EFiled: Jul 10 2023 03:22PM EDT
Filing ID 70335323
Case Number 12,2023

IN THE SUPREME COURT IN THE STATE OF DELAWARE

JAMES E. COOKE, JR. Defendant Below, Appellant,	:	No. 12, 2023
v.	:	On Appeal from the Superior Court of the State of Delaware
STATE OF DELAWARE Plaintiff Below, Appellee.	:	in and for New Castle County No. 0506005981

APPELLANT'S OPENING BRIEF

Christopher S. Koyste, Esquire
Law Office of Christopher S. Koyste
709 Brandywine Boulevard
Wilmington, DE 19809
Tel: (302) 762-5195
Ckoyste@koyste.com

James T. Lawley, Esquire
Beth Ann Muhlhauser, Esquire
Federal Public Defender's Office
Capital Habeas Unit
100 Chestnut Street, Third Floor
Harrisburg, PA 17101
Tel: (717)-782-3843
Fax: (717)-782-3966
James_Lawley@fd.org
Beth_Muhlhauser@fd.org

Dated: July 10, 2023

PRELIMINARY STATEMENT CONCERNING CITATIONS AND FORM

Citations preceded by "A" refer to the Appendix. The Superior Court denied Rule 61 discovery requests from the bench, and so the transcript of that proceeding is attached to this brief as Exhibit A. The Superior Court's orders therein are referred to as "DO". The Opinion denying Rule 61 relief, which is attached to this brief as Exhibit B, is referred to as "Opinion". Appellant Mr. Cooke and all individuals mentioned, are identified in the first instances by full name and title (if applicable), and thereafter by last name.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other

NATURE OF PROCEEDINGS

On April 13, 2012, following a retrial in the Superior Court of Delaware, New Castle County, Cooke was convicted on multiple counts including first degree murder. A503-09. On July 24, 2014, this Court affirmed Cooke's conviction on direct appeal. A620-47. Certiorari was denied on January 12, 2015. A647.

On March 24, 2015, Cooke filed his initial Rule 61 motion in the Superior Court. A648-54. On August 2, 2016, during the pendency of the Rule 61 proceedings, this Court struck down 11 *Del. C.* § 4209 as unconstitutional following *Hurst v. Florida*, 136 S. Ct. 616 (2016). *Rauf v. State*, 145 A.3d 430 (Del. 2016). On December 15, 2016, this Court determined that *Rauf* applied retroactively. *Powell v. State,* 49 A.3d 1090 (Del. 2016). Consequently, on July 7, 2017, Cooke was resentenced to life without parole and this Court affirmed on February 21, 2018. *Cooke v. State*, 181 A.3d 152 (Del. 2018).

On February 28, 2019, Cooke filed an Amended Rule 61. A655-896. Evidentiary proceedings were conducted in July and November of 2021, and in February and March of 2022. A98, DE 636; A102, DE 661; A105, DE 683; A106, DE681. Oral argument was held on May 9, 2022 (A107, DE 690) and November 17, 2022 (A109, DE 704). Relief was denied on December 15, 2022. O1-245. Cooke timely appealed. On April 28, 2023, this Court granted Cooke's motion to extend the filing deadline by 60 days and the word limit to 15,000.

SUMMARY OF ARGUMENT

1. Counsel were ineffective for failing to explore competency, and the trial court erred in not doing so *sua sponte*.
2. Counsel were ineffective for failing to reasonably investigate the case before making critical "strategic" decisions.
3. The State's unconstitutional peremptory strikes.
4. Counsel's failure to challenge the admission of Cooke's statement.
5. The trial court's denial of a continuance.
6. The cumulative prejudicial effect of the errors.
7. Discovery denial.
8. Claims that could not be raised on appeal.

STATEMENT OF FACTS

A. The evidence at trial.

This Court's opinion, appended here, A620-47, accurately details the facts established at the 2012 trial. At 2:49 am on May 1, 2005, a fire was reported at Lindsey Bonistall's apartment. After the fire was extinguished, Bonistall's body was found partially burned in her apartment bath. A519**.** She was killed sometime between 1:00 am and 1:45a.m. A628**.** Someone had written messages in marker on the apartment walls, doors, and kitchen surfaces. *Id.*

The next day, 911 received a call from someone claiming knowledge about Bonistall's murder, and referencing two other recent home invasions.[1] The first occurred sometime before 1:00 am on April 26, 2005, at the apartment of Cheryl Harmon. The intruder had written on her walls with nail polish. A628. The second occurred on April 29, when Amalia Cuadra awoke to find an intruder standing over her. *Id.* He fled taking her backpack which contained various possessions including her Visa card. A628. Before the May 2nd 911 call, police had not considered that the three incidents were linked; the call made that connection. *Id.*

Cuadra's bank reported an attempted use of her Visa card at a Newark ATM. A628. Using stills taken from the CCTV video of the ATM, police created wanted

[1] The caller made two other phone calls. A628.

posters. *Id.* On May 31, police received a tip from employees at Payless shoe store identifying James Cooke, a part-time co-worker, as the person in the posters. A629.

Police interrogated Cooke's partner, Rochelle Campbell, during which she confirmed that on April 29 Cooke brought a backpack into their home; inside, he found a Visa card which he attempted to use at an ATM. A628. She also tentatively identified Cooke in the ATM video and his voice on the 911 calls. A629**.**

Cooke was located and arrested in Wilmington on June 7. A629. During his interrogation he repeatedly stated he did not understand his rights and asked for a lawyer. *E.g.* A323 ("I can't comprehend, man," "I don't comprehend stuff"); A340 (Q: Sit there and lie and say you don't understand things and say I don't comprehend things. A: I don't have to, I don't comprehend that."); A364 ("Nah, I'll just talk to a (inaudible) lawyer that's all I told. It's not, it's not making sense. I don't understand what's going on here, man.")

Cooke's DNA was later found to "match" DNA found inside Bonistall. A629. A police analyst "matched" Cooke's handwriting with the writing at Bonistall's apartment. *Id.*

B. The first trial and appeal.

This same evidence was presented at both of Cooke's trials. *Id.* At the first trial, defense counsel—public defenders Brendan O'Neil and Kevin O'Connell (2007 counsel) presented a "guilty but mentally ill" (hereinafter "GBMI") defense

against Cooke's protestations. A629. On appeal, with new counsel Attorneys Kate Aaronson and Joseph Gabay[2], this Court held that 2007 counsel improperly conceded Cooke's guilt and remanded for a new trial. *Id.*

C. The second trial.

Aaronson continued to represent Cooke on remand, joined by Attorney Patrick Collins after Gabay withdrew. A40, DE 301. On October 18, 2010, Cooke sued Aaronson and Collins (2010 counsel) for "conspiring" with the trial judge and the State, withholding evidence, filing fraudulent motions, and keeping him in solitary confinement. A1159-74; A978-79. Now conflicted, 2010 counsel withdrew, but in the process notified the court that they doubted Cooke's competence. A978; A1039. The State concurred that Cooke should be evaluated at the state hospital. A981-2; *see also* A289 (denial of evaluation post-withdrawal).

Attorneys Tony Figliola and Peter Veith (2012 counsel) were next appointed, on March 9, 2011. A48, DE 344. Cooke directed them to pursue an "innocence" defense. A2816. Their efforts to achieve that goal are addressed below. *Infra* at 12-13.

On November 30, 2011, Cooke "fired" 2012 counsel because neither they nor the judge would change his prison housing situation. A369-7; A378-80; A440-41;

[2] Attorney Gabay was asked to provide an affidavit in response to the Rule 61, but in light of *In re Gabay*, 80 A.3d 960 (Del. 2013), his recollections were not sought.

A487-88. Counsel did not renew 2010 counsel's incompetence concerns. Cooke was permitted to waive counsel and requested—but was denied—a continuance to prepare for trial. A379; A380; A382.

During voir dire, six of the State's seven peremptories were against females and/or minorities. A389-93; A396-01; A403; A405-14; A417-32. The State gave no reason for the strike of one female juror, A398, but provided reasons, which were accepted, for the rest. A393; A401; A403; A405; A411; A414; A417-21; A424-25. During one discussion, the State commented that the racial composition of the seated jury "far outweigh[ed] the general percentage of African Americans in (sic) New Castle County population." A424.

While representing himself, Cooke disavowed counsel's pretrial motions and filed a raft of his own motions. A54, DE 377-396. He also repeatedly tried to admit the results of a polygraph examination—which he had instigated and which showed deception—at trial. A443; A446. Believing the 911 call recording exculpated him, he insisted on introducing it at trial. A1073-4. Cooke also repeatedly ignored the court's instructions, interrupted the proceedings, and had multiple outbursts; the trial court eventually found Cooke's behavior forfeited his pro se rights and directed counsel to resume their representation. A404; A434-7; A439; A443-48; A450-66; A469-75; A489-90. Counsel noticed their intent, which was accepted, to file such pre-trial motions they believed necessary. A483; A485. They also moved for mistrial

(which was denied) based on Cooke's repeated outbursts in the presence of the jury, many of which had occurred during jury selection. A126. Counsel did not raise Cooke's mental health/competence. Counsel ultimately did not (re)file any motions.

Cooke testified to explain his consensual contact with Bonistall on Friday, April 29, 2005. A639. However, witness statements and Bonistall's work time-sheets established she was working that night. O124.

Cooke was convicted and sentenced to death. A503-04.

D. The Rule 61 allegations and hearing.

Cooke's Rule 61 petition alleged, *inter alia*, counsel ineffectiveness for failing to raise Cooke's potential incompetence at trial, and for failing to investigate the guilt-phase evidence case. A691-780.

1. 2012 counsel

Addressing Argument 1, counsel variously testified they did not pursue mental health issues with Cooke because he "was firing every attorney that tried to [explore his mental health]," A2808-09, and he would "fire" them if they did, A2816-18. Counsel attempted to develop a mitigation case, hiring a mitigation specialist who met with Cooke multiple times (even after he "refused" to meet her). A2762. However, Cooke "flat out refused" to meet a doctor about mitigation. A2761.

Addressing Argument 2, counsel relied on Cooke's testimony that he had consensual sex with Bonistall on April 29 to explain the presence of his DNA. A2814-2817; A2818-22. Counsel also decided to present a likely "alternative perpetrator." *Id.* A yellow rose found in Bonistall's apartment, along with a University of Pennsylvania fraternity photo-composite with various comments penned on it, led counsel to investigate and present evidence that one of Bonistall's acquaintances at that fraternity was the alternative perpetrator. Their investigation uncovered no evidence supporting that theory. A2818-19.

Counsel implemented their planned defense: relying on Cooke to explain the presence of his DNA and to suggest that a fraternity brother brought Bonistall the yellow rose and then killed her. A2816. Counsel also attacked the credibility of the State's investigation, arguing the police investigation was flawed because it did not test the DNA of all suspects, A494; A496-97, coerced witnesses into identifying Cooke, A495; A498, and suggested Det. Rubin's investigation was biased because Rubin "has been convinced" Cooke was the perpetrator "since the summer of 2005 when he stopped pursuing the other persons of interest," A498.

2. Argument 1

2012 counsel possessed—from prior counsel and the court record—extensive records, prior medical and attorney opinions, and other evidence detailing Cooke's mental health. A2755.

a. Records

Childhood, school, medical, and other records detailed Cooke's extensive experiences of abuse and neglect, *e.g.* A897-902 (noting premature birth, physical abuse by mother); A901-17 (noting trauma, abuse, and deprivation), and his severe emotional, intellectual, and behavioral problems; A2319-20 (noting mood swings, impulsivity and poor judgment, instability, and immaturity). The record consistently described Cooke having severe problems functioning in school. *See, e.g.*, A1175; A1179; A1181; A1182; A2320. Multiple experts noted Cooke's perseveration. A1066, A1074-6, A1082-83. Dr. S.G. Padilla conducted neuropsychological testing in 1981 which indicated brain damage (and lack of effort or malingering not detected). A927; A2692. Multiple experts concluded Cooke's behaviors and presentations were symptomatic of cognitive and/or psychiatric impairments. A906; A1004.

b. 2007 experts and counsel and behavior

2007 counsel retained several experts to opine on Cooke's mental health. They did not ask the experts to consider Cooke's competence. A1023; *see also* A932 (evaluation for GBMI); A945 (mental state at the time of the offense); A921 (psychosocial assessment concerning abusive childhood); A1004 (neuropsychological testing, not an applied diagnosis evaluation). All, however, identified symptomologies and functioning problems consistent with his childhood

records. A932-36; A1004. All concluded Cooke suffers from cognitive and/or psychiatric disorder(s). A945-6; A931-44; A920-30; A1004. Of note, Dr. Abraham Mensch's 2006 neuropsychological testing demonstrated "frontal lobe [i.e. brain] damage." A1080-82; A1004. Dr. Alvin Turner also administered a partial neuropsychological test which mirrored Mensch's results. A938-43. Neither testing indicated lack of effort or malingering. A1080-82; A938-43

2007 counsel testified Cooke did not understand the evidence and became fixated on irrelevant issues. A1032. He could not understand, despite repeated explanations, that the inculpatory DNA sample came from *one* person with three ethnic backgrounds, not three *different* people. A1018-9; A122. Cooke insisted he was called the n-word and "scum" during his interrogation, but the interview video refuted this. A1021; *see also* A124-5. Counsel explained Cooke believed the "system" was conspiring against him, and this belief impaired his judgment. A985

Cooke's behavior at the 2007 trial mirrored his childhood symptomologies. *See, e.g.*, A116 (interrupting proceedings and talking very loudly during testimony); A117 (asserting the judge threatened him and accusing State of tampering with evidence); A120 (Cooke removed from the courtroom). On one occasion when the court asked Cooke to modify his behavior, Cooke explained he was helping his case. A122. Ultimately, counsel requested Cooke be removed from the courtroom because

his outbursts were hurting his case. A994; A1020; A1022-27. They believed stress, frustration, and mental illness made Cooke unable to control himself. A984.

Cooke did eventually testify, but that testimony opened the door to otherwise inadmissible evidence that incriminated him. A986-9. Attorney O'Connell objected to Cooke's own testimony to protect him. A1028-31; A148-49; *see also* A151; A128-29; A131; A132-146.

2007 Counsel did not ask the experts to consider Cooke's competence, A1023. *See also* A932 (evaluation for GBMI); A945 (mental state at the time of the offense); A921 (psychosocial assessment concerning abusive childhood); A1004 (neuropsychological testing, not an applied diagnosis evaluation). However, O'Connell testified that as he now understands competency, Cooke was incompetent in 2007. A991. Both agreed Cooke was likely incompetent to waive counsel in 2007. A992-3; A1031.

c. 2010 counsel

2010 counsel testified they did not mislead the court when they raised concerns about Cooke's possible incompetence. A983, A1043. They questioned his competence for a range of reasons. In addition to the records detailed above, *supra* at 11-12, Cooke's suit against them, which precipitated their withdrawal, contained wild allegations of their conspiracy, racism, and failure to change his prison housing situation. A978-79; A1159-74. Also, before their withdrawal, counsel witnessed

Cooke perseveration about aspects of the evidence, and experienced his combative responses when they contradicted his rigid beliefs. A1036. Counsel sent Cooke a series of letters explaining all aspects of the case, but—as exemplified by his continued insistence the inculpatory DNA profile was of three people, A1037-38—Counsel did not believe Cooke understood them. A1036. Collins confirmed Cooke could not assist in his defense or make a rational decision about testifying. A1037-8.

The defense-retained psychologist, Steven Eichel, Ph.D., and mitigation specialist, Melissa Lang, were included in Cooke's suit so both also stopped working on the case. A977. Before that, however, both provided their expert opinions about Cooke's mental health.

Counsel asked Eichel to assess Cooke's competency. A978. Because of the lawsuit, Eichel did not prepare a final report, but made extensive notes, A1129-58, and reported his findings and conclusions to counsel, A996-1003. Consistent with other experts, Eichel flagged extremely rigid thinking, A1058; paranoid ideations, *e.g.*, A1059; A1060; A1061; and "bizarre belief system," A1062. Eichel opined that Cooke suffered from a delusional disorder consistent with paranoid thinking. A1063-4.

Lang observed similar symptomologies. A1049; A1056-7; A1096-1123. For example, because Aaronson ignored an issue he liked on appeal Cooke believed she

could not be trusted. A977; A1017; A1051-2. Cooke also felt betrayed when counsel did not change his prison housing, which counsel could not control. A1053; A1124. Cooke believed Collins was racist because he hired a DNA expert from Texas. A977; A1054-5; A1126-27. Lang described Cooke as a young child having temper tantrums, with "childish, concrete thinking." A1128. Based on her observations and her training and experience, Lang believed he had brain damage. A1056; A1128.

d. 2012 counsel

2012 counsel received all the above records, reports, transcripts, and files. A2761-62. They also experienced Cooke's symptomatic behaviors firsthand. A2810. And, they were in court when Cooke "fired" them for not changing his prison housing. A369-72; A379, A380; A382.

e. Mental health evidence

Dr. Bhushan Agharkar evaluated Cooke twice in 2019. A2646. He also reviewed all of Cooke's childhood records, the expert reports from 2007, Aaronson and Collins' records, Eichel and Lang's records, both trial transcripts, and more. A2322-23. He testified at the Rule 61 hearing. A1044-1095.

Dr. Stephen Mechanick, the State's psychiatrist from the 2007 trial, testified for the State. He reviewed some of the same materials reviewed by Agharkar. A2661-64. He did not review Mensch's 2006 neuropsychological testing, A2675, and did not view Cooke's polygraph examination, A2686.

i. Agharkar

Agharkar identified Cooke's perseveration and delusions as prominent symptoms of underlying issues. A1077-79. He concluded that Cooke likely decompensates under stress or when exposed to excess stimuli (such as a trial). A2683.

Agharkar explained that Cooke held a delusional belief that racism pervades every aspect of his life and explains every negative experience. A2658-60. One cited example was the polygraph examination Cooke instigated where Cooke accused the polygraph *machine* of being racist. A1070; A2322; *see* Court Record, Exhibit 76-22 from February 1, 2022 Evidentiary Hearing.

In concluding Cooke suffered from brain damage, Agharkar referenced Mensch's 2006 neuropsychological testing establishing "frontal lobe [i.e. brain] damage." A1080-82; A1004.

Agharkar concluded Cooke suffered from central processing dysfunction and perceptual impairment caused by brain damage, and diagnosed him with delusional disorder, persecutory type, as well as longstanding trauma. A2646.

Agharkar concluded that, while "competence" is a legal term, not a "diagnosis," Cooke's paranoia, persecution complex, delusions, and other symptomologies impaired his ability to rationally understand the case and evidence

against him, the court process, and his ability to communicate rationally with counsel. A1065; A1087-91; A2682.

ii. Mechanick

Mechanick found Cooke's trial behaviors unusually inappropriate, unreasonable, and disruptive. A2678; A2684; A2687-88. He acknowledged Cooke behaved differently because he viewed the world differently, A2679, and agreed that Cooke perseverated, A2680. He acknowledged Cooke was "difficult, obstreperous and uncooperative," and exercised poor judgment throughout his case. A2689. However, Mechanick denied these behaviors were symptomatic of mental illness or cognitive dysfunction. A2665. Rather, he opined that Cooke's paranoia, courtroom behavior, perseveration, and fixed beliefs were rational, deliberate acts designed to benefit himself, and indicative of anti-social personality disorder (ASPD). A2676.

In support, Mechanick noted that Cooke was diagnosed with "conduct disorder" as a youth, a necessary precursor for an ASPD diagnosis. A2676. However, Mechanick appeared unaware of the neuropsychological tests that accompanied that diagnosis, A2676, and was unaware of Mencsh's corroborating 2006 testing, A2675. Nevertheless, he testified Cooke's low verbal IQ scores indicated lack of motivation, not brain damage. A2675.

Mechanick also disagreed that Cooke's belief in pervasive racism explaining all his ills is a "delusion." A2689. However, Mechanick agreed that the American

Psychiatric Association, *Diagnostic and Statistical Manual, 5th Edition*, DSM–5 (2013) (DSM–5) defines delusions as "a fixed belief that is not amenable to change in light of conflicting evidence." A2685. Additionally, while he did not view Cooke's self-instigated polygraph examination, he agreed that Cooke's accusing the polygraph *machine* of racism when told of the results is delusional. A2686.

3. Argument 2

a. DNA

Pre-trial discovery revealed that the State lab produced a "false-positive" result during a calibration sample-run in this case. A725. 2010 counsel sought additional discovery on the DNA evidence, and an expert to review it. A1034-5. 2012 counsel did not. In fact, Figliola testified that he did not recall the false-positive, and that was something he should have "looked into" except that it did not fit with the chosen defense. A2823.

Dr. Daniel Krane reviewed the State's pre-trial production and identified four problems with the lab's handling and storage of samples. A2724. Those concerns suggest an increased risk of sample-contamination. *Id.*

The State belatedly produced electronic data from the DNA testing.[3] Krane reviewed that data and testified that it confirmed the lab's protocols were followed

[3] There was confusion at the hearing as to whether and when that data was provided to counsel. O184. Cooke did not receive it from prior counsel and so included it in his discovery motion, which the court denied. DO at 131-32.

in response to the false positive. A2768. However, he also testified that the data did not change his previous concerns. A2770. In fact, the "new" data raised additional concerns.

Krane explained that, in the event of a false-positive, the lab would identify and record the source of the contaminant DNA, if known. A2768-69. Because the false-positive would most likely have been caused by a "sample-switch," A2769, the electronic data would likely identify the source of that contaminating sample, *id.* The electronic data here contained the expected information for all the sample-runs except for one: the false positive. A2768-69.

As Krane explained, there is no way of knowing if any particular sample is contaminated if there is no reference sample to compare to. A2770. The contamination here is only known because a control-sample produced a false-positive. A2770-71. The existence of control-samples, and the data from them, is critically important because if the defendant's DNA is found in a sample from the scene, there is no way of knowing if its presence is because the defendant deposited it there or because the defendant's sample contaminated the control-sample. A2770-71.

b. Other evidence

i. Rochelle Campbell.

In her first statement to police, Campbell explained how the night of April 29, she and Cooke heard a commotion outside their home and she saw flashing police lights. A951. Cooke went outside to look and returned with a backpack. *Id.* He said a car had pulled over and the occupants threw the backpack out of the car. *Id.* Cooke went through the backpack and found items identified as Cuadra's, including the Visa card. *Id.* He left to try and use the card to withdraw money from an ATM. *Id.* She testified similarly at the 2006 suppression hearing. A113-14.

Campbell also told police that the night of the Cuadra burglary Cooke never left the house except when he found the backpack and when he went to the ATM. A951. She also told police he had no scratches on his body. A919. The next day, she told police Cooke had been in bed the entire night when Bonistall was killed. A2759.

Counsel possessed a letter purportedly written by Campbell in the days after her interrogation, describing police efforts to coerce her to implicate Cooke. A947-50. Counsel also possessed records showing extensive contact between police and Campbell from the moment they searched her home. A952 (Campbell's contact with police lasted at least two hours longer than her recorded interrogation); A952 (police threat that she would give birth in jail if she did not inculpate Cooke); A954 (Department of Family Services investigation into Campbell; police buy her diapers

and baby wipes); A967 (Police help Campbell restore her electric service). By the time of trial, Campbell backed away from any suggestion of exculpatory statement. A2783-87.

In Rule 61, Deborah Davis, Ph.D., provided extensive information concerning the coerce effects of police interrogations and continued police contact in general and in this case. A2766-89. She concluded Campbell's "voice and photo identifications of James were specifically the product of undue suggestion," A2788, and the differences between Campbell's statement and testimony "may have been the result" of acceptance of Cooke as the suspect/perpetrator over time, her response to that acceptance, suggestions from police and prosecutors, and changes in memory from the passage of time. A2788. Campbell confirmed writing the letter detailing the coercive efforts of police, as well as a second letter she wrote to Cooke also detailing the emotional effects of the police coercion. A2797-2807.

ii. Amalia Cuadra

Cuadra did not identify Cooke when shown a photo-lineup. A629. Following her line-up viewing, Det. Rubin met with Ms. Cuadra to "2-3 times" to "clarify" her statement. A950.

At the second trial, however, she identified Cooke as the intruder, but explained that Det. Rubin had chastised her for picking the wrong person and

identified the "right" person for her. A2811. In Rule 61, she confirmed Rubin's improper comments. A2728.

iii. The alternative perpetrators

Police identified multiple individuals as likely suspects. A744-53; A2732; A2748. Of these, counsel considered Patrick Breckin as a possible alternative, but they discounted him after some investigation. A2825. Counsel also considered Alan Sentel as a possible perpetrator, but investigation ruled him out also. A2763. And, as noted above, *infra* at 10-11, counsel considered the yellow-rose giver/fraternity brother. A2816; A2818-19.

Defense expert Robert Tressel, a former homicide detective and now private consultant, reviewed the police reports as provided to defense counsel. A2744. Those reports indicated that police received but ignored numerous tips and leads, many for no apparent reason, knew of multiple offenses similar to the ones ultimately attributed to Cooke, and of multiple offenses related to key people or locations to this case but ceased investigating them for no apparent reason. A752-71. Tressel testified that police would—or should—have created and retained records detailing why tips were ignored, leads not followed, suspects eliminated, and other such information. A2743; A2751-52.

From those reports, Tressel also concluded Mark Warren was also a police suspect. A2733-35. The reports indicated that police tested a condom from an

investigation into Warren as part of this case, A2733, that Warren was identified as being at least at one party with Bonistall, *id.*, and left Newark for Pennsylvania after Bonistall's murder, *id.* The police investigation went so far as to obtain a warrant for Warren's arrest in Pennsylvania. A2734.

Tressel also confirmed that Jermaine Jervey was a police suspect; he was a maintenance worker in Bonistall's building, was interviewed multiple times by police before disappearing, A2735, then reappeared close to the 2012 trial when an ICE investigation uncovered female underwear and newspaper clippings about Bonistall in his storage unit. A2736-37. Tressel also noted the police reports shows the underwear was subjected to DNA testing, which was "inconclusive" as to whether any of it was Bonistall's. A2737. Tressel confirmed there is no documentation indicating that Jervey had been eliminated as a suspect or why. *Id.*

Police suspected a group of traveling magazine sellers, who were also suspects in other home invasions in the area. A2733-39; A2744.

Police also detained two men shortly after the Bonistall murder, and discovered "burglary tools" in their car. A2747. Several probation/parole officers provided police with information concerning their various clients who might be considered suspects. *Id*.

Police reports also showed police knew of, but did not investigate, potentially material electronic evidence, and lost or destroyed multiple items of forensic evidence. *Id.*

Counsel did not seek discovery regarding the State's investigation into any of them, interview any witnesses about them, or request access to physical evidence (such as DNA for retesting) relating to them.

iv. Johnathan Arden, M.D.

Johnathan Arden, M.D., a defense forensic pathologist, reviewed records related to Bonistall's autopsy. A2719-21. He concluded that the evidence does not conclusively show whether or not Bonistall was subject to consensual or nonconsensual sex, or whether or not she was subjected to blunt force trauma. A2721-22. Arden also confirmed that sperm cells may remain identifiable DNA for up to five days. A2722.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to rule on the merits of Cooke's claims pursuant to Rule 61, authorizing relief from any ground presenting a "sufficient factual and legal basis for a collateral attack upon a criminal conviction." Super. Ct. Crim. R. 61(a)(1).

STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL

Cooke's ineffectiveness of counsel claims are evaluated under the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984): (a) deficient performance, i.e., that counsel's performance fell below "an objective standard of reasonableness," *id.* at 688; and (b) prejudice, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

Any strategic decision must be informed and reasonably designed to effectuate the client's interests, and are only reasonable if counsel has investigated the relevant facts and law. *Porter v. McCollum*, 558 U.S. 30, 40 (2009). The "reasonable probability" standard for prejudice "is less demanding than the preponderance standard." *Hull v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999) (quotation marks and citations omitted). *Strickland* also applies to claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

ARGUMENT

I. COOKE'S LIKELY INCOMPETENCE AT ALL CRITICAL STAGES OF THE CASE.

Questions Presented: Whether counsel were ineffective for ignoring "reasonable cause" to doubt Cooke's competence because they feared he would "fire" them, and whether the trial court violated due process for not *sua sponte* ordering an evaluation? (Preserved A691-718).

Scope of Review: While denial of Rule 61 relief is reviewed for abuse of discretion, *Swan v. State*, 28 A.3d 362, 382 (Del. 2011), questions of law, claims of constitutional violation, and mixed questions of law and fact are reviewed de novo, *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010). Because the lower court's denial of Cooke's constitutional claims depends on questions of law or mixed questions of law and fact, that denial is reviewed *de novo*.

Merits of Argument: "Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial," as well as attorney's representation about his client's competency, establish "reasonable cause to believe" that the defendant is incompetent. *Drope v. Missouri*, 420 U.S. 162, 173, 180 (1966); *Pate v. Robinson*, 383 U.S. 375, 378 (1966). Where such cause exists, the trial court violates due process by failing to conduct a competency evaluation, *Drope*, 420 U.S. at 173, and defense counsel may be ineffective for failing to comply with their duty to their client, *Jermyn v. Horn*, 266

F.3d 257, 283 (3d Cir. 2001); *Red Dog v. State*, 625 A.2d 245, 247 (Del. 1993). Here both the court, and certainly counsel, had obligations to evaluate Cooke's competency, but failed to do so.

A. Ineffective assistance of counsel – competence to stand trial and to waive counsel.

The court concluded counsel's performance was not deficient because their fear that Cooke would "fire" them if they explored his mental health was a reasonable basis to ignore his incompetence, and because Cooke could not establish prejudice because he could not prove his incompetence by a preponderance of the evidence. O53. Both conclusions are legally and factually incorrect.

1. The court's erroneous legal and factual holding that counsel were reasonable in deciding not to assess Cooke's competence because he might fire them.

Competence is foundational to a fair trial. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). Where there is "reasonable cause" to doubt competence, counsel have a duty to raise it. *Jermyn*, 266 F.3d at 283. Counsel have a special role in effectively invoking adequate procedures to ensure their client is competent to stand trial (and, by corollary, waive counsel). *Hull*, 190 F.3d at 111-12 (collecting cases). Counsel's special role arises both from the typical attorney-client relationship, and from the fact that a potentially incompetent defendant by definition may be unable to appreciate the proceedings or to assist his attorney (or to make an intelligent decision on challenging his competency). *Id.*

Ignoring these standards, the lower court concluded counsel's fear that, "[if] they attempted anything with mental health he would fire them," was a reasonable basis not to ensure their client's competence. O51; O53. The court clearly erred.

In any situation, counsel's decision not to act for their client out of a fear the client would end their representation would violate the ordinary attorney-client relationship, as it places the attorney's interests above the client's. DEL. LAWYERS' R. PROF. CONDUCT RULE 1.7(A)(2). Here, counsel also violated the special duties owed to a potentially incompetent client. *Hull*, 190 F.3d at 111-12; *Jermyn*, 266 F.3d at 283. By choosing to protect their appointment, counsel left the decision to assess competency to their client, the very person who was likely incapable of making it. *Hull*, 190 F.3d at 111. The court's conclusion that counsel acted "reasonably" is clearly erroneous.

Notwithstanding the court's legal error, the court also erred on the facts. For example, the court repeated counsel's lament that Cooke had "fired every attorney" that explored his mental health. O52-53. That is not true. Cooke did not try to fire 2007 counsel, even when they conceded his guilt. He did not fire Aaronson and Collins; they withdrew because Cooke sued them. A276-86. Ironically, Cooke *did* "fire" 2012 counsel, but not because of their (non)pursuit of mental health issues but because they could not change his prison housing status. A368-75; A377-80. The court's acceptance of counsel's factually incorrect testimony is in error.

Also erroneous is the court's acceptance of counsel's testimony that Cooke "flat out refused" to meet a doctor, A2761, as an explanation for their ignoring mental health issues. O52-53. Counsel's mitigation specialist continued to meet Cooke even after he had "refused" to see her. A2762. Moreover, even if Cooke *had* refused a defense evaluation, restarting the competency process initiated by Aaronson would have led to the state hospital evaluating Cooke. A981-12. Cooke's "refusal" to meet a defense doctor was immaterial. But moreover, if counsel truly feared being fired, they could still have raised incompetence after they were reinstated; as Cooke had been found to have forfeited his pro se rights, he could not have fired them then again.

The court's holding that counsel were reasonable to not raise Cooke's competence because they feared he would fire them is legally untenable and contrary to the facts in the record.

2. Prejudice

a. The court erroneously equated "reasonable probability" to "preponderance of the evidence."

Explaining its conclusion that, having "found [Cooke] competent, there can be no prejudice," O53, the lower court quoted *State v. Shields* at length and with approval to demonstrate the high bar the defendant must overcome to prove incompetence. O66-67. In so doing, the court held Cooke to an improper standard of proof.

Shields addressed the competence standard applied at trial, where the defendant must prove his incompetence by a preponderance of the evidence. *State v. Shields*, 593 A.2d 986, 1013 (Del. Super. Ct. 1990); *Medina v. Calif*ornia, 505 U.S. 437 (1992). "Preponderance of the evidence," though, is inapplicable here.

To succeed on this ineffective counsel claim, Cooke must show a "reasonable probability" of a different result. *Strickland*, 466 U.S. at 694. The Supreme Court expressly rejected "preponderance of the evidence" as the prejudice standard as too high-a-burden. *Id.* Consequently, Claim 1 rested on whether there is *a reasonable probability* Cooke was incompetent (in 2012), not that he *was* incompetent per *Shields*, *et al*. *Jermyn*, 266 F.3d at 283; *Hull*, 190 F.3d at 110. By applying the trial-incompetence standard, the court held Cooke to an improperly high standard of proof that is contrary to the controlling law.

b. Legal errors impaired the court's assessment of the facts.

Assessing *Strickland*-prejudice requires the court to consider the totality of all the evidence. *Strickland*, 466 U.S. at 680-81. The totality of the evidence here includes childhood records, opinions of multiple attorneys, expert assessments of Cooke's incompetence, and the observations (and responses) of two trial judges on one hand, and Mechanick on the other. *See*, *supra* at 13-20. By misapplying the standard of proof, the court actively, and improperly, rejected the overwhelming totality of the evidence.

The court also ignored evidence the Supreme Court has expressly directed is critical even in the *trial* competency assessment. An attorney's opinion of his client's competency is "unquestionably a factor which should be considered." *Drope*, 420 U.S. at 177 n.13. Attorney O'Connell testified that as he now understands competency, Cooke was incompetent in 2007. A991. Both O'Connell and O'Neil agreed that Cooke was likely incompetent to waive counsel in 2007.[4] A992-3; A1031. The court disregarded these opinions.

The court also disregarded the opinions of 2010 counsel, who both apprised the court of their "reasonable doubt" about Cooke's competence. *Supra* at 16-18. The court's disregard of these attorney-opinions was in error.

As well as counsel, the court's own observations of the defendant are important in assessing competency *at trial*. *Drope*, 420 U.S. at 180 (court's observations are important factors). In fact, the court mischaracterized the two trial-judges' observations.

The court stated it considered "how Cooke conducted himself in the majority of the court proceedings" in assessing his mental health, O67, but actually sanitized

[4] Attorney O'Neil's opinion that while Cooke was competent in 2007 he was also "profoundly mentally ill." A989. O'Neil assessed competency because Cooke knew who all the courtroom participants were, *id*, not whether Cooke possessed the capability for rationality. *Dusky v. United States*, 362 U.S. 402 (1960); *see also Williams v. State*, 378 A.2d 117, 119 (Del. 1977) (citing *Dusky*, 362 U.S. at 402).

that behavior to the point of unrecognizability. Rather than unconcerning, as the lower court descried Cooke's juror interactions, O75, the first trial court found Cooke's interactions required repeated warnings, A404; A434-37. Similarly, the lower court's description of Cooke's "vigorous cross examination" of witnesses, O76, minimizes the multiple warnings Cooke received from the trial judge while examining witnesses, A444; A447-48; A450-58; A469-75. Ultimately, that judge found Cooke's conduct so egregious that it warranted revocation of pro se rights. A476-82. The lower court's sanitized account of Cooke's courtroom conduct ignores the trial judges' responses to that conduct.

c. The court's many factual errors.

While the trial court's factual findings, including determinations of credibility, are afforded substantial deference, those findings are only accepted by this Court "[i]f they are sufficiently supported by the record and are the product of an orderly and logical deductive process." *Stegemeier v. Magness*, 728 A.2d 557, 561 (Del. 1999). Further, where those facts are intermixed with the law, the court's opinion is reviewed *de novo*. *Zebroski*, 12 A.3d at 1119.

All the symptoms identified by Agharkar in reaching his conclusions are consistent with observations by his prior attorneys. 2007 and 2010 counsel all noted Cooke's perseveration. A1032; A1036. Both also noted his paranoia and delusions, A978-79; A985; A1159-74, and the effect of stress on his self-control, A984;

A1024-25. They are consistent too with the conclusions of prior experts: A1066; A1074-6; A1082; A1083 (DYFS records); A1058-64 (Eichel); A943 (Turner).

Ignoring this consistent historical corroboration, the court accepted Mechanick's lone opinion, A2665-67, that Cooke's paranoid beliefs, his disruptive and self-harming behaviors, and his inexplicable interpretations of the evidence, were all rational and deliberate choices, consistent with ASPD. O58-60. However, the court ignored that Mechanick actually agreed with Agharkar's conclusions about Cooke's behavior but merely placed a different label on them. *E.g.* A2678; A2684 (Cooke's trial behavior was unusually inappropriate, unreasonable, and disruptive); A2687-88 (Cooke behaved differently because he viewed the world differently); A2679 (Cooke perseverated); A2680 (Cooke was "difficult, obstreperous and uncooperative"); A2689 (Cooke's judgment was poor throughout his case.) In all, the court ignored that Mechanick's observations, whatever label he put on them, are consistent with the opinions throughout Cooke's life.

The court also contradicted its conclusions with its own observations. The court described Cooke as "argumentative to the extreme," concluding that Cooke "threw a temper tantrum" when he did not like what was happening, O49; O68, and found that Cooke was "locked into certain beliefs and there was no changing his mind," O57. The court's descriptions mirror the observations of trained mitigation specialist Lang. A1128 (Cooke is like a young child having temper tantrums, and

has "childish, concrete thinking.") The court's rejection of Agharkar's conclusions despite agreeing that Cooke perseverated and employed rigid thinking is unsupportable.

Similarly unsupportable is the court's conclusion that Cooke's erratic and bizarre behaviors were rational decisions advancing a "plan[ed] legal strategy," O64; O68, while finding that Cooke's legal decisions were "illogical and stupid." O69. The court's parsing of "illogical" and "irrational" on a distinction without difference. Moreover, it again sanitizes the facts to reach a legal conclusion.

Cooke's "illogical" but "rational" behavior included testifying in 2007 to open the door to harmful, otherwise inadmissible evidence. A986-9. Cooke "illogically" but "rationally" sued his lawyers for conspiring with the state, for not raising a different argument in an appeal that had already been won, for being racists and hiring racist experts, and for not changing his prison housing. A1159. In 2012, Cooke "illogically" but "rationally" waived 2012 counsel, again because they could not change where the prison held him. A369-72. He "illogically" but "rationally" disavowed counsel's pretrial motions in favor of his own raft of incomprehensible motions. A55, DE 386. Cooke "rationally" and repeatedly tried to admit his inculpatory polygraph results. A443; A446. Cooke "rationally" but "illogically" accused the polygraph machine of being racist. A2686. Cooke "rationally" but "illogically" insisted on introducing the 911 call, erroneously believing it eliminated

him as being the caller. A1073-4. The court's conclusion that Cooke acted rationally and in a manner designed to help himself is unsupported by the facts.

The court also improperly ignored the expert opinions closest in time to the trial at issue. Agharkar's identification of Cooke's paranoia, perseveration, and delusions, all mirror Eichel's identification of the same symptoms in 2010. Again consistent with other previous experts, Eichel flagged Cooke's extremely rigid thinking, A1058; paranoid ideations, *e.g.*, A1059; A1060; A1061; and "bizarre belief system," A1062. Based on these symptoms, he diagnosed Cooke with delusional disorder consistent with paranoid thinking. A1063-4. Agharkar similarly diagnosed Cooke with delusional disorder, persecutory type. A2658-60. Yet the court made no mention of Eichel or his conclusions in the "bottom line" findings. O66-69. The court's rejection of Eichel's near-contemporary opinion—which is consistent with all opinions before and after—in favor of Mechanick's is not just factually unsupported, it is legally unsound. *Jermyn*, 266 F.3d at 283.

Similarly factually and legally improper, the court relied on speculation about non-opinions from 2006-07. O67. The court noted "we do not know" that none of the 2007 doctors were asked to opine on competence and postulated that if signs of incompetence were apparent, those experts would have said so. O67. That is not true. Counsel testified they did not explore competence, A1023, and the experts' reports corroborate they were not asked. A932 (evaluation for GBMI); A945 (mental state

at the time of the offense); A921 (psychosocial assessment concerning childhood); A1004 (neuropsychological testing). But again, while the observations of symptoms across Cooke's life are compelling, and help demonstrate that Cooke's underlying symptoms have been present throughout his life, the ultimate competency-(non)opinions from 2007 are not dispositive of the question whether there is a reasonable probability Cooke was competent in 2012.

The court's finding that Cooke was not delusional, O58-59, is also unsupported. Agharkar's diagnosis was informed by Cooke's delusional belief that racism pervades every aspect of his life, and explains every negative experience. A2658-60. Referencing the DSM-5, Mechanick testified that delusion" is "a fixed belief that is not amenable to change in light of conflicting evidence." A2685. "Delusions" may be bizarre (i.e. impossible) or non-bizarre (i.e. possible but not true). A2690. However, Mechanick testified that Cooke's "racism" beliefs are not delusional.[5] *Id.*

Ignoring both experts, the court held that, because racism infects all aspects of life, Cooke's opinions on the effect of that systemic racism on his life and this case is not delusional. O56; O58. The court rejected uncontroverted testimony from

[5] Mechanick deigned not to watch Cooke's self-instigated polygraph examination, but agreed that his accusing the *machine* of being racist was delusional. A2686.

both parties *and* the medical community's definition. The court is, therefore, in error. *E.g. Moore v. Texas*, 581 U.S. 1, 5–6 (2017) (courts should not ignore established medical standards).

Discounting Agharkar's brain damage diagnosis, the court stated that "Agharkar acknowledged there had been no frontal lobe neuropsychological testing done" and that such testing "could have better nailed down any brain damage/dysfunction diagnosis." O59.[6] The court is incorrect. Agharkar *confirmed* that Mensch conducted neuropsychological testing that showed "frontal lobe [i.e. brain] damage." A1080-82; A1004.

The court's conclusion is also unsupported by Mechanick. Mechanick testified that Mensch's 2006 neuropsychological testing does not establish brain damage as a cause of Cooke's impairments. A2676. But, Mechanick had not reviewed Mensch's testing (which concludes brain damage) when he testified. A1080-82; A1004; A2675-76; A2767.[7] And, he discounted neuropsychological

[6] The court pointedly referenced that Agharkar "acknowledged" that he did not conduct any testing himself. O59. But, as psychiatrists, both doctors Agharkar and Mechanick do not administer the tests; they are trained to base their opinions on tests administered by psychologists. A1092; *see also U. S. ex rel. Dessus v. Com. of Pa.*, 452 F.2d 557, 563 (3d Cir. 1971) (affirming the denial of funds to repeat the testing by a psychologist employed by the state, but granting the defendant funds for a psychiatrist to opine on the basis of that testing).

[7] Mechanick complained that he had not been provided with that report. A2675-76. While it is not clear whether or when it was provided to the State before Rule 61 proceedings, it was provided in these proceedings.

testing from Cooke's childhood also indicating brain damage, A927, and reports from Turner in 2006 indicating the same, A938-43. Mechanick's rejection of brain damage rests on his rejection of neuropsychological testing *as a practice*, and on his disinterest in the most comprehensive testing from 2006. The court's reliance on his conclusions undermines the court's conclusions.

The court's opinion is also inconsistent. The court laments the lack of evidence of brain damage to support the competency argument, O58-60, but later concludes that "Cooke's probable brain dysfunction contributed little to the incompetency theory," O61. The court's "push me-pull you" approach to evidence of brain damage is legally and factually unsound.

Also unsound is the conclusion that Cooke "functioned well in society." O61. Childhood records describe Cooke's severe problems functioning in school. *See, e.g.*, A1175; A1179; A1181-82; A2320. The 2007 expert opinions similarly identified functioning problems. A932-36; A1004. And, as the court noted, Cooke was diagnosed with "conduct disorder" as a youth. O67. As Mechanick described them, A2676, the symptoms attributable to conduct disorder do not describe a child functioning "well in society."

Cooke's behavior at both trials—which Mechanick described as inappropriate, and not how a reasonable person would behave, A2678; 2687-88, and was "extremely disruptive," A2684—and general behavior—which he described as

"difficult, obstreperous and uncooperative," A2689, is not that of a man "functioning well."

Moreover, the ASPD diagnosis (which the court accepted, O67) requires that the patient's symptoms "cause *significant functional impairment* or subjective distress..." DSM-5, p. 659 (emphasis added). The court's conclusion that Cooke functioned well is contradicted by the diagnosis the court accepted.

d. Conclusion

The question is whether there was a *reasonable probability* Cooke would have been found incompetent in 2012 had counsel raised the issue. *Jermyn*, 266 F.3d at 283. Instead, the court assessed whether Cooke could establish his incompetence as a trial litigant. As that standard was rejected by *Strickland*, the court's use of it here is improper.

It also led the court below to improperly ignore or reject evidence. A court hearing an ineffectiveness claim must consider the totality of the evidence. *Strickland*, 466 U.S. at 695. The totality of the evidence here—including factors that "unquestionably" should be considered—show a reasonable probability Cooke was incompetent in 2012. Ignoring that totality of evidence, and on occasion ignoring established medical standards, the court concluded "I have found him competent." O53. The court erred, and reversal is required.

B. Ineffective assistance of counsel – Miranda

Related to Cooke's incompetence to stand trial and/or to waive counsel is the effect of his cognitive and mental-health impairments on his ability to waive his *Miranda* rights. A708-10. The court's denial of this claim, O119, erred on the law on both performance and prejudice analyses.

1. Performance

The court held that, because Cooke "wanted the jury to hear his statements" it was impossible for counsel to move to suppress those statements once they resumed representation. *Id*. Again, the court improperly elevated counsel's concerns of being "fired" over their ethical and constitutional duties.

The court also incorrectly held Cooke's reference to his interrogation in his opening meant "it was too late to close the barn door." O119. That is not true. All involved expected counsel to file necessary motions when they resumed the case. A483; A485. The court's holding is belied by the record.

Finally, the court concluded counsel could not have litigated suppression "if there was not, and would not be, any mental health evidence at all." O119. The court's conclusion alludes to Cooke's disapproval of such evidence, which is legally improper. *Supra* at 31-33. Moreover, the court's conclusion ignores that counsel also decided not to move to suppress either when Cooke fired them or after they were reinstated. The court's conclusion in error.

2. Prejudice

The court concluded that because it held Cooke was competent the argument that he could not comprehend his *Miranda* rights sufficient to waive them fails. O119. That conclusion is wrong as a matter of law.

The voluntariness of a waiver is based on the totality of the circumstances, *Withrow v. Williams*, 507 U.S. 680, 688-89 (1993), which includes the defendant's mental and physical state. *See Jackson v. Denno*, 378 U.S. 368, 391-92 (1964). Trial-competence is not the same as capacity to waive *Miranda* rights. *See, e.g.*, *Smith v. State,* 918 A.2d 1144, 1149-51 (Del. 2007) (court finds *Miranda* waiver invalid despite finding defendant competent to stand trial). The court's holding that trial-competence determines *Miranda*-capacity is in error.

The question is whether there is a *reasonable probability* Cooke's waiver of his *Miranda* rights was not knowing and intelligent. *Supra* at 31-33. There is. Whether a waiver is knowing and intelligent is determined by the particular facts and circumstances of the case, "including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (the totality the surrounding circumstances includes "the characteristics of the accused"). Cooke's "characteristics" include cognitive dysfunction and mental illness, *supra* at 13-20, which are evident

throughout the interrogation, *supra* at 9. Further, as detailed above, *supra* at 14, all his prior attorneys noted his lack of comprehension about his case.

Moreover, the court ignored its own finding that Cooke's IQ was below average. O55; O60. It is well-established that individuals with below-average IQs do not understand the *Miranda* warnings. *E.g. United States v. Preston*, 751 F.3d 1008, 1021 n.17 (9th Cir. 2014) (quoting Richard A. Leo, *Police Interrogation and American Justice* 232 (2008); *Cloud, Words Without Meaning*, *supra*) ("People with cognitive deficits generally have 'tendencies to mask or disguise their cognitive deficits and to look to others—particularly authority figures—for the appropriate cues to behavior.' Thus, a 'disabled person may feel compelled to answer a question, even if the question exceeds his ability to answer.'") *See also* Morgan Cloud et. al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. Chi. L. Rev. 495, 572 (2002) ("Only at some IQ above 88 . . . do people begin to understand their rights.") The court's conclusion that Cooke's IQ is below average itself raises a reasonable probability that, had counsel moved to suppress his statement on that basis, the court would have found his *Miranda* waiver was not knowing and intelligent and suppressed his statement. Considered in combination with the totality of all the evidence, the court's rejection of this claim was in error.

C. The trial court's failure to protect a potentially incompetent defendant.

Where reasonable cause exists to believe the defendant is potentially incompetent, the trial court violates due process by failing to *sua sponte* evaluate the defendant's competence. *Drope*, 420 U.S. at 173. For the reasons detailed above, *infra* at Argument 1(A)(1), the trial court had sufficient "reasonable cause" to doubt Cooke's competence. Even if the trial court was not aware of all the medical opinions available to counsel, the court was aware that prior counsel both had requested a competency evaluation based on the opinions of at least one mental health expert. *Id.* at 177 n.13 (opinion of counsel is a significant factor establishing "reasonable cause.") The court too had experienced Cooke's behaviors. *Id.* at 180 (court's observations are important factors).

As detailed above, *supra* at 33-34, the lower court committed fatal legal errors in assessing the Rule 61 evidence. The overwhelming weight of *medical* opinion was that Cooke's lifelong symptoms and neuropsychological testing demonstrate brain damage and psychiatric illness, *supra* at 34-43, at the "preponderance" of all evidence established Cooke likely would have been found incompetent had the trial court *sua sponte* ordered his evaluation. The court's ignoring of this claim should be reversed.

II. COUNSEL WERE INEFFECTIVE FOR FAILING TO REASONABLY INVESTIGATE THE CASE BEFORE MAKING CRITICAL "STRATEGIC" DECISIONS.

Question Presented: Whether counsel were ineffective for deciding to present a defense without evidentiary support without first investigating the State's case and their client's version? (Preserved A718-80).

Scope of Review: See Standard; Argument 1.

Merits of Argument: The lower court erred in misconstruing and rewriting Cooke's claim in contravention of established jurisprudence. That error tainted the court's analysis of Cooke's underlying allegations, leading the court to multiple material errors.

A. The court improperly divided Cooke's claim into separate claims.

Rather than addressing Claim 2 as pled, the court divided the various factual allegations into separate and independent claims, abrogating the rule that the "party who brings a suit is master to decide what law he will rely upon . . . " *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913); *see also United Jersey Banks v. Parell*, 783 F.2d 360, 368 (3d Cir. 1986) (Cautioning against abrogation of "the rule that a plaintiff is master of his or her complaint") (citations omitted).

Cooke pled his claim in accordance with established ineffectiveness jurisprudence. Ineffectiveness claims address decisions by counsel that implicate the reliability of the trial process itself. *Strickland*, 466 U.S. at 687. Cooke did not allege

counsel ignored one particular piece of evidence or one particular objection undermined the reliability of his trial. Cooke alleged that counsel's decision to pursue their chosen defense undermined the reliability of his trial because that decision was made without a reasonable investigation. *See Williams v. Taylor,* 529 U.S. 362, 395 (2000) (counsel has duty to conduct thorough investigation); *Rompilla v. Beard*, 545 U.S. 374, 395 (2005) (decision not to investigate must be based on "informed tactical decision"). The court's rewriting of Cooke's Claim to allow for piecemeal denials was improper and should be reversed.

B. Performance – the lack of a reasonable investigation.

Counsel's reasonable decisions should be deferred to. *Strickland*, 466 U.S. at 681. However, decisions made without a reasonable investigation, or the surrounding facts showed an investigation was unnecessary, are *un*reasonable and so not deferred to. *Id.* at 682. Counsel decided their defense theory without investigating material issues, despite investigation being necessary.

The State implicated Cooke in two ways. First, DNA evidence "established" that Cooke had sexual contact with Bonistall shortly before she was killed. *Supra* at 9. Second, an interconnected web of phonecalls, identifications, timing, and other evidence combined linking Cooke to the murder. *Supra* at 8-9. Cooke's "innocence" goal necessitated a defense theory that addressed both.

a. DNA

Faced with inculpatory forensic evidence, a defense can challenge the admissibility or credibility of the evidence, provide an innocent explanation for its existence, or both. Without reasonably investigating either, counsel chose the latter. A2814-22.

Counsel possessed clear evidence of lab-error, A725, and prior counsel's hiring of a DNA expert, A1034-35. *See, e.g.*, *Strickland,* 466 U.S. at 688 (counsel's conduct assessed based on prevailing professional norms.) Counsel nevertheless decided not to investigate the reliability of the State's DNA evidence because it did not fit their defense. A2823 (Though not recalling the false-positive, Figliola confirms it was something he should have "looked into," but likely did not given the chosen defense.) Counsel decided their defense theory, then rejected an investigation that did not fit that decision. That is the precise opposite of a reasonable process. *Porter*, 558 U.S. at 40 (decisions should be made *after* reasonable investigations.)

As a corollary, counsel also did not reasonably prepare for Cooke's expected "innocent explanation" testimony, A639, that he was with Bonistall on Friday night. Counsel testified that they were able to communicate with Cooke, A2765; A2828-29, and so those communications should have included explaining the impossibility of his planned testimony. So advised, Cooke could have realized his mistake and, with his recollection refreshed, remembered he saw Bonistall on *Saturday* night. The

court considers this akin to counsel telling their client to lie. O128. The court is wrong; counsel's duty to advise their client about the decision to testify, *e.g. Strickland,* 466 U.S. at 688 (attorney must consult with client about important decisions), necessarily must include the consequences of testifying. As the consequences of testifying would have included cross-examination showing his testimony was impossible, counsel had a duty to advise Cooke about the impossibility of his story. The court's conclusion that counsel should not advise their client about the weaknesses of their proposed testimony is legally unsupportable.

The court's conclusion also ignores that refreshing Cooke's recollection was not the only possible consequence of counsel adequately advising him. Cooke could still have insisted on testifying about Friday night. The reasonable response would have been to consider whether Cooke could rationally understand the evidence (or was incompetent), to employ mental health evidence to explain Cooke's confusion about dates, or to investigate ways to bolster his testimony. Counsel did none of these.

The court held that counsel's inaction was reasonable because they followed Cooke's instructions on what defense to pursue. O181. The court improperly elevates the client's preferences above counsel's ethical and professional duties. While the client has the final say on the ultimate goal of their case, the attorney's duty is to develop and implement a strategy to achieve that goal. *E.g. Taylor v.*

Illinois, 484 U.S. 400, 417–418 (1988) ("[T]he lawyer has—and must have—full authority to manage the conduct of the trial.") Cooke's goal was to show his innocence. It was counsel's duty to decide how best to achieve that goal, and that decision required a reasonable investigation. The court's holding that counsel's decision not to investigate because Cooke might fire them is legally unsupportable.

b. Non-DNA evidence.

Notwithstanding DNA, to advance Cooke's innocence goal, counsel needed to choose a defense that would defeat the other inculpatory evidence.

i. Rochelle Campbell.

Campbell was a keystone in the case. Her 2007 testimony identified Cooke at the ATM and Cooke's voice on the 911 calls. A629. Consequently, impeaching her credibility or her identification would attack key links in the State's chain of evidence.

Additionally, Campbell's statement to police provided an innocent explanation for how Cooke came to possess Cuadra's ATM card, and provided alibis for both the Cuadra burglary and the Bonistall murder. A951; A2759.

Police records produced in discovery detailed extensive contact between Campbell and police between her statement and her 2007 testimony. A952; A954; A967. And, counsel possessed a letter supposedly from Campbell in which she complained how police were pressuring her to inculpate Cooke. A947-49. A

reasonable investigation would have involved seeking further discovery about her contacts with police, and confirming whether she wrote the letter, which she later did. *See* A2797-2807.

Even if counsel were unable to interview Campbell, or address the letter and other matters with her before trial, they still possessed the letter and the many police contacts to help impeach her *and* to emphasize her exculpatory statement. Failure to investigate and/or present *all* evidence to impeach Campbell's inculpatory testimony and to present her exculpatory statement was unreasonable.

ii. Amalia Cuadra

Counsel also knew from the first trial and from their discovery materials that Amalia Cuadra had not identified Cooke when shown a photo lineup. A629. They also knew that Detective Rubin had met with Cuadra "2-3 times" to "clarify" her identification. A950. Given the materiality of the link between Cuadra and the Bonistall murder, a reasonable investigation would have included investigating Cuadra's non-identification of Cooke and the content of the meetings with police to "clarify" her identification. Counsel did not interview Cuadra or seek in discovery recordings or other records of Cuadra's non-identification, or other police efforts to secure her testimony. Failure to adequately investigate the chosen defense was unreasonable.

iii. Alternative perpetrators.

Counsel decided to present as part of their defense evidence that an alternative perpetrator killed Bonistall. A2814-17; A2818-22. Their investigation into that theory was unreasonable.

Counsel testified they believed the presence of a yellow rose in Bonistall's apartment, along with a University of Pennsylvania fraternity photo composite with various comments penned on it, suggested one of Bonistall's acquaintances at that fraternity was *the* alternative perpetrator. A2816; A2818-19.

Counsel did investigate this theory, but uncovered no evidence identifying where the rose came from or who brought it to the apartment, and found nothing linking any of the fraternity members to Bonistall's death. A2818-19. Despite lacking any evidence supporting it, counsel still presented this theory as their "alternative perpetrator." Their decision was unreasonable.

Police identified multiple individuals as likely suspects. A744-53; A2732; A2748. Counsel investigated. Patrick Breckin was discounted after he was interviewed, A2825, and exculpatory information discounted Sentel, A2763.[8] Had

[8] Cooke challenged counsel's failure to investigate that exculpatory cell-phone evidence. A743-71. At the hearing, the State presented expert evidence bolstering the exculpatory evidence and likely establishing Sentel was not the 911 caller. O112-18. The court concluded this evidence disproved any prejudice in Cooke's ineffectiveness claim *concerning Sentel*. *Id.* There is no ineffectiveness claim about counsel's investigation of Sentel, but a claim that counsel's investigation

these been the only alternatives, counsel's decision might have been reasonable. But they were not.

For example, Warren and Jervey were identified as suspects, A2734; A2739-43, as were a group of traveling magazine sellers, who were also suspects in other home invasions in the area, A2744, two men discovered "burglary tools" in their car, A2747, several probationers/parolees, A2744-46, and various others. Given their chosen defense, a reasonable investigation would have involved determining whether any could be identified as an alternative perpetrator, such as by requesting discovery about the State's investigation into them and why it ceased, interviewing pertinent acquaintances, or requesting DNA analysis and/or other forensic evidence on items potentially linking them to the murder. Counsel did none of this.

The point is not, as the court reasoned, to show one of these individuals *was* the killer. O202-12. Rather, given the existence of so many other alternative perpetrators, counsel's decision to rest on their non-existent evidence of the non-existent fraternity perpetrator without investigating those alternatives was unreasonable.

---

of the case was unreasonable. That Sentel was proven not to have made the 911 calls does not change the fact that counsel's investigation *of the case* was unreasonable.

c. Evidence of a flawed or biased police investigation

Counsel's decision to argue in closing that the police investigation was flawed, A494-98, was also made without reasonable investigation or implementation.

First, flaws in the police investigation were irrelevant without also undermining the State's other evidence and addressing or preventing Cooke's impossible testimony, which counsel unreasonably failed to do.

Second, counsel possessed police reports indicating that police received but ignored numerous tips and leads, knew of multiple offenses similar to the ones ultimately attributed to Cooke, and of multiple offenses related to key people or locations in this case but ceased investigating them for no apparent reason, *id.*, and did not investigate numerous suspects, ignored electronic evidence, and lost or destroyed multiple items of forensic evidence. A752-71. But counsel did not request any discovery to determine if the police investigation was flawed, and did not cross-examine Detective Rubin (the lead detective) with the police reports suggesting a flawed investigation. Instead, counsel chose to just *say* it was flawed with no support. That decision was unreasonable.

d. Conclusion

Counsel's decisions on what defense to present and how to present it were made without reasonable investigations into either the alternatives or even the

substance of their chosen approach. Those decisions, therefore, were unreasonable, rendering their performance deficient. The court's conclusion otherwise was based on an improper rewriting of Cooke's allegations and a resultant misapprehension of the facts alleged.

C. Prejudice.

The court's improper division of Claim 2 into its components also tainted its prejudice analysis. Most obviously, the court did not conduct *an* analys*is*, but *many* analys*es*; rather than consider what effect counsel's failure to investigate before deciding a defense theory, the court assessed the effect each ignored avenue of investigation or ignored piece of evidence had. O129-212. For example, the court considered whether counsel's "failure" to investigate the provenance of the yellow rose prejudiced Cooke without any reference to how the rose compared to other issues counsel did *not* investigate. O193. Without considering how any single piece of evidence or suspect related to the whole case, the court easily found no prejudice as to each separate allegation. Given that prejudice requires analysis of the totality of the evidence, *Strickland,* 466 U.S. at 681, the court erred.

Had counsel investigated the State's DNA evidence before deciding to accept it and try to explain it away, counsel would have learned that evidence was incredible potentially to the point of inadmissibility.

The court concluded that Dan Krane, Ph.D., reviewed the DNA evidence and was satisfied with the lab's protocols for dealing with false-positives were sufficient and were followed. O185. Thus, the court concluded, the DNA evidence was unsullied by the Rule 61 evidence. *Id.* That conclusion is factually incorrect.

From his initial review of the State's DNA evidence, Krane identified four problems with the lab's handling and storage of the DNA samples which created a risk of contamination. A2724. That risk, as already noted, was realized in this case. A2768. The belated production of electronic data revealed more.[9]

While the lab followed protocol in response to the false positive, A2768, the new production did not change Krane's four previously identified problems, A2770. In fact, it raised additional compelling concerns.

Because the false-positive was likely the result of a "sample-switch," A2769, the electronic data would likely identify the source of contamination, *id.* That would enable the lab to identify the source of the contaminant DNA, if known. A2768-69. The electronic data here contained all the expected information for all the sample-runs except for one: the false positive. *Id*. 2768-69.

[9] There was confusion at the hearing as to whether and when that data was provided to defense counsel. O184. Cooke had requested this very material in his discovery motion, which the court denied. DO at 131-32.

As Krane explained, if a lab is testing to determine if a suspect's DNA matches DNA found at a crime-scene, it is impossible to know if that sample is contaminated because there is no reference sample; that is, a "match" is an expected result, so there is no reason for the lab to believe a "match" result is the result of contamination. 2770-71. The absence of data from the false-positive therefore prevents determination of whether the "match" between Cooke's DNA and the DNA found in and on Bonistall was because Cooke deposited that DNA or because the sample was contaminated with Cooke's DNA in the lab.

In short, a reasonable investigation would have revealed that the State lab's practices created at least four contamination risk-factors, *at least* one sample-run in this case *was* contaminated, and the data identifying the contaminant DNA was deliberately removed from the produced materials. In short, counsel would have had a significant chance of excluding DNA evidence entirely, or at least heavily impeaching it before the jury.

With that knowledge, counsel would have presumably advised Cooke he did not need to explain away the DNA, and so did not need to testify.[10] Alone, the prejudicial effect of counsel not investigating the DNA is significant.

---

[10] The lower court concluded Cooke was "emphatic" on testifying, notwithstanding counsel's advice. O182. That conclusion is bare speculation. Further, if the court is correct that Cooke would have insisted on providing

But, as Claim 2 alleges, counsel's reasonable investigation would also have confirmed that Campbell wrote the letter detailing law enforcement's coercion, would have sought discovery about the polices' coercive efforts before trial, and would have known either that Campbell's testimony would comport with her exculpatory statement and not her inculpatory 2007 testimony.

And, the reasonable investigation would have revealed that Cuadra's post-lineup identification of Cooke had followed Rubin's improper influence to persuade her to pick the "right" person. A2728.

Without the DNA evidence and Campbell's and Cuadra's identification of Cooke, and with Campbell's alibi testimony, there would have been effectively no evidence pointing to Cooke. Added to that, a reasonable investigation would have enabled counsel to present evidence *suggesting* any one of Warren, Jervey, or any other of the half-dozen or more possible perpetrators were responsible (rather than the non-existent fraternity perpetrator). Or, counsel could have used the evidence they already had to cross-examine police witnesses about the focus on Cooke instead of completing the investigations into the many other, better, suspects.[11] The

---

unnecessary and impossible testimony that is further evidence of Cooke's incompetence.

[11] In fact, the deliberate concealing of data in the DNA evidence would have furthered counsel's defense that the police investigation was flawed, or even biased against Cooke.

combined effects of a reasonable investigation and presentation of the State's case would have removed every material "fact" from the State's case.

D. Conclusion

Counsel's failure to conduct a reasonable investigation before making their key case-strategy decisions contaminated the entire case. The court's holding otherwise was contrary to the controlling law and, as a consequence, misapprehended and ignored material evidence. The denial of this Claim should be reversed.

III. THE STATE'S UNCONSTITUTIONAL PEREMPTORY STRIKES.

Questions Presented: Whether counsel were ineffective for not objecting to (and appellate counsel ineffective for not appealing) the State's peremptory race- and gender-based strikes? (Preserved A817-29).

Scope of Review: See Standard, Argument 1.

Merits of Argument: The State peremptorily struck people of color and women from Cooke's jury in violation of his rights to equal protection, due process and an impartial jury. *J.E.B. v. Alabama*, 511 U.S. 127, 128-29 (1994); *Batson v. Kentucky*, 476 U.S. 79, 84 (1986); *Swain v. Alabama*, 380 U.S. 202, 203-04 (1965). Six of the State's seven peremptories were against women and/or minorities. A389-93; A396-401; A403; A405-14; A417-25; A426-32. The State failed to provide any reason for the strike of one female juror, A398, and the pretextual reasons for the remaining strikes failed to satisfy *Batson*. A393; A401; A403; A405; A411; A414; A417-21; A424-25; s*ee Riley v. Taylor*, 277 F.3d 261, 285 (3d Cir. 2001) (comparison between struck black juror and sitting white juror relevant to pretext).

The lower court held because one alleged *Batson*/*J.E.B.* violation was adjudicated at trial and the others were not objected to, the substantive claims are procedurally barred. O97; O108. The court also held that Cooke's *pro se* status at jury selection prevents ineffective assistance of counsel from overcoming any bar or standing as a substantive claim. O97; O108. The court held that counsel were not

ineffective for not raising *Batson*/*J.E.B.* challenges once they resumed the representation. O108. Finally, the court held Cooke's *Batson*/*J.E.B.* allegations were "denied on the merits." *Id.* The court erred on the law and facts for all points.

A. Ineffective assistance of counsel

Cooke representing himself does, as the court held, bar any claim of his ineffectiveness. However, counsel's effectiveness once they resumed the representation is a cognizable claim and reason to overcome the procedural bar.

1. Performance

The court held that Cooke's argument that trial counsel could have addressed any jury-selection issues upon their resumption of the case was "nonsensical." O108. The record belies that conclusion.

There existed a willingness from the trial court to entertain motions involving jury selection, a willingness from counsel to file such motions, and a mechanism to do so. A483; A485. It was not "nonsensical". As counsel both testified, they did not raise *Batson*/*J.E.B*. because they did not believe they could. A2764 (Veith: "[I]t wasn't objected to on the record."); A2813 (Figliola: "We didn't pick the jury. He did.") That belief must be assessed for its reasonableness, not simply dismissed.

2. Prejudice.

The court did not directly address the prejudice resulting from trial counsel's failure to raise *Batson*/*J.E.B.* in the mistrial motion. However, the court did address

prejudice—briefly—from appellate counsel's failure to raise *Batson/J.E.B.* on appeal, holding that, because it found Cooke could not meet the third *Batson* prong, appellate counsel were not ineffective. O107. That conclusion ignores that *Batson* claims rest on a preponderance of the evidence standard. *See*, *e.g. Jones v. State*, 938 A.2d 626, 636 (Del. 2007) (Acknowledging application of "preponderance of the evidence" to *Batson's* third prong). As detailed in Argument 1, *supra,* ineffectiveness claims are reviewed at a lower standard than preponderance of the evidence. Thus, the question for the lower court was whether, had either counsel raised the *Batson/J.E.B.* issues, there is a reasonable probability the court(s) would have found discriminatory intent by the State. The court's application of the burden of proof of the underlying claim to Cooke's ineffectiveness claims was erroneous.

B. The State's discriminatory intent.

Applying the correct standard, the record establishes a *reasonable probability* Cooke would have demonstrated the State acted with discriminatory intent in its strikes. Consequently, ineffective assistance of trial *or* appellate counsel is established without need to overcome any procedural bar.

Despite a warning by the court after the State's third peremptory and additional inquiry after its fifth, the court accepted the State's purported race/gender neutral reasons. A401. In doing so, the court failed to review the totality of the circumstances in determining intent as required by *Miller-El v. Dretke*, 545 U.S. 231,

239 (2005) (The "totality of the relevant facts" demonstrate discriminatory intent). (quoting *Batson*, 476 U.S. at 94, 96). The State made its discriminatory intent clear, however, after noting that the racial composition of the seated jury "far outweigh[ed] the general percentage of African Americans in (sic) New Castle County population." A424. A new trial is mandated if just one potential juror is excluded based on race or gender, regardless of whether and how many other persons of color or women are actually seated as jurors. *J.E.B.*, 511 U.S. at 141 n.13; *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).

The record shows a reasonable probability that, had counsel moved at trial and/or raised the issue on appeal, the court would have found the State acted with discriminatory intent. Counsel were therefore ineffective.

IV. COUNSEL'S FAILURE TO CHALLENGE THE ADMISSION OF COOKE'S STATEMENT.

Question Presented: Whether counsel's failure to challenge the admissibility of Cooke's statement under *Miranda* was ineffective. (Preserved A861-71).

Scope of Review: *See* Standard; Argument 1.

Merits of Argument: Cooke explicitly asked for counsel several times during the interrogation, but police ignored his requests. A2368. Even if Cooke had not asked for counsel, as detailed above, *infra* Argument 1 (C) and (D), he lacked the mental and intellectual capacity to knowingly, voluntarily, and intelligently waive his *Miranda* rights. Counsel were ineffective for failing to re-file their motion to suppress Cooke's interrogation-statement.

The lower court failed to address the initial question of whether Cooke requested counsel, and instead denied this claim solely because it found Cooke was competent and because it was impossible for counsel to move to suppress his statement. O119. The court erred.

As detailed in Argument 1, *supra*, counsel recognized the need to suppress Cooke's statement, moving to suppress early in their representation. A304. The reasonableness of their decision not to re-file upon resuming representation is addressed in Argument 1, as is the lower court's legally and factually erroneous conclusion that re-filing was impossible. Counsel knew the statement should be

suppressed, and had ability to seek that suppression. Failure to do so was unreasonable.

Miranda warnings are required when police interrogate a suspect in a custodial setting. *Dejesus v. State*, 655 A.2d 1180, 1190 (Del. 1995). Once counsel is explicitly requested, no additional questioning is permitted until counsel is provided or the suspect himself initiates further conversation. *Crawford v. State*, 580 A.2d 571, 574 (Del. 1990) (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)). A suspect may waive their right to silence/counsel either explicitly or by continuing to engage in conversation with his interrogators after receiving the warning. *Miranda v. Arizona,* 384 U.S. 436, 479 (1966). In either case, to be valid a waiver must be knowing and intelligent. *Id.* at 444. Where the suspect lacks the mental or cognitive capacity to understand their rights or the consequences of waiving them, their waiver is not knowing or intelligent and so not valid. *Smith,* 918 A.2d at 1149, 1150 (defendant with recognized cognitive deficits had inadequate understanding of warning and therefore waiver invalid). There is a reasonable probability that, had counsel sought suppression on these bases, they would have prevailed.

Cooke requested counsel multiple times at the start of his interrogation, but detectives ignored all his requests and continued questioning. *Supra* at 8; *see also* A316-66. The lower court declined to consider this factor and instead focused on the allegation that Cooke lacked the cognitive capacity to validly waive his right to

counsel, concluding that because Cooke was competent the claim fails. O119. The court erred.

Cooke's *Miranda* warning takes up nearly 50 pages of transcript. A316-66. In those 50 pages, Cooke indicated multiple times he did not understand his rights and asked for counsel several times. Each time, police ignored his requests. *Id.*

The right to counsel is meaningless if police can ignore a suspect's request for counsel. After Cooke asked for counsel multiple times, police continued to question him. Cooke's statement was, therefore, due to be excluded.

Notwithstanding the improper disregard of Cooke's requests, his eventual "waiver" of counsel was not knowing, intelligent or voluntary. As Argument 1, *supra*, detailed, Cooke was and is severely cognitively and psychiatrically impaired throughout these proceedings, including during his interrogation. He was not capable of waiving his right to counsel and/or silence.

However, competence is not the standard. Competent or not, Cooke's cognitive deficits still made his *Miranda* waiver invalid. Cooke's incomprehension during interrogation was apparent. A316-66. He did not understand his rights and did not understand what it meant to waive them. The combination of the detectives ignoring his requests for counsel and his own impairments, Cooke was incapable of knowingly, intelligently or voluntarily waiving his right to counsel.

The lower court denied this Claim because it concluded that Cooke was competent. O119. While Cooke maintains the court erred in finding him competent, that is not the standard. The lower court's failure to address the effects of Cooke's cognitive impairments separate from his competence to stand trial but concerning his capacity to waive his right to counsel was in error. *See* Argument 1, *supra.*

Similarly erroneous was the lower court's failure to address detectives deliberately ignoring Cooke's repeated requests for counsel. Notwithstanding Cooke's cognitive impairments, the detectives' flagrant *Miranda* violations alone warranted suppression of Cooke's statement.

The lower court erred factually and legally in concluding counsel could not have moved to suppress Cooke's statement. They could have, but chose not to. That decision was unreasonable. Had they done so, there is a reasonable probability Cooke's statement would have been suppressed. The lower court's holding otherwise should be reversed.

V. THE TRIAL COURT'S DENIAL OF A CONTINUANCE.

Question Presented: Whether the court's failure to grant Cooke a continuance unconstitutionally violated Cooke's due process rights. (Preserved A871-73).

Scope of Review: *See* Standard; Argument 1.

Merits of the Argument: After he waived counsel on November 30, 2011, Cooke requested a continuance for time to receive and review the multiple boxes of evidence; that was denied. A379; A380; A382-83. Cooke, despite his cognitive impairments and psychiatric disorders, therefore represented himself at his capital trial with just two months to prepare.

The lower court found this claim was previously adjudicated on appeal and so barred under 61(i)(4). O230. The court also noted, again, that Cooke had been warned before trial that trial would not be continued if he waived counsel. O230; A575-83. The court erroneously ignored the effects of Cooke's cognitive and mental health impairments.

On appeal, Cooke argued he lacked sufficient time to prepare for trial, and so his due process rights were violated. A632-33. He did not—because counsel, as detailed in Argument 1, *supra*, did not investigate or present it—make any reference to his cognitive impairments and psychiatric disorders as compounding reasons why he was unable to prepare.

Whether denial of a continuance impacts due process depends on the circumstances of the particular case. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (citations omitted). Because this Court was denied evidence of the compelling circumstances of this case explaining why Cooke required a continuance, this Claim as raised in Rule 61 was not previously litigated. The court's dismissal of this Claim should be reversed.

To the extent the previous adjudication bar applies, counsel's failure to raise and present Cooke's impairments constitute ineffectiveness (*see* Argument 1, *supra)* to overcome the bar.

Because of his impairments Cooke required additional time to prepare his defense. There is a *reasonable probability* Cooke would have received a continuance or this Court would have reversed a denial of that continuance. *See*, *e.g.*, *Jermyn*, 266 F.3d at 283 (holding that the prejudice caused by counsel's failure to assert a right is whether there is a reasonable probability that right would have been upheld at trial, not whether that right *would* have been upheld.) The lower court's failure to address this claim as pled should be reversed.

VI. THE CUMULATIVE PREJUDICIAL EFFECT OF THE ERRORS.

Question Presented: Is Cooke entitled to relief based on the cumulative errors in this case? (Preserved A892-94).

Scope of Review: *See* Standard; Argument 1.

Merits of the Argument: Constitutional claims of error must be considered cumulatively as well as individually and cumulative error or prejudice may provide a basis for relief whether or not the effect of individual errors warrants relief. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995). Although each of the individual claims presented herein requires relief, even if relief is not required on any error it is required on the basis of the cumulative effect of these errors denying Cooke a fair trial. *Id.*

The lower court concluded Cooke failed to prove his allegations of ineffectiveness. O234. As demonstrated throughout this brief, the lower court's findings are contradicted by both the record and the law. Because there is a reasonable probability of a different determination, upon *de novo* review, this Court should grant relief.

VII. DISCOVERY DENIAL

Question Presented: Whether the court erred in denying the majority of Cooke's discovery requests? (preserved A97, DE630; Exhibit A).

Scope of Review: The decision of a trial court to refuse additional discovery in a Rule 61 proceeding is reviewed for abuse of discretion. *Dawson v. State*, 673 A.2d 1186, 1197 (Del. 1996).

Merits of Argument: The court denied the majority of Cooke's discovery requests. DO. It is unnecessary to address each one individually because the court's denials relied on the same misapprehension of law and fact.

Regarding materials Cooke identified as supporting his claims of State suppression, destruction, or falsification of, evidence (Claim 3), the court's denial rested on a misapprehension of *Brady* requirements. The court held that the State's representation it had produced all "*Brady* material" is dispositive. DO at 12. ("The State's report as officers of the court is final.")

Courts have generally rejected such a universal rule. *E.g. United States v. Kiszewski*, 877 F.2d 210, 215–16 (2d Cir.1989) (*in camera* review of prosecution materials ordered even after the prosecutor denied the existence of *Brady* material.) The reason is plain; it is impossible for the prosecutor to know whether or how some piece of evidence would be favorable to the defense without full access to the defense files and counsel's strategy. *See United States v. Bagley*, 473 U.S. 667, 696–

97 (1985) (Marshall, J., dissenting) (identifying the same). The court's *per se* acceptance of the State's *Brady*-representations makes *Brady*-based discovery impossible, as the State could always represent the non-existence of such material (and, as the *Bagley*-dissent noted, innocently and without bad faith or not.) *Id*.

Second, regarding all materials—including those identified as necessary for his claims of ineffective assistance of counsel and *Brady*—the court relied on several improper arguments. The court held generally:

> there is no due process right to discovery of police reports made in a criminal investigation. There's no general constitutional right to discovery in a criminal case. So it's controlled by in pretrial, it's controlled by Rule 16, and it's controlled by case law in a postconviction environment.

DO at 10.

But, that is clearly contrary to the *Brady* requirement. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) (holding that a state law prohibiting disclosure of CYS records does not trump the constitutional obligation to produce favorable material.)[12]

Moreover, many exceptions to blanket discovery prohibitions exist that are dependent on the contents of the materials in question. Indeed, the ultimate issue—whether the requested materials are helpful to the defense—is a question only the

[12] The court cited *Ritchie* as the basis for its holding that the state's *Brady*-representation is final, O180, but *Ritchie* does not make that holding.

defense can answer. The only way to assess whether trial counsel could have met an exception, or shown that the materials were helpful, is through access to those materials. Similarly, the only way of assessing prejudice is to have access to the materials at issue.

The lower court's blanket denial of Rule 61 discovery on the basis of these misapprehensions of controlling law was improper and should be reversed.

VIII. CLAIMS THAT COULD NOT BE RAISED ON APPEAL

Question Presented: Whether the court erred in denying various of Cooke's other Rule 61 claims for relief. (Preserved A780-18; A846-54; A873-92).

Standard of Review: See Standard, Argument 1.

Merits of Argument: Cooke's operative Rule 61 petition numbered over 200 pages and included an appendix of over 20,000 pages of documents. The resulting evidentiary hearing consisted of 12 days of testimony and two days of argument, involved 22 witnesses, and several thousand pages of exhibits. The court's Opinion denying relief covered 245 pages of reasoning.

On April 28, 2023, Cooke requested word limit extension to this Brief, which this Court granted in part. However, it remains that the facts and argument necessary to address the Arguments identified above, occupy considerable space. Counsel have endeavored to minimize the arguments, but it remains that Rule 14's strict limitation on the contents of this Brief prevent Cooke from including all the Claims raised in his Rule 61 litigation in the body of this opening brief.

Counsel recognize this Court has previously held that an attempt to appeal issues by reference to pleadings in the lower court will be rejected and any such issues will be considered waived. *Ploof v. State*, 75 A.3d 811, 822–23 (Del. 2013), *as corrected* (Aug. 15, 2013). Counsel nevertheless do the same here in an effort to protect Cooke's federal habeas rights. In the realm of post-conviction, the *federal*

requirement that a petitioner exhaust all his claims in state court lest they be barred in federal habeas, 28 U.S.C. § 2254(b), requires a Rule 61 appellant to present all his claims on appeal. The strict application of Rule 14 to Rule 61 appeals forces the appellant to choose between adhering to this Court's Rules or preserving his habeas rights.

Cooke therefore asserts the lower court erred in denying the following claims raised in his Rule 61 litigation, which are meritorious for the reasons detailed therein:

Claim 3 The State Falsified, Suppressed and Destroyed Material Evidence, in Order to Convict Mr. Cooke;

Claim 4. Mr. Cooke Was Deprived of a Fair and Reliable Trial Where Members of the Jury Were Exposed to Adverse Community Sentiment and Prejudicial Pretrial Publicity;

Claim 7. The Court's Dependence on the Evidentiary Rulings of the First Trial Denied Mr. Cooke Due Process;

Claim 8. Counsel Were Ineffective for Failing to Seek the Exclusion of the State's Footprint Comparison Evidence;

Claim 12. As a Result of the Judicial Misconduct that Infected the First Trial, Mr. Cooke's Second Trial Violated Double Jeopardy;

Claim 13. The Trial Court's Reasonable Doubt Instruction was Improper;

Claim 14 Prosecutorial Misconduct During the Guilt-Innocence and Penalty Phases of Petitioner's Capital Trial.

CONCLUSION

For the reasons presented here, Appellant respectfully requests that this Court reverse the Superior Court's denial of his Rule 61.

/s/ Christopher S. Koyste
Christopher Koyste, Esquire (#3107)
709 Brandywine Boulevard
Wilmington, DE 19809
Tel: (302) 762-5195

/s/ James T. Lawley
James T. Lawley, Esquire
(*pro hac vice*)
Beth M. Muhlhauser, Esquire
(*pro hac vice*)
Federal Public Defender's Office
Capital Habeas Unit
100 Chestnut Street, Third Floor
Harrisburg, PA 17101
Tel: (717) 782-3843
Fax: (717) 782-3966

Counsel for Mr. James E. Cooke, Appellant