand.[146] The prosecutor further stated that he would call witnesses in a rebuttal case to establish additional facts.[147]

At the request of the judge and with the acquiescence of defense counsel, Mr. Miller was brought into the courtroom to hear what evidence the State would

[141] A358-359.
[142] A361-363.
[143] A371-372.
[144] A373.
[145] A631.
[146] A631-633.
[147] A634.

present if he testified.[148] The judge told Mr. Miller he had to think long and hard about testifying, because the State would impeach him and "there are several areas the State would want to get into."[149]

The prosecutor listed the convictions that would be admissible pursuant to Rule 609: Drug Dealing from 2015, Maintaining a Dwelling from 2009, two Trafficking convictions from 2002, and an Assault First Degree and PFDCF case from 2002.[150] The prosecutor had told the judge minutes before that he was not sure whether the 2002 convictions were admissible due to their age.[151]

Next, the State explained that questions will "inevitably" come out pursuant to Rule 404(b) that he had tried to keep out of the trial.[152] The prosecutor said that Mr. Miller runs a drug business, and that if he testified, he would be questioned about his drug dealing relationship with Michael Mude, Lee Ray, and Mr. McDonald.[153]

The prosecutor stated that all prior fights and arguments in which Mr. Miller was involved would be brought out to establish motive to kill Mr. McDonald.[154] The prosecutor then said that Mr. Miller was the "prime suspect" in the murder of

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[148] A638.
[149] *Id.*
[150] A639.
[151] A632-633.
[152] A639.
[153] A639-640.
[154] A640.

200, who also had a relationship with Krystle Bivings, and Mr. Miller would be asked about that.[155]

Next, the prosecutor stated the fact that Mr. Miller was the target of a DEA drug investigation involving "numerous federal authorities" would come in, as well as the fact that Mr. Miller was an informant for the DEA. The prosecutor said that Mr. Miller had fed names to federal officers as suspects in Mr. McDonald's murder.[156]

Finally, the prosecutor explained that Mr. Miller would be questioned about all the affidavits and other documents recovered from his cell, and that would make relevant the threats made to James Watson, Eugene Wheeler and their families, as well as the threats to Tony Pruitt.[157]

Mr. Miller told the Court he was not deciding at that time whether to testify.[158] He later decided not to testify.[159]

Defense counsel then brought up the "touchy" issue about the murder of 200, and that he planned to bring in a witness, Dashanna Jones, who would testify about that.[160] The prosecutor warned that if Jones testified that Mr. Miller was

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[155] *Id.*
[156] A641.
[157] *Id.*
[158] A642.
[159] A721.
[160] A643.

talking about a different alibi on the phone, the State would ask about that, and "then the conundrum Mr. Figliola finds himself in."[161]

Detective Shahan

As the State's final witness, Detective Shahan took the stand to tie up some loose ends. He testified that two search warrants were executed at the "trap house," 6 Heron Court.[162] When police executed a search warrant for drugs, they found a mask, a jacket, and some ammunition, so they held the scene for a second search warrant to be issued in connection with the murder case.[163] Shahan reiterated that no witnesses identified the mask from 6 Heron Court to be the mask worn by the shooter.[164]

On cross-examination, the defense admitted the coats found at 6 Heron Court; Shahan testified that they were not tested for DNA.[165] On redirect, the detective blurted out that through "reliable witness statements," it was clear that the suspect never made it back to 6 Heron Court after the shooting.[166]

At the close of the State's case, the Court denied the defense application for a judgment of acquittal on the witness tampering charge.[167]

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[161] *Id.*
[162] A648-649.
[163] A649.
[164] A653, A657.
[165] A662-663.
[166] A670.
[167] A679.

Defense Witness Dashanna Jones

Jones is the mother of one of Mr. Miller's children. She testified that Mr. Miller never told her he was in Smyrna when the murder of Mr. McDonald occurred.[168] At sidebar, defense counsel explained he was still working on trying to clear up the problem from the prison phone calls and the second alibi.[169] That was all the defense wanted from Jones, but the State cross-examined her. The prosecutor asked if Mr. Miller had ever told her that he was in Smyrna with his wife.[170] Jones blurted out that call was about a different murder; the judge called a sidebar.[171] The judge wanted to strike all Jones' testimony, but defense counsel objected on the grounds that if her testimony was stricken, the jury would be left with the impression that Mr. Miller did tell Jones he was in Smyrna for the McDonald murder.[172] The judge then decided not to strike, as the attorneys had no more questions for the witness.[173]

Rose Miller

Still attempting to defuse the conflicting alibi issue, the defense called Mr. Miller's wife, Rose Miller. She testified that Mr. Miller was living in Frenchtown

[168] A685.
[169] A687.
[170] A688.
[171] A689.
[172] A689-690.
[173] A692.

Woods in 2012, which is near the Maryland state line.[174] She had spoken to Mr. Miller right after she heard of the murder and was about to leave for the crime scene, as she knew Farmer as well.[175] Rose Miller testified that she called Mr. Miller on his house phone.[176] However, in the rebuttal case, the State played a prison phone call in which Rose Miller remembered calling Mr. Miller's cellphone.[177]

Judgment of Acquittal as to Tampering with a Witness

The judge revisited the motion for judgment of acquittal, opining that Mr. Miller's communications to Wheeler may constitute criminal solicitation but not deceit.[178] The State argued that the crucial element is that the defendant used deception, not necessarily that the witness was deceived.[179] Later, the State argued that the "victim" of witness tampering is not the witness, because the statute is in the "administration of justice" portion of the codebook.[180] Nevertheless, the Court noted that Wheeler was not deceived but instead gave various versions because he was affirmatively trying to help his friend.[181] The Court granted the motion for

[174] A745.
[175] A746.
[176] A748.
[177] A788-789; State's Exhibit 125.
[178] A728.
[179] A730.
[180] A776.
[181] A778.

judgment of acquittal as to the Tampering with a Witness charge and denied the State's request for a lesser-included offense of Attempted Tampering with a Witness.[182]

Prosecutor argues multiple alibis in closing

The prosecutor argued that Mr. Miller provided inconsistent alibis in his prison calls.[183] He noted that on some calls, Mr. Miller said he was at home during the murder. Then he said he was in a liquor store in Smyrna.[184] Noting that Dashanna Jones testified that Mr. Miller was talking about a different murder, but "did we hear anything in the prison calls that reference any of that? But that's Dashanna Jones' testimony to explain that away."[185] Finally, the prosecutor falsely claimed that on one of the calls, Mr. Miller said he was in Elkton, Maryland,[186] when in reality he stated he was "all the way down there by f***ing Elkton, Maryland" on that call.[187] The prosecutor concluded, "which is it? Is he at Elkton, Smyrna, and at home, or is he in the circle killing Farmer, like Gene and Bocker said he was."[188]

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[182] A780-781.
[183] A808.
[184] A809.
[185] *Id.*
[186] *Id.*
[187] A350; State's Exhibit 64.
[188] A809.

Verdict and motion for new trial.

The jury retired to deliberate at 12:51 PM[189] and had reached a verdict by 4:35 PM.[190] The judge found Mr. Miller guilty of the PFBPP charge after a brief bench trial.[191]

The defense filed an Amended Motion for New Trial on April 16, 2020.[192] The motion argued that the eyewitness evidence was inconsistent, and that all the tampering evidence was prejudicial given that the witness tampering charge was ultimately dismissed. Finally, the defense argued that the playing of the Tony Pruitt statement without him being present and subject to cross-examination was so prejudicial as to require a new trial.[193] The Superior Court denied the motion on July 30, 2020.[194]

[189] A868.
[190] A874.
[191] A879.
[192] A883-909.
[193] A888.
[194] *State v. Miller*, 2020 WL 4355557 (Del. Super. July 30, 2020); A947-956.

ARGUMENT

I. THE STATE COMMITTED MISCONDUCT BY INTRODUCING FALSE CONTRADICTORY ALIBI EVIDENCE, RESULTING IN A DEPRIVATION OF MR. MILLER'S SUBSTANTIAL RIGHTS.

A. Question Presented

Whether the State committed prosecutorial misconduct when, knowing that certain alibi statements pertained to a different homicide, portrayed them as about the same case, then asserting that Mr. Miller would have to testify if he wanted to explain the contradiction, and then by threatening to establish Mr. Miller's status as suspect in that separate homicide if he were to testify. Additionally, whether the State committed misconduct when arguing Mr. Miller asserted a third alibi, knowingly misstating the evidence.

Although defense counsel undertook several actions attempting to mitigate the misconduct throughout the trial, counsel did not specifically object or seek a mistrial. As such, Mr. Miller seeks review pursuant to Supreme Court Rule 8. That rule states that only questions fairly presented to the trial court may be presented for review. However, this Court may consider such questions when the interests of justice so require.[195] The effect of the misconduct on the fairness of Mr. Miller's right to a fair trial was palpable enough to warrant review. Moreover, this Court

[195] Supr. Ct. R. 8.

has routinely considered unpreserved prosecutorial misconduct claims, albeit under a plain error standard of review.[196] As such, Mr. Miller respectfully seeks review of this claim pursuant to Rule 8.

B. Standard and Scope of Review

When defense counsel fails to timely object to prosecutorial misconduct, this Court applies plain error review.[197] First, this Court conducts a *de novo* review of the record to determine if prosecutorial misconduct occurred. If this Court does not find misconduct, then the inquiry ends.[198] If this Court does find misconduct, however, it applies plain error standard articulated in *Wainwright v. State*: the error must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.[199] Plain error is "limited to 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."[200] Finally, if plain error does not result in reversal under the *Wainwright* standard, this Court will apply the *Hunter* test: "whether the prosecutor's statements are repetitive errors that require reversal

[196] *See, e.g.*, *Spence v. State*, 129 A.3d 212, 219 (Del. 2015).
[197] *Spence v. State*, 129 A.3d 212, 226 (Del. 2015).
[198] *Id.*
[199] 504 A.2d 1096, 1100 (Del. 1986).
[200] *Id.*

because they cast doubt on the integrity of the judicial process."[201] This Court can reverse pursuant to *Hunter* even if it would not have done so under *Wainwright*.[202]

C. Merits of Argument

Evidence of Mr. Miller being a suspect in a second murder permeated the trial.

The State used out-of-context prison calls to create an impression for the jury that Mr. Miller told different people different alibis. In four of the calls played, Mr. Miller told Wheeler that he was down at his house in Frenchtown Woods near the Maryland State line – not in Maryland as the State would argue.[203] He explained that both his wife and baby's mother called him at his home in Frenchtown Woods. In another prison call to the same person, Wheeler, he explained that when he got a call from "Gate," he was at a liquor store in Smyrna with his wife, and that the Feds should know that because they put a GPS tracker on his car.[204] He said he same thing in another call regarding where he was when he got the call from Gate.[205] He also told his baby's mother Elena Vega the same thing in an additional redacted call.[206]

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[201] *Hunter v. State*, 815 A.2d 730, 733 (Del. 2002).
[202] *Spence* at 226, *citing Baker v. State*, 906 A.2d 139, 150 (Del. 2006).
[203] State's Exhibits 58, 62, 64, and 65.
[204] State's Exhibit 62.
[205] State's Exhibit 70. Although not specifically stated in the record, this call was likely to Dashanna Jones, who would later testify for the defense.
[206] State's Exhibit 69

The State clearly knew Mr. Miller was a suspect in a second murder. In fact, the prosecutor admitted as much at a sidebar, and it was also one of the main things the prosecutor promised to bring out on cross-examination should Mr. Miller testify. Yet the prosecutor told the judge, "but we don't know that. And if that is what Mr. Miller is telling Mr. Figliola, he's got to take the stand and say that."[207] While it is true that the calls are rambling and jump around from topic to topic, the redacted Smryna alibi calls have the context of a different alibi for a different case. Mr. Miller is clear on the calls that at the time he thought the DEA had a tracker on his car, he was living in Smryna, not Frenchtown Woods. Moreover, the Smyrna alibi calls reference getting a call from "Gate," whereas the Frenchtown Woods alibi calls reference getting calls from Mr. Miller's wife and child's mother about Mr. McDonald's murder. Finally, Mr. Miller told Wheeler about both the Smryna alibi and the Frenchtown Woods alibi in two separate calls one week apart.[208]

This second alibi fiction permeated the trial and accomplished two objectives for the State: it portrayed Mr. Miller as a liar, and it raised the specter of Mr. Miller being a suspect in a second murder in addition to the murder for which he was on trial.

[207] A353.
[208] State's Exhibits 63 and 64.

Defense counsel was placed in the position of asking the chief investigating officer whether his client was a suspect in the murder of 200. The fallout from the State's playing of the prison calls caused the defense to open the door to prior bad act evidence. But the jury was not instructed in any way as to how to receive and consider the evidence of Mr. Miller being a suspect in another murder.

When defense counsel stated he planned to call Dashanna Jones to address the "touchy" subject of the murder of 200, the State warned that it would ask questions about what the other alibi was about, calling it "the conundrum Mr. Figliola finds himself in."[209] The defense called Jones as a witness simply to establish that Mr. Miller never told her that he was in a liquor store in Smyrna when the murder of Mr. McDonald occurred. But the State cross-examined her about if Mr. Miller had ever told her he was in a liquor store in Smyrna with his wife. That question resulted in the response that Mr. Miller's statement was "about another guy that was murdered."[210] By asking that question, the State again placed before the jury Mr. Miller's status as a suspect in a second murder.

By playing the Smyrna liquor store calls, the State created a situation that impacted Mr. Miller's decision on whether to exercise his right to testify. On the one hand, the prosecutor stated, "if that's what Mr. Miller is telling Mr. Figliola,

[209] A643.
[210] A688-689.

he's got to take the stand and say that."[211] But it was the State that put Mr. Miller in the position of having to explain uncharged misconduct evidence by playing the calls in the first place. As such, Mr. Miller had to decide whether to testify to rebut highly prejudicial evidence that should have not been admitted.

After telling the judge that Mr. Miller would need to take the stand, apparently to explain to the jury that he was the suspect in a second murder and had an alibi for that one too, the State then explained to Mr. Miller all the subjects it would introduce into evidence if he did elect to testify. Several of the topics were of dubious admissibility, such as Mr. Miller's alleged status as a drug dealer and specifically a person who had drug dealing relationships with the victim and many of the witnesses. Similarly, it is difficult to see how Mr. Miller's status as a DEA informant and also a target of a DEA investigation would be admissible. Cross-examination may not exceed the scope of direct examination and matters affecting the witness's credibility.[212] It is unlikely that Mr. Miller's direct examination would open any such doors. Nor did the State file a motion to admit other crimes, wrongs, or acts evidence. As to Mr. Miller's criminal history, the prosecutor had not yet done an analysis on whether his older convictions would be admissible, but

[211] A353.
[212] D.R.E. 611(b); *Jones v. State*, 940 A.2d 1, 16 (Del. 2007).

on the record advised Mr. Miller they would be. Neither party had sought a pretrial ruling on the admissibility of prior convictions should Mr. Miller testify.

The most important warning the prosecutor gave Mr. Miller, however, pertained to the murder of 200. According to the State, the questioning would not be limited to whether Mr. Miller was talking on the phone about a separate murder investigation when he said he was at a liquor store in Smyrna with his wife at the time. The State planned to establish that not only was Mr. Miller the "prime suspect" in the murder of 200, but also that 200 was another person who had a relationship with Krystle Bivings, the source of the alleged bad blood between Mr. Miller and Mr. McDonald. That questioning, if deemed admissible by the trial judge, would have further cemented motive in the McDonald murder: that Mr. Miller is fueled by jealousy over Krystle Bivings and acts murderously upon that jealousy. Moreover, that Mr. Miller has a general propensity to commit violent crimes; the State considered him the prime suspect in a separate murder. Mr. Miller, as noted, elected not to testify.

The State would continue to leverage the multiple alibi angle in its closing argument to the jury. The State derided Dashanna Jones' testimony about a separate murder as an attempt to "explain away" the Smyrna alibi, arguing, "did we hear anything in the prison calls about any of that?"[213] This argument elided the

[213] A809.

fact that the prison calls were redacted and that Dashanna Jones testified that when Mr. Miller talked about living in Smyrna and being in a liquor store, he was speaking of his whereabouts during a different murder of which he was a suspect. Moreover, the prosecutor continued to argue that Mr. Miller said on prison phone calls that he was both at home in Frenchtown Woods *and* in Elkton, Maryland at the time of the murder of Mr. McDonald.[214]

Mr. Miller's fundamental rights were violated.

The admission of the Smyrna alibi calls and the improper argument about a third Maryland alibi gravely compromised Mr. Miller's right to a fair trial before an impartial jury. The jury heard evidence and argument misleadingly establishing Mr. Miller to be a liar about his whereabouts during the murder of Mr. McDonald by presenting purportedly different alibis on different calls. More importantly, the jury was left to freely consider that Mr. Miller was a person with a general propensity to commit violent crimes. The jury was left uninstructed as to how to consider the evidence; there was never a curative or limiting instruction given.

Moreover, the evidence left Mr. Miller deprived of his right to make a free and voluntary choice whether to testify. The State, having introduced the calls, then argued to the judge that Mr. Miller would just have to take the stand and explain them. But when it came time for Mr. Miller to make the decision, the State

[214] *Id*.

was permitted to list a litany of topics that would be admissible if he did take the stand – several of them with dubious chances for admissibility unless Mr. Miller specifically opened the door. However, the State made clear that it would not simply permit Mr. Miller to testify that his references to Smyrna were in relation to another case. The State indicated it would bring out the fact that Mr. Miller was the prime suspect as the murderer of 200, and in fact that 200 had a previous relationship with Mr. Miller's paramour Krystle Bivings – just as Mr. McDonald did. As such, the State improperly leveraged the prison calls to discourage Mr. Miller from testifying, even though the State created the situation by playing the calls in the first place.

These constitutional violations meet the *Wainwright* standard. They are material defects that are plain from the record. They deprived Mr. Miller his right to a fair trial before an impartial jury and affected his right to make a free and deliberate choice whether to testify. These violations meet the standard for the deprivation of substantial rights and manifest injustice.

The repetitive nature of the errors require reversal under the* Hunter *standard.

As demonstrated, the State's errors were not limited to playing calls referencing an alibi for a different murder investigation. The errors permeated the trial. The State could have easily corrected its error by eliciting testimony that those calls pertained to a separate incident, then seeking a limiting instruction from

the judge. But the State leaned into the false alibi argument throughout the trial, beginning with the statement that Mr. Miller would have to take the stand himself and explain the calls. Then followed the State's promise to expose further prejudicial details about the 200 murder, in which the State averred Mr. Miller was the prime suspect. The State did not need to cross-examine Dashanna Jones when she testified that Mr. Miller never told her he was in a Smyrna liquor store during the murder of Mr. McDonald. The State did so anyway, eliciting further damaging testimony that those calls were about another person who was murdered. Finally, the State could have easily refrained from making its improper multiple alibi argument in closing argument but did it anyway.

These multiple errors and arguments more than satisfy the *Hunter* rubric of repetitive errors that must be reversed because they cast doubt on the integrity of the judicial process. The State's repeated elicitation of evidence and its argument that Mr. Miller was a liar because he concocted multiple alibis qualify as repetitive. The State eliciting testimony that Mr. Miller was a suspect in another case, compounded by promising to Mr. Miller that it would bring out even more damaging details if he testified, adds to the repetitiveness of the errors. As such, even if this Court finds the *Wainwright* standard has not been established, this Court should still reverse under the *Hunter* rubric.

II. THE TRIAL JUDGE ERRED IN ADMITTING TONY PRUITT'S PRIOR STATEMENT TO POLICE ON THE BASIS OF FORFEITURE BY WRONGDOING.

A. Question Presented

Whether the Superior Court abused its discretion by permitting the statement of Tony Pruitt to be played on the grounds of forfeiture by wrongdoing. This issue was preserved when the defense objected to the admission of the statement.[215]

B. Standard and Scope of Review

A trial judge's admission of evidence pursuant to forfeiture by wrongdoing is reviewed by this Court for abuse of discretion.[216] An abuse of discretion occurs when the trial judge "exceed[s] the bounds of reason in view of the circumstances and has so ignored recognized rules of law or practice so as to produce injustice."[217]

If this Court concludes there was an abuse of discretion, next this Court determines whether the prejudice was significant enough to deny the accused of a fair trial.[218] However, alleged constitutional violations pertaining to a court's evidentiary rulings are reviewed *de novo*.[219]

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[215] A613.
[216] *Phillips v. State*, 154 A.3d 1130, 1143 (Del. 2017).
[217] *Wright v. State*, 131 A.3d 310, 320 (Del. 2016), *citing Charbonneau v. State*, 904 A.2d 295, 304 (Del. 2006).
[218] *Johnson v. State*, 878 A.2d 422, 425 (Del. 2005).
[219] *Id*.

C. Merits of Argument

Applicable legal precepts

Forfeiture by wrongdoing is a common law doctrine permitting the introduction of statements when the defendant has procured the witness's absence. This exception to the hearsay rule extinguishes the right to confrontation on "essentially equitable grounds."[220] In Delaware, this principle has been codified at D.R.E 804(b)(6), which provides, "a statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."[221]

To establish admissibility under D.R.E. 804(b)(6), the proponent must show (1) that the defendant engaged or acquiesced in wrongdoing, (2) that the wrongdoing was intended to procure the declarant's unavailability, and (3) that the wrongdoing did procure the unavailability.[222] The mere elimination of a witness is insufficient to establish admissibility; the proponent must establish that the defendant procured the witness's absence to silence his or her testimony.[223]

The right to confront witnesses is a basic constitutional right and has been termed "the greatest legal engine ever invented for the discovery of truth…"[224]

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[220] *Davis v. Washington*, 547 U.S. 813, 833 (2006).
[221] D.R.E. 804(b)(6).
[222] *Phillips*, 154 A.3d at 1143 (internal citations omitted).
[223] *Id.*
[224] *California v. Green*, 399 U.S. 149, 158 (1970).

Given the lack of evidence that Mr. Miller procured the absence of Pruitt, the Superior Court misapplied the law.

Certainly, there was evidence that Pruitt was intimidated into staying away from the trial. He told his probation officer he felt threatened. He alleged that five people came to his job and threatened him. He quit his job immediately. A separate question – the only relevant one – is whether those threats were by Mr. Miller or through his acquiescence. The State candidly admitted that of all the prison phone calls it had listened to there were no threats or even a direct reference to Pruitt by Mr. Miller.[225]

On the other hand, Mr. Miller doubtless contacted witnesses other than Pruitt. One witness testified that Mr. Miller intimidated him and threatened him. As to the rest, most notably Wheeler and Watson, Mr. Miller tried to get them to testify in a certain way, such as saying the mask found at 6 Heron Court had been worn by the shooter. Moreover, there was no indication that the Brookmont denizens in the courtroom – Brookmonsters, as the prosecutor called them[226] – were present at Mr. Miller's request or command.

The judge's error was aggregating this evidence, which had nothing to do with Pruitt, and using it as proof of forfeiture by wrongdoing: "the wrongdoing is wrongdoing which would carry over to anybody who has been affected by it or

[225] A453.
[226] A515.

may be affected by it. From that standpoint, unless you have something else, I will allow [Pruitt's statement] to come in.[227] This was error, as the hearsay exception is squarely addressed to the declarant and not anyone else. Without this misapprehension of the law, Pruitt's statement is inadmissible. There was no evidence presented at all that Mr. Miller did or acquiesced in anything to procure Pruitt's unavailability.

The Court's reliance on *U.S. v. Mastrangelo*[228] for the proposition that it would be inconceivable that the wrongdoing could have been without Mr. Miller's knowledge is misplaced.[229] In that case, a witness testified before a grand jury that he sold trucks to the defendant; the trucks were later seized, "loaded with drugs."[230] The witness was murdered before trial. The trial judge admitted the witness's grand jury testimony, finding that Mastrangelo either committed or arranged for the killing.[231] The trial judge found that it was "inconceivable" that it could have been anyone else, because he was the only person to gain from the killing of the witness.[232]

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[227] A454.
[228] 693 F.2d 269 (2d Cir. 1982).
[229] *See*, *State v. Miller*, 2020 WL 4355557 at *9, n.49 (Del. Super. July 30, 2020); A955.
[230] *Mastrangelo*, 693 F.2d at 271.
[231] *Id*.
[232] *Id.*

The appellate court was not as convinced and held that an evidentiary hearing was necessary to determine if Mastrangelo was aware of or had a hand in the killing of a witness.[233] So, the judge was citing the trial judge's finding, but not the appellate court's ruling.

The admission of Pruitt's statement violated Mr. Miller's right to confrontation and produced injustice.

The most important parts of Pruitt's statement were that Mr. McDonald had sold a .45 caliber handgun to Mr. Miller prior to the homicide, and that Mr. Miller had told Pruitt, "tell your boy Halloween is coming early."[234] There was so much hearsay in the statement that the judge instructed the jury to disregard the part about the gun sale. The jury did hear it, however. The statement about Halloween was very powerful in that the allegation was that Mr. Miller put on a wolf mask before shooting Mr. McDonald. This was strong evidence of premeditation and intent by Mr. Miller.

The defense never got to confront Mr. Pruitt. The jury never got to hear that Mr. Pruitt told both the defense lawyer and the prosecutors that he was drunk and high when he made the statement. Moreover, he told them he had been in a

[233] *Id.* at 273.
[234] A451.

motorcycle accident while not wearing a helmet and had significant memory loss.[235]

Had Pruitt been cross-examined, he likely would have testified that he did not recall any statement by Mr. Miller and did not recall his statement either. That is what he had told the attorneys all along. Because he was deprived of the right to confront Mr. Pruitt, Mr. Miller's right to a fair trial was compromised. As such, this Court should reverse.

[235] *Id.*

CONCLUSION

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

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