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Case Number 201,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIAN WILSON	)	
	)	
Defendant Below/Appellant,	)	**CASE NO. 201, 2020**
	)	
	)	**On appeal from the**
v.	)	**Superior Court of Delaware**
	)	**in and for New Castle County**
STATE OF DELAWARE,	)	**DUC 1901009072**
	)	
Plaintiff Below/Appellee.	)	

APPELLANT'S SECOND AMENDED OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

Brian Wilson (Appellant), also known as Fudayl Wakim, was in custody on federal drug charges when, on January 22, 2019, he was indicted in this case on charges of Murder First Degree, Conspiracy First Degree and Criminal Solicitation. Appellant was arraigned and plead not guilty in Superior Court on May 28, 2019.

The case proceeded to trial on January 13, 2020. The jury found Appellant guilty of all charges. Appellant was sentenced on March 13, 2020.

A timely Notice of Appeal was filed. Appellant filed an Opening Brief.[1] Before other briefing was filed, the case was stayed and remanded to the trial court to consider Appellant's motion for a new trial based upon new *Brady* material. The trial court denied the motion for new trial and the case returned to the Supreme Court.

Appellant was given leave to file an Amended Opening Brief on appeal. This is Appellant's Amended Opening Brief.

[1] A1-A8.

SUMMARY OF ARGUMENTS

I. THE TRIAL COURT ABUSED ITS DISCRETION BY SUSTAINING THE STATE'S OBJECTION REGARDING REPUTATION OF STATE WITNESS TIMOTHY KEYES.

II. ADMISSION OF UNAVAILABLE WITNESSES' TEXT MESSAGES WAS ABUSE OF DISCRETION BECAUSE THE STATEMENTS WERE HEARSAY WITHIN HEARSAY.

III. THE MOTION FOR NEW TRIAL SHOULD HAVE BEEN GRANTED BECAUSE UNDISCLOSED FEDERAL OFFER TO WITNESS TIMOTHHY KEYES UNDERMINES CONFIDENCE IN THE TRIAL AND IS MATERIAL.

STATEMENT OF FACTS

In opening statements, the State told the jury that on June 26, 2016 Allen Cannon was the victim of a head shot - shot and killed by Eric Ray.[2] The State said that Brian Wilson aka Fudayl Wakim (Appellant) ordered his murder. Under the State's theory, Appellant hired the contract killer for revenge.[3]

The cause for revenge, the State said, occurred on June 24, 2016 when Appellant was the target of an attempted robbery during a dice game.[4] The alleged robber was Artie Pratt.[5] Allen Cannon was Pratt's uncle.[6] Cannon attempted to smooth things over after, which led to a price on his head and Pratt's.[7] The State further posited that Appellant recruited Bobbie Dimes to hire a hit man to avenge the attempted robbery and that said murder was carried out on June 26, 2016 by Eric Ray.[8]

The State's first witness was Tomika Tate.[9] Tate testified she knew the victim, Allan Cannon (nicknamed Messy), as her brother.[10] She testified that Artie Pratt is her son.[11] She testified that she knows Appellant and Bobby Dimes from her neighborhood.[12]

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[2] A9
[3] A9.
[4] A9.
[5] A10
[6] A27-A29.
[7] A10
[8] A9-10
[9] A27.
[10] A28.
[11] A29.
[12] A28-30.

Tate said that she was standing next to Cannon when he was shot.[13] Cannon stated to her, "I should not have put my nephew [Pratt] in a situation like this."[14] Tate believed her son, Pratt was in danger.[15] After being shown Exhibit's 19 & 22,

[13] A31.
[14] A32.
[15] A33.

pictures of Bobby Dimes with others, she identified one of the other individuals with Bobby Dimes as the person who shot her brother.[16]

The defense objected to the admission of text messages between Artie Pratt, who was not available to testify and another person.[17] Arguing for admissibility, the State argued the text messages were subject to a subpoena, as business records, and exempt under D.R.E 803(6) as a hearsay exemption. [18] The defense argued that, without the author of the text messages, the meaning as interpreted by either the testifying officer or the jury would be misleading. The trial court overruled the defense objection and entered the statements as a business record after a foundation was laid.[19]

In support of its argument for business record admissibility, the State stated that the text messages were extracted from a cell phone by a police officer. "Early in the case, what was testified to was the cellphone extractions that come via forms of a search warrant. So, from our standpoint, these are 803 business records."[20] The text messages were part of a comprehensive summary of all of the cellphone extractions all done by Sergeant Fox of the Wilmington Police Department.[21]

The Pratt statements that were admitted included as follows:

- Outgoing statement by Artie Pratt: "Yo come get me they bout to shoot uncle messy they said"
- Incoming statement to Artie Pratt: "You HAVE to lay low stay in;"

[16] A34
[17] A35
[18] A36
[19] A36 - A38.
[20] A36
[21] A36-37

"cause your name in everything even though you ain't even do nothing"

- Outgoing statement by Artie Pratt: "I'm laying low for you;" "before I leave I gotta take a n**** out;" "I gotta go to North Carolina for a lil bit you coming?"[22]

The State next introduced a series of inmates who had been incarcerated with Appellant who all stated that Appellant had confessed to hiring the hit on Cannon:

- Jaquan Brown testified that Appellant stated "you better ask about the last person that tried to take something from me, he ain't around."[23]
- Sergio Izzo, testified that Appellant bragged about hiring a shooter after a disagreement at a dice game so no one would mess with him again.[24]
- Daniel Baker, testified he knew Appellant as Brian, Fudayl and B Wills.[25] Appellant spoke to him about Allen Cannon.[26] Baker said Appellant was robbed by Cannon (Messy) at a dice game.[27] He said Appellant met a younger man through Bobby Dimes and hired the younger man to kill Cannon.[28] He said Appellant never revealed the shooter.[29]

[22] A250
[23] A39
[24] A41
[25] A43
[26] A45
[27] A47
[28] A48
[29] A49

- Keith Blalock said that Appellant admitted to the killing.[30]
- Robert Shepherd testified he has known Appellant for roughly thirty years. Appellant spoke to him about Messy and Mika Tate's son robbing him. He wanted revenge. Appellant asked Sheperd if he had someone who could handle it and later told Sheperd it was taken care of. Appellant was bragging about who he was now.[31]

The State also called inmate Timothy Keyes.[32] Keyes came to know Appellant when they were incarcerated together leading up to Appellant's trial. Keyes was awaiting sentencing for a federal drug conviction.[33] Prior to his sentencing and Appellant's trial, Keyes gave a statement to Sergeant Fox about the Cannon killing.[34]

Keyes' statement to Fox was on December 6, 2019.[35] Assistant United States Attorney Whitney Cloud was present for the interview.[36] Fox told Keyes that he wanted to discuss the murder of Allen Cannon and that

[30] A50
[31] A67-A73
[32] A54, A134
[33] A55
[34] A56
[35] A90, A93
[36] A93

Appellant had been indicted.[37] Keyes told Fox that Appellant told him that Appellant arranged Cannon's murder.[38]

Keyes said that Appellant and Cannon, who went by "Messy," were playing dice and "they got tussling and Messy fired off a shot and took off runnin'. He said he left, he ran. Wherever the case may be. He said after that he went lookin' for Messy. He couldn't find Messy. He asked a couple people whether had they seen Messy. Cody Curtis and family members to Messy. They couldn't find him. He said he put somebody on Messy. Come to find out it was Eric."[39] Keyes said that Appellant was humiliated because Cannon robbed him in front of other people.[40] Keyes said that Appellant said he had hired Eric and Eric caught and killed Cannon.[41] Keyes stated that Appellant hired Bobby Dimes who hired Eric to kill Cannon.[42]

One month after giving the statement to Fox, Keyes was before a District Court Judge and, after a hearing, was released for "good cause" pending sentencing. United States Attorney Cloud, who was present at the statement to Fox, was the attorney for the government.[43]

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[37] A93
[38] A93
[39] A93
[40]A93
[41] A93
[42] A93
[43] A103

Keyes did not want to testify at trial.[44] He disregarded his trial subpoena.[45] He appeared only after the execution of a warrant on the morning of trial.[46]

His trial testimony differed significantly from the statement he had given to Fox. On the witness stand, he denied any personal knowledge and said his knowledge was all hearsay.[47] He said that Appellant never spoke to him about the killing.[48] Keyes's sworn testimony was that people in the facility were talking about the Cannon killing, mainly Jaquan Brown.[49] He stated Appellant liked to blow spoke and people in prison say things to make them look tough. Appellant liked to bolster his reputation.[50] Appellant never admitted killing Messy.[51]

Ultimately, the recording of Keyes' statement to Fox was played to the jury in Appellant's trial pursuant to 11 Del. C. § 3507.[52] The statement was admitted while Keyes was an uncooperative witness for the State.[53] His

[44] A54, A134
[45] A234
[46] A234
[47] A57-A59
[48] A57.
[49] A61
[50] A62
[51] A59 - A64.
[52] A60
[53] A60

statements once on the witness stand led the State to enter the interview with Fox as a 3507 statement.[54]

Thomas Wisher was called to the stand by defense.[55] Defense counsel asked Wisher if he had ever seen or heard Appellant and Keyes talking about Appellant's case and Wisher answered "no."[56] Defense counsel then asked Wisher if he was aware of any reputation that Keyes had in prison.[57] The State objected to the testimony as it related to the reputation of Keyes – arguing that any information Wisher had about Keyes' reputation was hearsay.[58] The court sustained the objection.[59] Wisher further testified that Keyes approached him about seeing the news about the murder. Wisher approached Appellant about the news report and Appellant was shocked. Wisher went on to testify that he never saw Wilson and Blalock speaking and that Sheperd did not like Wilson.[60]

[54] A234
[55] A74.
[56] A75.
[57] A75.
[58] A75.
[59] A74-A77
[60] A78-A81

Allen Prince testified for the defense.[61] He stated he was present on the night of the alleged robbery at the dice game. Appellant was there and ran, there was no altercation.[62]

Appellant testified on his own behalf and denied he had any involvement in the murder of Allan Cannon.[63]

In closing, counsel for Appellant argued that Appellant would have to be the stupidest man on earth to tell this story or the witnesses are saying what they need to say to get a deal.[64]

On October 21, 2020, after the verdict, the United States Attorney's Office wrote the State Prosecutor stating that a witness at Appellant's trial, Timothy Keyes, had been offered consideration in his pending Federal criminal sentencing if he testified at Appellant's state trial.[65] Keyes was pending sentencing in the District of Delaware for firearm and drug offenses.[66] "On April 4, 2018, Keyes pleaded guilty; as part of his plea agreement, he agreed to cooperate with the government pursuant to certain terms."[67]

On December 6, 2019, weeks before Appellant's trial, Keyes met with the Assistant United States Attorney Whitney Cloud and Sergeant Robert Fox

[61] A82
[62] A82-A83
[63] A84-A86
[64] A87-A88
[65] A90
[66] A90
[67] A90

of the Wilmington Police Department.[68] Prior to giving his statement to Fox, Cloud told Keyes that, "if he testified in Wilson's state trial, his cooperation would factor into the government's ultimate sentencing recommendation in Keyes' federal case."[69]

In his letter to the State, the Assistant United States Attorney says that "on December 6, 2019, Keyes and his lawyer met with Assistant United States Attorney Whitney Cloud in furtherance of cooperating with the government. While the main purpose of this meeting was to gather information relevant to other federal investigations, Keyes also discussed Brian Wilson."[70] "Portions of Keyes' statement were recorded by Sergeant Robert Fox of the Wilmington Department of Police. Prior to that recording, Cloud told Keyes that, if he testified in Appellant's state trial, his cooperation would factor into the government's ultimate sentencing recommendation in Keyes' federal case.[71]

[68] A90, A93
[69] A90
[70] A90
[71] A90

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY SUSTAINING THE STATE'S OBJECTION REGARDING REPUTATION OF STATE WITNESS TIMOTHY KEYES

QUESTION PRESENTED

Was sustaining the objection to the reputation evidence of a State witness an abuse of discretion?[72]

STANDARD AND SCOPE OF REVIEW

A trial judge's evidentiary rulings will not be set aside by this Court absent an abuse of discretion.[73]

MERITS OF THE ARGUMENT

The trial court abused its discretion by sustaining the State's objection to evidence of witness Keyes' reputation in prison. The defense called Thomas Wisher to testify. Thomas Wisher was incarcerated with Appellant at FDC Philadelphia and knew Keyes.[74] The defense asked Wisher "were you aware of any reputation that Mr. Keyes had?"[75] The State objected arguing "Mr. Wisher is about to refer to Timothy Keyes as a snitch...anything he heard about him being a snitch is going to be from people, which would be hearsay."[76] The State further objected that the evidence was inadmissible character evidence.[77]

DRE § 404(a) states that evidence of a person's character or character trait is

[72] A74-A76
[73] *Manna v. State*, 945 A.2d 1149 (Del. 2007).
[74] A74
[75] A75
[76] A75
[77] A76

not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. However, the rule carves out an exception that evidence of a witness' character may be admitted under DRE §§ 607, 608 and 609. The Court only considered DRE 404 and Getz v. State, 538 A.2d 726 (Del. 1988) but did not consider DRE 608.

DRE § 608 says that "except as otherwise provided by statute, a witness' credibility may be attacked or supported by testimony about the witness' reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character." "By its terms, DRE § 608 addresses how and when the 'credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation.'"[78] "The trial judge is in the best position to determine whether the witness' character has been 'attacked' and whether the introduction of character evidence is pertinent to the witness' credibility pursuant to this rule."[79]

The State's case was heavily reliant upon the 11 *Del. C.* § 3507 statement of Keyes, discussed *infra*, which was introduced as affirmative evidence with independent testimonial value. The State sought to introduce the statement pursuant to § 3507 because it was challenging Keyes' truthfulness on the witness stand.[80] The trial judge allowed it to be published. Hence, Keyes reputation for untruthfulness was squarely at issue – having been attacked by the State. Wisher's testimony about Keyes reputation as a snitch speaks to Keyes' truthfulness and

[78] *Manna v. State*, 945 A.2d 1149 (Del. 2007).
[79] *Manna v. State*, 945 A.2d 1149 (Del. 2007).
[80] *Russell v. State*, 1996 Del. LEXIS 332 (Del. 1996) (describing the use of 3507 in the case of a turncoat witness).

untruthfulness. One cannot be a snitch without betraying trust. One cannot betray trust without being untruthful. Keyes reputation also speaks to his truthfulness or untruthfulness in his statement to Sergeant Fox. Where that statement was submitted to the jury as affirmative evidence with independent *testimonial* value, the evidence of Keyes' reputation would have served to challenge the truthfulness of the statement.

The State argued that the character of the witness was garnered through hearsay and was thus inadmissible. In *Capano v. State,*[81] the court permitted the hearsay testimony of a State's witness. Testimony of the victims Psychotherapists and friends, under state of mind exception. The reputation through a witness based only on rumor was deemed admissible by this court in *Steigler v. State*.[82]

[81] 781 A.2d 556 (Del. 2001).
[82] 277 A.2d 662 (Del. 1971) (citing *Michelson v. United States*, 335 U.S. 913 (1948)).

II. ADMISSION OF UNAVAILABLE WITNESSES' TEXT MESSAGES WAS ABUSE OF DISCRETION BECAUSE THE STATEMENTS WERE HEARSAY WITHIN HEARSAY.

QUESTION PRESENTED

Did the text message statements of Artie Pratt and his unknown texting partner meet a hearsay exception?[83]

STANDARD AND SCOPE OF REVIEW

A trial judge's evidentiary rulings will not be set aside by this Court absent an abuse of discretion.[84]

MERITS OF ARGUMENT

The trial court committed reversible error by admitting text message statements by Artie Pratt who was unavailable to testify. The trial court ruled that they were admissible as business records.[85] However, the trial court failed to consider the fact that the text message statements were hearsay within hearsay.[86] One level of hearsay was without exception and inadmissible. Appellant suffered prejudice and the case must be reversed.

The State argued to the trial court that Artie Pratt's business records were admissible as business records.[87] To support that, the State stated that the text messages were extracted from a cell phone by a police officer and the officer completed a comprehensive summary of all of the cellphone extractions – all done

[83] A35-A38, A250.
[84] *Manna v. State,* 945 A.2d 1149 (Del. 2007).
[85] A38.
[86] DRE 805.
[87] A36.

in the ordinary course of business. The problem is that rationale only addresses one level of hearsay – the level that applies to the officer doing the extracting.[88]

The trial court failed to consider the fact that the statements made by Artie Pratt and the unidentified person with whom he was speaking in the text messages are, themselves, all hearsay statements.[89] The statements were as follows:

- Outgoing statement by Artie Pratt: "Yo come get me they bout to shoot uncle messy they said"
- Incoming statement to Artie Pratt: "You HAVE to lay low stay in;" "cause your name in everything even though you ain't even do nothing"
- Outgoing statement by Artie Pratt: "I'm laying low for you;" "before I leave I gotta take a n**** out;" "I gotta go to North Carolina for a lil bit you coming?"

The business record exception to the hearsay rule[90] has four requirements: (1) the record must be made at or near the time of the act of event; (2) it must be made by or from information transmitted by a person with knowledge; (3) the record must be prepared and maintained in the course of regular conducted business activity; and (4) it must be the organization's regular practice to record the act or event.[91]

"It is well recognized that 'when the source and the recorder of the information, as well as every other participant in the chain producing the record,

[88] *Downs v. State*, 206 A.3d 835 (Del. 2019).
[89] A250
[90] DRE 803(6).
[91] *Wilgus v. Bayhealth Medical Center*, 2018 WL 3814591 (Del. Super. Aug. 10, 2018).

are acting in the regular course of business, multiple hearsay is excused by DRE 803(6).'"[92] However, if the source of the information is an outsider, Rule 803(6) does not, by itself, permit the admission of the business record. The outsider's statement must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have."[93]

The outsider statements made by Artie Pratt and whomever he was texting with were not identified as a second level of hearsay. The statements are not supported by a hearsay exception. The issue decided by the trial court was that the statements were admissible as business records. However, the second level of hearsay statements were without an exception.

[92] *Wilgus v. Bayhealth Medical Center*, 2018 WL 3814591 (Del. Super. Aug. 10, 2018) (citing *United States v. Baker*, 693 F.2d 183 (D.C. Cir. 1982)).
[93] *United States v. Baker*, 693 F.2d 183 (D.C. Cir. 1982)

III. THE MOTION FOR NEW TRIAL SHOULD HAVE BEEN GRANTED BECAUSE UNDISCLOSED FEDERAL OFFER TO WITNESS TIMOTHHY KEYES UNDERMINES CONFIDENCE IN THE TRIAL AND IS MATERIAL.

QUESTION PRESENTED

Was the undisclosed fact of Timothy Keyes' federal offer material in determining Appellant's guilt and does it undermine confidence in the outcome of the trial?[94]

STANDARD AND SCOPE OF REVIEW

Appellate courts review a trial judge's ruling on the admissibility of an 11 *Del. C.* § 3507 statement for an abuse of discretion.[95] However, violations of a constitutional right (in this case pursuant to *Brady)* is reviewed *de novo*.[96]

MERITS OF ARGUMENT

The Superior Court abused its discretion by denying Appellant's motion for a new trial. Contrary to the trial court's finding, Assistant United States Attorney Cloud's offer to Timothy Keyes for sentencing consideration in exchange for testimony against Appellant *was* material in determining Appellant's guilt. The State's failure

[94] A191, A234.
[95] *McMullen v. State*, 2021 WL 2070119 (Del. 2021).
[96] *Downs v. State*, 206 A.3d 835 (Del. 2019).

to provide said information *does* undermine confidence in the outcome of Appellant's trial. Interest of justice requires reversal.

Superior Court Criminal Rule 33 governs motions for a new trial. The Superior Court may grant a new trial if required in the interest of justice.[97] A motion for a new trial alleging a *Brady* violation will be granted by the trial court "if it finds the information in question to be material in determining defendant's guilt, and where the failure to provide said information undermined confidence in the outcome of the trial."[98] Evidence that can be used to impeach a witness falls within the ambit of *Brady v Maryland*, 373 U.S. 83 (1963).[99]

At the heart of the new trial motion in Superior Court is the State's failure to disclose evidence that would have been impeaching of a key witness called by the State, Timothy Keyes. The absence of this information for the jury undermines the confidence in the verdict. There is a reasonable probability that the evidence would have altered at least one juror's assessment of the case.[100]

Immediately prior to Keyes giving his statement to Sergeant Fox of the Wilmington Police Department about the murder of Allen Cannon, Assistant United States Attorney Whitney Cloud told Keyes that "if he testified in Wilson's

[97] Superior Court Criminal Rule 33.
[98] *Starling v. State*, 882 A.2d 747 (Del. 2005). See also *United States v. Bagley*, 473 667 (1985).
[99] *Jackson v. State*, 770 A.2d 506 (Del. 2001). See also *Giglio v. United States*, 405 U.S. 150 (1972).
[100] *Cone v. Bell*, 556 U.S. 449 (2009).

[Appellant's] State trial his cooperation would factor into the governments ultimate sentencing recommendation in Keyes' federal case."[101]

The trial court held that Keyes' federal offer, sentencing consideration in exchange for testimony at Appellant's trial, was not so material as to implicate *Brady*. The court stated "the evidence was not material and did not create a probability of undermining the verdict."[102] In the absence of the evidence, Appellant did not have a fair trial.[103]

The trial court relied upon the fact that Keyes was not a cooperative witness for the State when he testified at Appellant's trial. "At first blush, it would seem reasonable that Keyes would be motivated by the possibility of receiving a federal. Sentencing benefit in exchange for his cooperation. However, any benefit that Keyes anticipated would have been predicated upon his cooperation with the State in Defendant's state trial. Keyes did not cooperate and thus, could not have been expected to receive anything in exchange for his testimony. To the contrary, Keyes' testimony appeared purposed at assisting Defendant's case."[104]

The trial court also relied upon the fact that inconsistencies between Keyes' statement to Fox and his testimony at Appellant's trial led the State to enter the statement to Fox into evidence pursuant to 11 *Del. C.* § 3507.[105]

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[101] A90
[102] A234
[103] *Kyles v. Whitley*, 514 U.S. 419 (1995).
[104] A234
[105] A234

However, the trial court abused its discretion because it failed to consider the fact that evidence introduced under 11 *Del. C.* § 3507 is introduced as *affirmative evidence*. "In 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."[106]

Regardless of how Keyes testified on the witness stand, the jury still heard his 3507 statements to Fox and used them as affirmative evidence with substantive independent testimonial value. The 3507 statements were made immediately following Cloud's federal offer. Certainly, Keyes was motivated by the federal offer to give statements about Appellant's guilt to Fox. In evaluating Appellant's 3507 statements, the jury should have been aware of the federal offer because it impacted Keyes' motivation to give the 3507 statements. It was particularly significant information in light of the fact that Keyes' did change his story when he testified. Certainly, the jury would have given less weight to 3507 statements given in the presence of the Assistant United States Attorney prosecuting Keyes where Keyes changed that statement later in court.

If Appellant was aware of the federal sentencing consideration, the defense would have used that information to cross-examine Keyes' 3507 statement to Fox. Defense counsel did question Keyes on his bias – his motivation to testify in court.[107]

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[106] 11 *Del. C.* s. 3507.
[107] A134

However, without knowing about Cloud's federal offer to Keyes, defense counsel could not cross-examine Keyes on his bias as it pertained to his motivation to give his statement to Sergeant Fox.

Further, it was an abuse of discretion to conclude the there was no *Brady* violation because the State did not know about Cloud's statement to Appellant until after trial. Even though it is true that the Assistant United States Attorney letter to the State is dated October 21, 2020, after Appellant's trial, the State surely had knowledge of what Cloud offered through Sergeant Fox.

In his letter to the State, the Assistant United States Attorney says that "on December 6, 2019, Keyes and his lawyer met with Assistant United States Attorney Whitney Cloud in furtherance of cooperating with the government. While the main purpose of this meeting was to gather information relevant to other federal investigations, Keyes also discussed Brian Wilson."[108] "Portions of Keyes' statement were recorded by Sergeant Robert Fox of the Wilmington Department of Police. Prior to that recording, Cloud told Keyes that, if he testified in Appellant's state trial, his cooperation would factor into the government's ultimate sentencing recommendation in Keyes' federal case.[109]

It is not reasonable to conclude that Fox was not aware of Cloud's offer when it was made. Keyes' statement to Fox was recorded in the Federal Courthouse in

[108] A90
[109] A90

Wilmington in the presence of federal law enforcement officers.[110] Sergeant Fox, a City of Wilmington Police Officer, had no business in the federal courthouse apart from interviewing Keyes. Sergeant Fox only interviewed Keyes because he was told that Keyes had information about the murder of Allen Cannon.

Sergeant Fox began the statement recording by soliciting introductions from the people in the room. Cloud, the Assistant United States Attorney who made the federal offer to Keyes, was present in the room and introduced herself.

The State has an affirmative duty to learn of and disclose *Brady* material – including information known to other government agents, including any agents or officers involved in the investigation.[111] The State failed in its duty to identify this information. It should have had this discussion with Sergeant Fox and with Cloud. The information was easily identifiable had the State performed its due diligence.

Further, of course Cloud's federal offer impacted what statements Keyes made to Fox. Fox was incarcerated at the time of his statement. He was pending federal sentencing. His prosecutor told him that his cooperation would factor into the sentencing recommendation. Only a month later, his prosecutor was present at the hearing where Keyes' was release pre-sentence for cause. Once released, Keyes testimony differed from his statement to Fox. If jurors had known about the federal offer, they would have not given any weight to Keyes' 3507 statement. Because they

[110] A93

[111] *Kyles v. Whitley*, 514 U.S. 419 (1995).

did not have knowledge of the federal offer, they were not able to appropriately weigh Keyes' testimony. Appellant would have been acquitted. Appellants due process rights pursuant to the *United States Constitution* and the *Delaware Constitution* were violated.

CONCLUSION

The Court abused its discretion in admitting excluding the reputation of a key State witness and admitting hearsay statements without exception. Keyes' undisclosed federal offer undermines confidence in the verdict. The conviction must be vacated.

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