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Case Number 6,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RODERICK OWENS,	)	
	)	
Appellant,	)	
	)	No. 6, 2022
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY
DUC 1312003447B

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

Roderick Owens (Appellant) was convicted after a jury trial of two offenses: Possession of a Firearm by a Person Prohibited and Possession of Ammunition by a Person Prohibited. Mr. Owens' convictions were upheld on direct appeal. Thereafter, Mr. Owens challenged his convictions in the New Castle County Superior Court pursuant to Superior Court Criminal Rule 61. The Superior Court denied Mr. Owens prayers for postconviction relief.

In this appeal, Mr. Owens challenges the Superior Court's denial of his motion for postconviction relief. He prays that this Honorable Court vacate his sentence and remand the matter to the Superior Court for the acceptance of the plea offer that Mr. Owens would have accepted had it been communicated to him be his trial counsel.

SUMMARY OF THE ARGUMENT

(1) Pursuant to the Sixth Amendment to the *United States Constitution* and to Article I § 7 of the *Delaware Constitution*, criminal defendants are guaranteed effective assistance of counsel throughout a criminal prosecution and to be present during critical stages. Criminal defendants have an absolute right to autonomy which gives them alone the authority to accept or reject a plea offer or proceed to trial. This power is vested in the defendant only, and not in the attorney, because of the extremely personal and significant ramifications of the decision.

(2) In this case, Mr. Owens was denied his opportunity to exercise his autonomy and absent for a critical stage. Here, Mr. Owens was never informed by his trial counsel of plea offers made available to him by the State. Had Mr. Owens been present at his critical stage final case review, or had he been so informed, he would have accepted the plea and it would have been accepted by the trial court.

(3) As a result, Mr. Owens was subject to a trial even though he desired to enter a plea. Further as a result, Mr. Owens was sentenced to a significantly more severe sentence then he would have under the uncommunicated plea offer.

(4) In addition, trial counsel's failure to investigate and present witnesses at suppression, but for which suppression would have been granted, fell below an objective standard of reasonableness.

STATEMENT OF FACTS

On December 5, 2013, Detective Lynch of the Wilmington Police Department was assigned to the Street Crimes section of the Drugs, Vice and Organized Crime Unit and was on patrol in the area of 24th Street and Carter Street in Wilmington, Delaware.[1] Pursuant to that assignment, it was his duty to investigate complaints involving loitering, drug sales and shootings in the area.[2]

The area was described as a high crime area.[3] There had been shots fired complaints that week.[4] Detective Lynch stated that he had received specific complaints about people loitering on the steps of 122 East 24th Street, a residential duplex on the corner of Carter and 24th Street.[5] Detective Lynch stated that he had spoken with the owner of 122, who had made loitering complaints and put up a no loitering sign,[6] and who had informed him that the building was vacant.[7] Detective Lynch further stated that the building was boarded up and a "No Trespassing" sign was posted on the door.[8]

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[1] A36.
[2] A36.
[3] A36.
[4] A36.
[5] A37.
[6] A43.
[7] A37.
[8] A37.

As the detective was driving, he saw someone sitting on the steps of 122 and so he started to turn on to 24th Street.[9] During the turn, he made eye contact with a person on the steps of 122.[10] That person, later identified as Mr. Owens, stood up, turned his body away from the officer, and adjusted something at his waistband.[11] The detective could not see what was being adjusted as it was under the clothing, but testified that, as Mr. Owens came off the step, he could see an outline a few inches long through the hooded black sweatshirt that Mr. Owens was wearing.[12]

Mr. Owens began to walk away.[13] As Detective Lynch began to open the door of his unmarked car, but before he got out, Mr. Owens started to run.[14] The detective saw that Mr. Owens was holding something as he ran.[15] The officer asserted that all of these things together caused him to think that Mr. Owens was armed and so he gave chase.[16] As he ran after Mr. Owens, he yelled "stop" and after a block Mr. Owens dropped his gun, which ejected a loaded magazine.[17] Mr.

[9] A37.
[10] A69.
[11] A37.
[12] A39.
[13] A37.
[14] A37.
[15] A38.
[16] A38.
[17] A38.

Owens was apprehended and arrested.[18] When Detective Lynch yelled "stop," that was the first time he spoke to Mr. Owens.[19]

Mr. Owens' preliminary hearing was held on December 17, 2013 and Detective Lynch testified to many of the above facts including a description of the condition of the 122 building.[20]

Subsequently, he was indicted on February 17, 2014 on charges of Possession of a Firearm by a Person Prohibited,[21] Possession of Ammunition by a Person Prohibited,[22] Carrying a Concealed Deadly Weapon,[23] and Resisting Arrest.[24] [25] Prior to trial, the trial court granted a motion to sever the person prohibited charges.[26] As a result, the matter was bifurcated into an "A" case that included the CCDW and Resisting Arrest charges[27] and a "B" case that included the two person prohibited offenses.[28]

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[18] A38.
[19] A38.
[20] A36.
[21] 11 *Del. C.* § 1448.
[22] 11 *Del. C.* § 1448.
[23] 11 *Del. C.* § 1442.
[24] 11 *Del. C.* § 1257.
[25] A19.
[26] A1.
[27] A385.
[28] A1.

At first case review on April 7, 2014, the case was merely set for final case review.[29] At that time, a plea offer was extended to Mr. Owens that included a recommended sentence of the minimum mandatory 15 years as a habitual offender.[30] The plea offer was to two offenses: CCDW and PFBPP.[31] It included open sentencing and a PSI.[32] The offer remained open until final case review.[33] Mr. Owens' trial counsel specifically recollects that he communicated this plea offer to Mr. Owens.[34]

A suppression hearing was held on August 18, 2014 and, again, the officer testified to the facts and circumstances of his encounter with Mr. Owens.[35] As of final case review on September 2, 2014, a decision on the suppression hearing was still pending.[36] Mr. Owens asserted that he was seized without justification in violation of his constitutional privacy rights.[37] It was argued that Mr. Owens was seized upon show of authority by Detective Lynch and that the discarded firearm was fruit of the poisonous tree.[38]

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[29] A724.
[30] A728 and A742-A744.
[31] A770.
[32] A770.
[33] A728.
[34] A728.
[35] A34.
[36] A720.
[37] A702 and A34.
[38] A705.

Trial counsel did not call a single witness at Mr. Owens' suppression hearing.[39] He did not investigate critical witnesses. Trial counsel received a letter from Augusta Collier.[40] Augusta Collier has stated that he was the property owner of 122 East 24th Street and did not call the police on December 5, 2013.[41] In addition, trial counsel did not interview Ronald Johnson.[42] Mr. Johnson was the property manager at 122 East 24th Street.[43] Mr. Johnson wrote that, at the relevant time, the property was not boarded up or vacant and did not have a no loitering sign.[44] He was never contacted by trial counsel.[45] Trial counsel never came into possession of a photo that is purported to show 122 without a no loitering sign in the relevant time frame.[46]

At final case review, the court and trial counsel discussed the case status and scheduled it for trial.[47] At that time, trial counsel informed the court that the State had extended to Mr. Owens a reduced, second plea offer that called for a sentence recommendation of a minimum mandatory ten-year incarceration which could not

[39] A264.
[40] A264 and A730.
[41] A717.
[42] A730.
[43] A718.
[44] A718.
[45] A718.
[46] A669.
[47] A720.

have been habitual.[48] Trial counsel did not have a written copy of the plea offer and the assigned prosecutor was not present.[49] The trial calendar judge considered but declined conducting a plea rejection colloquy – vaguely assuming the 10-year plea offer had been rejected.[50] The court and trial counsel engaged in the following discussion:

THE COURT: Well, I may not need to have a colloquy, then, if the suppression is pending.

MR. FLOCKERZIE: And that's fine.

THE COURT: Unless there has been an attempt in plea offer. What has Mr. Owens been offered?

MR. FLOCKERZIE: The minimum mandatory. Right now the last offer was ten – Ten years. And I also have been – I have my PFE involved and had discussions with Mr. Holloway, but there's been nothing better than that, which is the offer prior to the suppression hearing.

THE COURT: Now, is he facing any other mandatory time that's being *nolle prossed*?

MR. FLOCKERZIE: I don't believe he is. I can double-check the indictment.

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[48] A720.
[49] A721.
[50] A721.

THE COURT: And I'll need to have a copy of that plea offer.

MR. FLOCKERZIE: The problem, Your Honor, is I actually don't know if I have a copy of the latest offer. … "Your Honor, I apologize. I do not have in my file –

THE COURT: Based upon your representation, I don't think I need to speak with Mr. Owens. I can understand why the plea is being rejected at this time.[51]

All the while, Mr. Owens was downstairs in the lock-up holding area of the courthouse, having been held in default of bond and not having been brought into the courtroom to participate and unable to hear the discussion about the new, second plea offer.[52]

Trial commenced on September 16, 2014 for the "B" case.[53] Mr. Owens was convicted of the PFBPP and PABPP charges.[54] Prior to sentencing, the State by motion sought habitual offender status sentencing based upon Mr. Owens' prior record and pursuant to 11 *Del. C.* § 4214.[55] The court granted the State's motion and declared Mr. Owens to be a habitual offender.[56] Sentencing occurred on

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[51] A720-A721.
[52] A592.
[53] A21.
[54] A21-A24.
[55] A25.
[56] A32 and A472.

December 19, 2014.[57] Trial counsel addressed the court on behalf of Mr. Owens.[58] Upon trial counsel concluding his comments, the court asked "anything else?"[59] Where the judge was looking when he asked that question is not obvious in the record.[60] The sentencing judge did not address Mr. Owens expressly and directly until *after* the court made its sentencing decision to exceed the minimum mandatory.[61] There, the only thing the court asked about was Mr. Owens' education to which he informed the court he was a high school graduate.[62] Ultimately, Mr. Owens was sentenced as a habitual offender to 23 years at Level V suspended after serving 19 years followed by decreasing levels of supervision.[63]

Following the convictions on the "B" case, the State filed a *nolle prosequi* of the "A" case.[64] Prior to dismissal, the State and trial counsel discussed how to resolve the "A" case.[65] Trial counsel indicated that he would communicate any offers to resolve the "A" case to his client because he is required to do so.[66]

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[57] A2.
[58] A474.
[59] A474.
[60] A474.
[61] A474-A475.
[62] A475.
[63] A756.
[64] A385.
[65] A737.
[66] A737.

Mr. Owens attests by sworn affidavit that he was never informed of the second plea offer that was discussed at the final case review.[67] He states that on September 2, 2014, his counsel never came downstairs to the holding area to meet with him. "On that date, [trial counsel] did not speak with me and explain that a plea offer was available…counsel did not give me an opportunity to consider a plea offer."[68]

The issue of the uncommunicated plea offer was raised in Mr. Owens' subsequent postconviction relief proceedings in Superior Court pursuant to Superior Court Criminal Rule 61.[69] During those proceedings, trial counsel authored an affidavit on December 15, 2018[70] and a second affidavit on April 16, 2020.[71] The issue of the plea negotiation is not raised in the first affidavit.[72] In his second affidavit, with the plea negotiation issue squarely before him, he danced around it. In the second affidavit, trial counsel indicates that he does not recall meeting with Mr. Owens on September 2, 2014.[73] He states that there is "simply no way" he would not have communicated a plea offer to a client.[74] However, he

[67] A754.
[68] A755.
[69] A360.
[70] A262.
[71] A727.
[72] A262.
[73] A728.
[74] A729.

never acknowledges the second plea offer or states that it was communicated.[75] Likewise, the jacket on his trial file is silent on the issue.[76]

Ultimately, on December 21, 2021, the Superior Court denied all of Mr. Owens' claims for postconviction relief.[77] This appeal followed.[78]

[75] A728.
[76] A769.
[77] A566 and Exhibit A.
[78] Notice of Appeal.

ARGUMENT

I. THE SUPERIOR COURT ABUSED ITS DISCRETION BY CONCLUDING THAT THE SECOND PLEA OFFER HAD BEEN COMMUNICATED TO MR. OWENS BECAUSE THAT FINDING OF FACT IS NOT SUPPORTED BY COMPETENT EVIDENCE IN THE RECORD. MR. OWENS SUFFERED PREJUDICE.

QUESTION PRESENTED

Is the postconviction court's conclusion that trial counsel had communicated the plea offers to Mr. Owens supported by competent evidence in the record? *(Error Preserved in the Record at A566 and Exhibit A).*

STANDARD OF REVIEW

"The Delaware Supreme Court reviews the denial of a Superior Court Rule 61 Motion for Postconviction Relief for an abuse of discretion."[79] "Nevertheless, we carefully review the record to determine whether 'competent evidence supports the court's findings of fact.'"[80] "Legal and constitutional questions are reviewed *de novo*."[81]

[79] *Urquhart v. State*, 293 A.3d 719, 726 (Del. 2019) (citing *Dawson v. State*, 673 A.2d 1186 (Del. 1996)).
[80] *Neal v. State*, 80 A.3d 935, 941 (Del. 2013) (citing *Zebroski v. State*, 822 A.2d 1038 (Del. 2003)).
[81] *Urquhart v. State*, 293 A.3d 719, 726 (Del. 2019) (citing *Ploof v. State*, 75 A.3d 840 (Del. 2013)). See also *Green v. State*, 238 A.3d 160, 173 (Del. 2020).

MERITS OF THE ARGUMENT

"The Sixth Amendment to the *United States Constitution*, made applicable to the States by the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions."[82] This right is further guaranteed by Article I § 7 of the *Delaware Constitution*. The right to counsel is the right to effective assistance of counsel.[83]

The right to counsel extends from the moment of arrest[84] through a defendant's first right of appeal.[85] The United States Supreme Court "made clear that 'the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[86]

Further, the United States Supreme Court has held that claims of ineffective assistance of counsel in the plea-bargaining process are governed by the two-part test set forth in *Strickland*.[87] The Delaware Supreme Court adopted the two-part

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[82] *Missouri v. Frye*, 566 U.S. 134, 138 (2012) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).
[83] *Missouri v. Frye*, 566 U.S. 134, 138 (2012) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). See also *Shipley v. State*, 570 A.2d 1159, 1166 (Del. 1990) and *Urquhart v. State*, 293 A.3d 719, 728 (Del. 2019) (the right to counsel includes the right to effective assistance of counsel).
[84] *King v. State*, 59 Del. 1, *2 (Del. 1965).
[85] *Evitts v. Lucey*, 469 U.S. 387, 392 (1985).
[86] *Missouri v. Frye*, 566 U.S. 134, 141 (2012) (citing *Padilla v. Kentucky*, 559 U.S. 356 (2010)).
[87] *Missouri v. Frye*, 566 U.S. 134, 141 (2012) (citing *Hill v. Lockhart*, 474 U.S. 52 (1985)).

Strickland test in *Ploof v. State*.[88] The two-pronged test asks first if trial counsel's conduct fell below an objective standard of reasonableness and second if that deficient performance prejudiced the defendant.[89] In *United States v. Cronic*, it was established that prejudice need not be shown and is instead presumed in cases where there is a complete denial of counsel.[90] A defendant's autonomy interest under the Sixth Amendment includes his decision whether or not to take a plea.[91]

The United States Supreme Court had held that, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."[92] In *Missouri v. Frye*, the Court vacated a sentence because defense counsel was ineffective in failing to communicate the plea offer to the defendant before it expired and the defendant suffered prejudice.[93]

The government offered *Frye* a plea to a misdemeanor with a maximum sentence of one year incarceration. After that plea offer expired, *Frye* was forced to plea to a felony subject to up to four years of incarceration.[94] The Court found counsel's performance to be deficient because the record was void of any evidence

[88] *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013).
[89] *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013).
[90] *United States v. Cronic*, 466 U.S. 648, 659 (1984).
[91] *Taylor v. State*, 2013 A.3d 560, 567 (Del. 2018).
[92] *Missouri v. Frye*, 566 U.S. 134, 145 (2012).
[93] *Missouri v. Frye*, 566 U.S. 134 (2012).
[94] *Missouri v. Frye*, 566 U.S. 134, 140 (2012).

of any effort by trial counsel to communicate the offer to Frye during the offer window, instead reflecting a lack of meaningful effort to communicate the plea offer to the defendant.[95]

Further, *Missouri v. Frye* held that, to show prejudice under *Strickland* on a plea negotiation issue, the defendant must be able to show prejudice according to three criteria: (1) the defendant must show that the rejected offer would have been accepted had counsel presented it to them; (2) the defendant must show a reasonable probability that the state would not have cancelled the offer; and (3) they must show a reasonable probability that the court would have accepted it.[96] In *Frye*, although deficient performance was obvious, the Court remanded the matter for an evidentiary hearing to assess the three prongs of the prejudice analysis.[97]

The Uncommunicated Plea Offer

Mr. Owens' trial counsel never informed him of plea terms offered by the state that were favorable to him. Specifically, even if he was aware of the first plea offer made at initial case review (which he was not), he was never told that the State had offered a non-habitual plea offer with a recommendation of only 10-years at Level V to be served. As in *Frye*, trial counsel's performance fell below an objective standard of reasonableness and was ineffective - in violation of Mr.

[95] *Missouri v. Frye*, 566 U.S. 134 (2012).
[96] *Missouri v. Frye*, 566 U.S. 134, 148 (2012).
[97] *Missouri v. Frye*, 566 U.S. 134, 151 (2012).

Owens' Federal and State constitutional rights to counsel. Mr. Owens suffered prejudice in the form of a sentence nearly double that recommended by the second plea offer.[98] The judgment must be vacated and the matter remanded to the Superior Court for the imposition of a sentence pursuant to the second plea offer.

The first plea offer made to Mr. Owens called for guilty pleas to two violent felonies and a sentence recommendation that included a minimum mandatory Level V term of 15 years, habitual sentencing, open sentencing, and a PSI.[99] This plea offer was in writing and was set to expire at final case review.[100] In his second affidavit, trial counsel states specifically that the first plea offer was communicated to Mr. Owens.[101]

However, trial counsel never informed Mr. Owens of the initial plea offer nor that the state reduced the plea offer as outlined at final case review.[102] Only trial counsel appeared before the court for final case review.[103] The calendar judge asked defense counsel: "what has Mr. Owens' been offered?" Trial counsel

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[98] See *State v. Owens*, 2021 Del. Super. LEXIS 716 at *20 (Del. Super. Dec. 21, 2021) ("Indeed, prejudice is presumed 'if loss of the plea…led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence").
[99] A770.
[100] A770.
[101] A728.
[102] A754.
[103] A719.

responded: "the minimum mandatory. Right now, the last offer was ten – ten years."[104]

To be clear, the reduction noted by trial counsel was substantial. It is obvious that it reduces the mandatory recommendation. It necessarily implies that the State had agreed to forgo habitual sentencing. It also suggested that the State had agreed to forgo the PSI and opt instead for immediate sentencing. Under the new terms, a legal sentence range would have been ten years to fifteen years.

Mr. Owens attests that he was never informed that the State had made an offer to recommend the minimum mandatory,[105] non-habitual 10-year sentence in exchange for a guilty plea.[106] There is nothing in the record to contradict him. Nevertheless, the Superior Court concluded that he was so informed.[107] The Superior Court's finding of fact was an abuse of discretion – unsupported by competent evidence in the record.

Even according to trial counsel, there is no direct evidence that the plea offer was communicated. In his second affidavit, trial counsel stated that "I believe I met with Mr. Owens at final case review. I cannot think of a circumstance where I have ever not met with a client at a case review where the client was present. Final

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[104] A720.
[105] In fact, Mr. Owens should only have been subject to a 5-year minimum mandatory but no attorney or judge was aware. See 11 *Del. C.* § 4201(c).
[106] A754.
[107] A588.

case review occurred on September 2, 2014. I do not have independent recollection that I met with Mr. Owens that day, but I cannot imagine a scenario where I would not have met with him."[108] Trial counsel never says that he did, in fact, meet with Mr. Owens on September 2, 2014. Trial counsel's second affidavit does not even mention that the second plea offer existed – much less that it was communicated to Mr. Owens.[109] Trial counsel's file is formatted for case notes – but there are no notes indicating what happened on September 2, 2014.[110] In contrast, as noted above, trial counsel does state specifically in his affidavit that he communicated the initial plea offer to Mr. Owens.

Absent any competent evidence, trial counsel and the Superior Court pivot the focus to post-trial email between trial counsel and the State. By email, while discussing the severed CCDW charge that remained post-conviction, trial counsel told the State he would convey to Mr. Owens any offer to resolve the severed charge because he is required to.[111] But, this evidence merely indicates that trial counsel recognized, after the fact, that the law imposes a duty upon counsel to communicate a plea offer. It adds nothing else.

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[108] A728.
[109] A727.
[110] A769.
[111] A737.

None of those facts, relied upon by the Superior Court in denying postconviction relief, support the conclusion that Mr. Owens had been informed of the second plea offer. Only trial counsel's affidavit[112] supports a conclusion that Mr. Owens was even informed of first offer which called for substantially more mandatory Level V time and the chance for life imprisonment.

At the very least, the postconviction court should have conducted an evidentiary hearing to probe whether or not the second plea offer was communicated.[113] Superior Court Criminal Rule 61(h) permits the court to determine if an evidentiary hearing is desirable. One is desirable here. At a hearing, the court could have heard testimony from trial counsel and the assigned prosecutor that was subject to cross-examination by Mr. Owens. The court could have heard testimony from Mr. Owens. The court could have received the written offer into evidence. The court could have received records from DOC indicating whether or not trial counsel met with Mr. Owens in lock up on September 2, 2014. While Mr. Owens seeks remand for the imposition of the second plea offer, he alternatively seeks remand to conduct an evidentiary hearing.

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[112] A728.

[113] See for example *Reed v. State*, 258 A.3d 807 (Del. 2021) (finding error where the Superior Court denied postconviction relief without first conducting an evidentiary hearing).

Prejudice Presumed and Prejudice Shown

In *United States v. Cronic*, it was established that prejudice need not be shown and is instead presumed in cases where there is a complete denial of counsel.[114] Applied more narrowly, prejudice is presumed where there is a complete denial of counsel *at a critical stage of his trial*.[115] The United States Supreme Court "made clear that 'the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[116]

Here, trial counsel's failure to even communicate the second plea offer to Mr. Owens constituted a complete denial of counsel during the critical plea-bargaining stage. Had trial counsel presented the second plea offer to Mr. Owens but declined to discuss it with him in any meaningful way, then the analysis would require consideration of the second *Strickland* prong. However, because the offer was not even presented to Mr. Owens, the denial of counsel was total. As a result, prejudice is presumed and the second prong of *Strickland* need not be considered.

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[114] *United States v. Cronic*, 466 U.S. 648, 659 (1984).
[115] *United States v. Cronic*, 466 U.S. 648, 659 (1984).
[116] *Missouri v. Frye*, 566 U.S. 134, 141 (2012) (citing *Padilla v. Kentucky*, 559 U.S. 356 (2010)).

Assuming, *arguendo,* that *Cronic* does not apply, and instead Mr. Owens must show prejudice under the second prong of *Strickland*, Mr. Owens did suffer prejudice as defined by the *Frye* Court. As indicated *supra*, *Missouri v. Frye* held that, to show prejudice under *Strickland* on a plea negotiation issue, the defendant must be able to show prejudice according to three criteria: (1) the defendant must show that the rejected offer would have been accepted had counsel presented it to them; (2) the defendant must show a reasonable probability that the state would not have cancelled the offer; and (3) they must show a reasonable probability that the court would have accepted it.[117] Prejudice is presumed where the loss thereof results in a trial leading to convictions for more serious offenses or the imposition of a more severe sentence.[118]

Mr. Owens would have accepted the second plea offer had it been communicated to him. In one of his first letters to his trial counsel, he stated that he is interested in a plea.[119] It is no surprise that the first plea offer was not accepted. It called for a Level V habitual sentence that could be anticipated after a trial – not by a plea. That Mr. Owens would have accepted the second plea (had he known about it) can be presumed. The advantages of the second plea offer

[117] *Missouri v. Frye*, 566 U.S. 134, 148 (2012).
[118] *Urquhart v. State*, 293 A.3d 719, 728 (Del. 2019) (citing *Lafler v. Cooper*, 566 U.S. 156, 168 (2012)).
[119] A606.

compared to the first plea offer are immense. The first plea offer called for a sentence range of mandatory 15 years to life.[120] The second plea offer called for a non-habitual recommendation of a minimum mandatory 10 years where the maximum was 15 years.[121] To have declined such an offer would have been foolish. Mr. Owens would have testified that he would have accepted the plea in an evidentiary hearing had the Superior Court conducted one.

There is more than a reasonable probability that the State would not have cancelled the offer. Although the Superior Court found that the second plea offer had expired,[122] that conclusion is not supported in the record. In fact, the second offer was still available at final case review. Trial counsel's comments indicate that it was still available. The calendar judge considered whether or not to conduct a plea rejection colloquy.[123] No colloquy would have been considered if the offer was not still available. There is no reason to believe that the offer was revoked upon commencement of the suppression hearing. It is not as though the State always revokes a plea offer when someone exercises their constitutional rights. For instance, in *State v. Gillis*, after a habitual eligible defendant lost suppression

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[120] A770.
[121] Possession of a Firearm By A Person Prohibited by way of two prior violent felonies has a sentence range of 10 to 15 years at Level V. Enhanced by habitual sentencing, the range is 15 years to life at Level V.
[122] A594.
[123] A719.

related to gun possession, the State still agreed to recommend a minimum mandatory, non-habitual sentence.[124]

Further, there is nothing in the record suggesting that the Court would have rejected either the first or the second plea offer. In the final case review the court says it "understands why [it] is being rejected at this time."[125] Nothing in the wording suggests that the Court considered the offer outside of the bounds of justice or not reflective of the crime. Ten years is a long time. It is not a victim crime. In fact, a recommended ten years is common in cases of Class C Possession of a Firearm by a Person Prohibited as it is minimum mandatory.[126]

In *Frye*, although deficient performance was obvious, the Court remanded the matter for an evidentiary hearing to assess the three prongs of the prejudice analysis.[127] Here, Mr. Owens asks the court to find that he suffered prejudice without the need for an evidentiary hearing. In the alternative, Mr. Owens asks that the Court remand for an evidentiary hearing.

[124] *State v. Gillis*, 2016 WL 241085 (Del. Super. Jan. 19, 2016).
[125] A719.
[126] See Delaware SENTAC Bench Book 2021-2022 at page 41.
[127] *Missouri v. Frye*, 566 U.S. 134, 151 (2012).

II. THE SUPERIOR COURT ABUSED ITS DISCRETION BECAUSE THE FINAL CASE REVIEW WAS A CRITICAL STAGE BECAUSE IT WAS THE CUTOFF FOR A PLEA AND BECAUSE IT WAS ESSENTIAL TO PLEA NEGOTIATIONS. MR. OWENS SUFFERED PREJUDICE AS A RESULT OF HIS ABSENCE.

QUESTION PRESENTED

Was Mr. Owens' final case review a critical stage of the proceedings and, in even if it was not, was his absence prejudicial? *(Error Preserved in the Record at A566 and Exhibit A).*

STANDARD OF REVIEW

"The Delaware Supreme Court reviews the denial of Superior Court Rule 61 Motion for Post-Conviction Relief for an abuse of discretion."[128] "Nevertheless, we carefully review the record to determine whether 'competent evidence supports the court's findings of fact.'"[129] "Legal and constitutional questions are reviewed *de novo*."[130]

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[128] *Urquhart v. State*, 293 A.3d 719, 726 (Del. 2019) (citing *Dawson v. State*, 673 A.2d 1186 (Del. 1996)).
[129] *Neal v. State*, 80 A.3d 935, 941 (Del. 2013) (citing *Zebroski v. State*, 822 A.2d 1038 (Del. 2003)).
[130] *Urquhart v. State*, 293 A.3d 719, 726 (Del. 2019) (citing *Ploof v. State*, 75 A.3d 840 (Del. 2013)). See also *Green v. State*, 238 A.3d 160, 173 (Del. 2020).

MERITS OF THE ARGUMENT

Pursuant to Superior Court Criminal Rule 43, a criminal defendant has a right to be present at all critical stages of litigation.[131] A critical stage is a proceeding in which a defendant cannot be presumed to make critical decisions without counsel's advice.[132] "The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provide by this rule."[133] The United States Supreme Court "made clear that 'the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[134] Accordingly, a criminal defendant has a constitutional right to participate in the plea bargaining process.

Citing *Smolka* in denying postconviction relief, the Superior Court held that Rule 43's critical stage list is exhaustive.[135] However, *Smolka* does not say the list

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[131] *Smolka v. State*, 147 A.3d 226, 229 (Del. 2015).
[132] *Reed v. State*, 258 A.3d 807, 821 (Del. 2021).
[133] Superior Court Criminal Rule 43.
[134] *Missouri v. Frye*, 566 U.S. 134, 141 (2012) (citing *Padilla v. Kentucky*, 559 U.S. 356 (2010)).
[135] A593 and Exhibit A.

is exhaustive.[136] In finding that the final case review in this case was not a critical stage, the Superior Court made an abused its discretion.

The Superior Court correctly held that a final case review is not identified as a critical stage in Superior Court Criminal Rule 43. Correctly, the Superior Court described the final case review as a "docket management tool" that does not necessarily implicate constitutional dimensions.[137] From there, the Superior Court noted that the final case review had not been scheduled for the formal acceptance or rejection of a plea and that in any event the 10-year plea offer was off the table at final case review.[138] No wonder the Superior Court concluded that it was not a critical stage. It was wrong.

The Superior Court failed to recognize the significance of the final case review in Mr. Owens case. It was wrong when it concluded that the final case review was not tied to a plea. In fact, the first plea offer, made at initial case review, indicated that it would remain open until final case review.[139] Because the original plea offer expired at final case review, Mr. Owens presence was mandatory pursuant to Superior Court Criminal Rule 43.

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[136] See *State v. Lambert*, 278 A.3d 71, 75 (Del. Super. Mar. 17, 2022) (describing the critical stage list in Rule 43 as "non-exhaustive").
[137] A593 and Exhibit A.
[138] A594 and Exhibit A.
[139] A770.

The error is compounded by the fact that the final case review calendar judge did not adhere to the procedures established by the New Castle County Criminal Case Management Plan. In that plan, at final case review, counsel shall advise the court of details of the plea agreement offered and rejected by the defendant.[140] If possible, the assigned deputy is supposed to participate.[141] A copy of the agreement is to be filed with the court.[142] If the case does not resolve, the calendar judge must personally address the defendant in open court and colloquy the defendant on his decision to reject the plea.[143]

Further, as noted *infra*, plea bargaining is a critical stage. In Mr. Owens case, the final case review was Mr. Owens' last opportunity to accept any plea offer that was still on the table. It was also his only opportunity to learn of the second plea offer. There is nothing conclusive in the record that indicates that Mr. Owens met with counsel at final case review. In essence, Mr. Owens did not have a final case review.

The record does not support the Superior Court's factual finding that the 10-year plea offer had expired. Quite the opposite, the record reflects that the offer was on the table at final case review. The calendar judge asked defense counsel:

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[140] New Castle County Superior Court Criminal Case Management Plan.
[141] New Castle County Superior Court Criminal Case Management Plan.
[142] New Castle County Superior Court Criminal Case Management Plan.
[143] New Castle County Superior Court Criminal Case Management Plan.

"what has Mr. Owens' been offered?"[144] Trial counsel responded: "the minimum mandatory. Right now, the last offer was ten – ten years. And I have also been – I have my PFE involved and had discussions with [the State] but there's been nothing better than that, which was the offer prior to the suppression hearing."[145]

Then, the calendar judge inquired as to whether and minimum mandatory time would be subject to *nolle prosequi* pursuant to the plea. Trial counsel stated: "I don't believe he is."[146] Trial counsel then represented that he did not have a written copy of the 10-year plea offer and that the assigned prosecutor was not present.[147]

Trial counsel misrepresented to the calendar judge the consequences of rejecting the 10-year plea. Despite what trial counsel told the calendar judge, Mr. Owens did, in fact, face further mandatory Level V time if he rejected the plea. That is because the original plea offer that had been made, which was the only one ever communicated to Mr. Owens,[148] called for a minimum mandatory of 15-years as a habitual offender.[149] The second plea offer, which was not communicated to

[144] A720.
[145] A270.
[146] A721.
[147] A271.
[148] A754.
[149] A770.

Mr. Owens, called for (an erroneously calculated) minimum mandatory of only 10 years.[150]

The exchange was between trial counsel and the calendar judge only. The assigned prosecutor was not present.[151] All the while, Mr. Owens was downstairs in the lock-up holding area of the courthouse, having been held in default of bond and not having been brought into the courtroom to participate.[152] In his absence, and without his input, the second plea offer (and the first, for that matter) expired. He was then convicted at trial, resulting in a sentence including 19 years' incarceration.

The calendar judge elected not to conduct a plea rejection colloquy. Following *Lafler* and *Frye*, the best practice would have been to conduct a colloquy of Mr. Owens in open court at his final case review. This is especially true in his case because he was facing significantly greater penalties at trial including greater minimum mandatory incarceration and habitual sentencing with the potential for life.

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[150] Again, Mr. Owens should only have been subject to a 5-year minimum mandatory but no attorney or judge was aware. See 11 *Del. C.* § 4201(c).
[151] A720.
[152] A592.

Because the final case review was a critical stage, prejudice is presumed and need not be demonstrated.[153] Even if the final case review was not a critical stage, Mr. Owens' absence from his final case review under these circumstances did cause him prejudice in a manner that requires reversal. The Supreme Court has held that, when a defendant does not allege that he was absent during a "traditional critical stage," reversal requires that the appellant "show that he suffered some prejudice as a result of his absence."[154]

The Superior Court held that there was no prejudice; however, that conclusion is not supported by the record and is an abuse of discretion. The trial court's conclusion was based upon the mistaken finding that the plea offer had expired upon commencement of the suppression hearing. It had not expired. As a result, Mr. Owens' case shows obvious prejudice that requires reversal. Mr. Owens was sentenced to serve 19 years at Level V incarceration.[155] The sentence is 9 years longer – nearly double – the 10-year sentence that was discussed at final

[153] *State v. Lambert*, 278 A.3d 71, 75 (Del. Mar. 17, 2022).
[154] *Joyner v. State*, 155 A.3d 832 (Del. 2017) (citing *Capano v. State*, 781 A.2d 556 (Del. 2001)). See also *United States v. Cronic*, 466 U.S. 648, 659 (1984) ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that make the adversary process itself presumptively unreliable").
[155] A472 and A477.

case review in his absence. In the context of an uncommunicated plea, prejudice would be presumed.[156] No plea offer, including the 10-year plea offer, was never communicated to Mr. Owens by his counsel.[157] Mr. Owens only could have learned of the offer had he been present in the courtroom for his final case review. Had the offer been communicated to him, he would have accepted it. He also would have been able to correct the lawyers and the judge about his record because he this conviction was his only Title 11 Violent Felony.

[156] [156] *Urquhart v. State*, 293 A.3d 719, 726 (Del. 2019) (citing *Lafler v. Cooper*, 566 U.S. 156 (2012)).
[157] A754.

III. THE POSTCONVICTION COURT ABUSED ITS DISCRETION BECAUSE THE CUMULITIVE EFFECT OF TRIAL COUNSEL'S INNEFECTIVE REPRESENTATION AND MR. OWENS' ABSENCE FROM HIS FINAL CASE REVIEW JEOPARDIZED THE INTEGRITY OF THE TRIAL PROCESS.

QUESTION PRESENTED

Did trial counsel's failure to communicate the second plea offer combined with Mr. Owens' absence from final case review prejudice his substantial rights and jeopardize the fairness and integrity of the trial process? *(Error Preserved in the Record at A566 and Exhibit A).*

STANDARD OF REVIEW

"The Delaware Supreme Court reviews the denial of Superior Court Rule 61 Motion for Post-Conviction Relief for an abuse of discretion."[158] "Nevertheless, we carefully review the record to determine whether 'competent evidence supports the court's findings of fact.'"[159] "Legal and constitutional questions are reviewed *de novo*."[160]

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[158] *Urquhart v. State*, 293 A.3d 719, 726 (Del. 2019) (citing *Dawson v. State*, 673 A.2d 1186 (Del. 1996)).
[159] *Neal v. State*, 80 A.3d 935, 941 (Del. 2013) (citing *Zebroski v. State*, 822 A.2d 1038 (Del. 2003)).
[160] *Urquhart v. State*, 293 A.3d 719, 726 (Del. 2019) (citing *Ploof v. State*, 75 A.3d 840 (Del. 2013)). See also *Green v. State*, 238 A.3d 160, 173 (Del. 2020).

MERITS OF THE ARGUMENT

The Court utilizes a plain error standard of review to assess cumulative error.[161] "When there are multiple errors in a trial, this Court weighs their cumulative effect to determine if, combined, they are 'prejudicial to substantial rights so as to jeopardize the fairness and integrity of the trial process.'"[162]

Cumulative error exists and requires reversal because trial counsel's ineffective representation, combined with Mr. Owens' prejudicial absence from his Final Case Review, resulted in the elimination of his right to an autonomous determination of his plea. This violation of Mr. Owens' autonomy interest runs afoul of his constitutional rights guaranteed by the Sixth Amendment to the *United States Constitution* and Article I § 7 of the *Delaware Constitution*.[163]

In *Cooke v. State*,[164] the Delaware Supreme Court held that "the accused has the 'ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.' This is because such choices 'implicate inherently personal rights which would call into question the fundamental fairness of the trial if made by

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[161] *Hoskins v. State*, 102 A.3d 724 (Del. 2014).
[162] *Crump v. State*, 204 A.3d 114 (Del. 2019).
[163] See *Taylor v. State*, 213 A.3d 560, 567 (Del. 2019) (applying *de novo* review to the autonomy claim even though it was presented for the first time on appeal because it presented a constitutional claim).
[164] *Cooke v. State*, 977 A.2d 803, 840 (Del. 2009).

anyone other than the defendant.'"[165] This Court has re-affirmed these principles in *Taylor v. State*[166] and *Reed v. State*.[167]

As argued *infra*, had trial counsel informed Mr. Owens of the 10-year plea offer, he would have accepted it. Had Mr. Owens been present at his final case review, he would have learned of the 10-year plea offer and he would have accepted it. However, because his attorney did not communicate the offer and because the calendar judge conducted the final case review with trial counsel only, Mr. Owens was left, prejudicially, in the same type of Catch-22 that existed in *Reed v. State*.

In *Reed*, this Court held that the appellant was denied his constitutional right to counsel where counsel failed to file a motion to withdraw a guilty plea as instructed by his client.[168] In *Reed*, the trial court refused to accept and docket the appellant's *pro se* motion to withdraw his guilty plea because he was represented by counsel.[169] Significantly, the *Reed* Court classified plea negotiations as a critical stage of the proceedings requiring effective assistance of counsel.[170]

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[165] *Taylor v. State*, 213 A.3d 560, 567 (Del. 2019) (quoting *Cooke v. State*, 977 A.2d 803, 840 (Del. 2009)).
[166] *Taylor v. State*, 213 A.3d 560 (Del. 2019)
[167] *Reed v. State*, 258 A.3d 807 (Del. 2021).
[168] *Reed v. State*, 258 A.3d 807, 812 (Del. 2021).
[169] *Reed v. State*, 258 A.3d 807, 827 (Del. 2021).
[170] *Reed v. State*, 258 A.3d 807, 822 (Del. 2021).

Mr. Owens was left in a Catch-22 because he could not learn of the second plea offer as a result of the conflation of procedural rules. As a result of procedure, he was kept in the holding area while his trial counsel addressed the court. Similarly, Mr. Owens was not communicating directly with the State. All communications were through counsel. Because counsel was ineffective in communicating the plea offer to Mr. Owens, and because the only other way he would have learned of the plea was through his personal presence at final case review, the two errors accumulate and amount to plain error.

IV. THE POSTCONVICTION COURT ABUSED ITS DISCRETION BECAUSE TRIAL COUNSEL WAS INNEFECTIVE BY FAILING TO PRESENT EVIDENCE AT THE SUPPRESSION HEARING THAT WOULD HAVE CAUSED THE COURT TO GRANT THE MOTION TO SUPPRESS HAD IT BEEN PRESENTED.

QUESTION PRESENTED

Was trial counsel's performance at suppression below an objective standard of reasonableness because he did not present impeachment evidence and, had the evidence been presented, would the motion to suppress have been granted? *(Error Preserved in the Record at A566 and Exhibit A).*

STANDARD OF REVIEW

"The Delaware Supreme Court reviews the denial of Superior Court Rule 61 Motion for Post-Conviction Relief for an abuse of discretion."[171] "Nevertheless, we carefully review the record to determine whether 'competent evidence supports the court's findings of fact.'"[172] "Legal and constitutional questions are reviewed *de novo*."[173]

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[171] *Urquhart v. State*, 293 A.3d 719, 726 (Del. 2019) (citing *Dawson v. State*, 673 A.2d 1186 (Del. 1996)).
[172] *Neal v. State*, 80 A.3d 935, 941 (Del. 2013) (citing *Zebroski v. State*, 822 A.2d 1038 (Del. 2003)).
[173] *Urquhart v. State*, 293 A.3d 719, 726 (Del. 2019) (citing *Ploof v. State*, 75 A.3d 840 (Del. 2013)). See also *Green v. State*, 238 A.3d 160, 173 (Del. 2020).

MERITS OF THE ARGUMENT

The two-part *Strickland* test applies to this claim that trial counsel was ineffective for failing to present impeachment evidence at suppression.[174] In *Strickland*, the Court established that the petitioner must show: (1) counsel's conduct fell below an objective standard of reasonableness; and (2) there was a reasonable probability that, but for the trial counsel's errors, the result of the proceeding would have been different.[175] Considering the first prong, the Court considers whether counsel's performance was reasonable compared to "prevailing professional norms," grants deference to trial counsel, presumes the conduct was reasonable, and considers whether counsel's act might be considered sound strategy.[176]

In his motion to suppress, Mr. Owens asserted that he was seized without justification in violation of his constitutional privacy rights.[177] Applying *Jones v. State*,[178] it was argued that Mr. Owens was seized upon show of authority by Detective Lynch and that the discarded firearm was fruit of the poisonous tree.[179]

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[174] Mr. Owens does not assert that *Cronic* applies to this claim for relief.
[175] *State v. Lambert*, 278 A.3d 71, 74 (Del. 2022) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). See also *Williams v. State*, 12 A.3d 1155 (Del. 2011).
[176] *State v. Lambert*, 278 A.3d 71, 75 (Del. 2022)
[177] A702 and A34.
[178] *Jones v. State*, 745 A.2d 856 (Del. 1999).
[179] A705.

Trial counsel did not call a single witness at Mr. Owens' suppression hearing.[180] He also failed to investigate critical witnesses for suppression. His failure to do so was objectively unreasonable. Trial counsel received a letter from Augusta Collier.[181] Had counsel investigated, he would have learned that Augusta Collier has stated that he was the property owner of 122 East 24th Street and did not call the police on December 5, 2013.[182] Trial counsel apparently did not interview Collier. In addition, trial counsel did not interview Ronald Johnson.[183]

Mr. Johnson was the property manager at 122 East 24th Street.[184] Mr. Johnson wrote that, at the relevant time, the property was not boarded up or vacant and did not have a no loitering sign.[185] He was never contacted by trial counsel.[186] Trial counsel never came into possession of a photo that is purported to show 122 without a no loitering sign in the relevant time frame.[187]

When the evidence from Collier and Johnson are compared against Detective Lynch's testimony at the suppression hearing,[188] it is apparent that trial

[180] A264.
[181] A264 and A730.
[182] A717.
[183] A730.
[184] A718.
[185] A718.
[186] A718.
[187] A669.
[188] A36.

counsel's failure to investigate and call these witnesses fell below an objective standard of reasonableness.[189] Had trial counsel performed reasonably, the suppression court would have granted the motion and all evidence would have been suppressed.

Trial counsel declined to pursue this line of defense because "at that time, I did not believe that the relevant inquiry was whether the house was vacant. I believed that the relevant inquiry was whether the police seized Owens unlawfully."[190] Following trial counsel's reasoning in his affidavit, the postconviction court denied this claim for relief and stated instead that, for the suppression court, the no-loitering sign on the property was not the central issue.[191] The postconviction court also said that trial counsel did investigate Collier; however, that is not supported by the record.[192]

Contrary to the Superior Court's findings, the condition of the property was highly relevant to whether or not Mr. Owens was seized lawfully. But for the condition of the property, the court would not have found reasonable suspicion.

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[189] See *United States v. Gray*, 878 F.2d 702 (3d Cir. 1989). See also *Schubert v. Smith*, 2018 U.S. Dist. LEXIS 192655 (Middle District Pa. Nov. 9, 2018).
[190] A730.
[191] A566.
[192] A578.

Trial counsel's failure to see that rendered his representation ineffective under *Strickland*.

The suppression court summarized its findings of fact in writing.[193] In relevant part, the court found that Mr. Owens was sitting on the steps of the home which was vacant with boarded windows and a no loitering sign.[194] Mr. Owens stood up, made eye contact with the officer, adjusted an object in his pants, and ran.[195] The officer considered his movement to be consistent with someone armed.[196] The suppression court found reasonable suspicion because the home was vacant with boarded windows and a no loitering sign, there had been loitering complaints, it was a high crime area, there was a recent shooting complaint, and defendant stood up and fled.[197]

Had trial counsel presented testimony from Collier and Johnson, the suppression court would have heard their statements under oath. Obviously, the statements regarding the no loitering sign and boarded windows contradict the officer's testimony.[198] Their statements also indicate that the police had not, in

[193] A691.
[194] A693.
[195] A693.
[196] A693.
[197] A700.
[198] Compare A37 to A717 and A718.

fact, spoken to the property owner about the property condition.[199] Evidence from Collier and Johnson would have cast significant doubt on the accuracy of the officer's understanding of the property. Mr. Johnson said he was willing to testify[200] and there was no reason to believe Collier would not have, too.[201] That would have left the suppression court only with Mr. Owens' fight as a relevant fact in the suppression analysis.

Flight itself is not sufficient to sustain reasonable suspicion, even when that flight involves a furtive movement around the waist in a high crime area.[202] The suppression court would have granted the motion to suppress had it received testimony from Collier and Johnson. As recognized by the suppression court,[203] flight and high crime area are factors in the totality of the circumstances analysis – but are not alone sufficient to establish reasonable suspicion.[204] In *Woody*, the

[199] Compare A37 to A717 and A718.
[200] A718.
[201] See *Rolan v. Vaughn*, 445 F.3d 671 (3d. Cir. 2006).
[202] See *Lopez-Vasquez v. State*, 956 A.2d 1280 (Del. 2008) ("leaving the scene upon the approach or the sighting of a police officer or the refusal to cooperate with an officer who initiates an encounter cannot be the sole grounds constituting reasonable suspicion").
[203] A699.
[204] *Woody v. State*, 765 A.2 1257, 1265 (Del. 2001).

Court found reasonable suspicion because there was an active drug investigation[205] – a fact not present in Mr. Owens' case.

Because these would have been the only remaining factors to consider (in light of the Collier and Johnson testimony), there is a reasonable probability that suppression would have been granted and the outcome at trial would have been an acquittal without the suppressed evidence.[206] As a result of this claim, Mr. Owens must be afforded a new trial.

[205] *State v. Hairston*, 2017 Del. Super. LEXIS 158 (distinguishing *Woody v. State*, 765 A.2d 1257(Del. 2001)).
[206] See *Ploof v. State*, 75 A.3d 811, 838 (Del. 2013). See also *Khalil-Alsalaami v. State*, 486 P.3d 1216 (Kan. 2021) (applying *Strickland* in suppression context).

CONCLUSION

WHEREFORE, Mr. Owens prays that this Honorable Court vacate his sentence and remand the matter to the Superior Court for acceptance of the second plea agreement which calls for a recommended minimum mandatory sentence of 10 years at Level V non-habitual. In the alternative, Mr. Owens prays that this Court remand the matter to the Superior Court for an evidentiary hearing regarding the uncommunicated plea offer. Further in the alternative, Mr. Owens requests a new trial.

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