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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 CORRECTED REPLY BRIEF

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1. THE STATE'S PROCEDURAL BAR ARGUMENTS.

The Superior Court correctly rejected the State's bar arguments in ruling on the merits of Appellant's timely petition. O42. However, it is necessary to address the State's efforts to resurrect its arguments here that several of Cooke's claims are procedurally barred and that he cannot overcome the bars by application of Rule 61(i)(3) or (i)(5). Answering Brief (hereinafter "*Answer*"), 18-20; 54-55; 66-67.

A. The 2014 amendment removing the miscarriage of justice exception to violates *Ex* Post *Facto*.

States are prohibited from "passing any 'ex post facto [l]aw,'" *California Dept. Corrections v. Morales*, 514 U.S. 499, 504 (1995), ensuring the public can rely on the meaning of legislative acts until "explicitly changed". *Bailey v. State*, 588 A.2d 1121, 1124-25 (Del. 1990) (citing *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981)). A legislative or judicial action "violate[s] *ex post facto* . . . if: (1) the law applies to events occurring prior to its enactment; and (2) the changed law adversely affects the offender." *Bailey*, 588 A.2d at 1124 (citing *Weaver*, 450 U.S. at 29). Where, as here, the change in the law adversely affects a criminal defendant's substantive rights, *ex post facto* is violated.

Under the version of Rule 61 that applied at the time the constitutional errors alleged in Cooke's Rule 61 occurred, a movant could overcome a procedural bar to his claims by showing "a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality,

reliability, integrity, or fairness of the proceedings leading to the judgment of conviction." Del. Super. Ct. R. Crim. P. 61(i)(5) (2013). The removal of that exception in 2014 – after both the trial errors complained of in his Rule 61 *and* the subsequent errors[1] that will otherwise prevent review of those trial-errors – prevents him from enforcing his constitutional rights that were violated at his trial.

Additionally, Cooke will also be deprived of his constitutionally guaranteed right to habeas corpus. Because claims, issues, facts and/or arguments are barred in habeas proceedings unless presented to the state courts, preventing Cooke from addressing violations of his trial rights because of errors outside his control between conviction and these Rule 61 proceedings constitutes a substantive deprivation of his habeas rights and his predicate constitutional trial rights.[2]

B. Ineffectiveness of counsel is cause and prejudice to overcome procedural bars.

Any bar to Cooke's claims is overcome because of ineffective assistance of counsel. As this Court has made clear, "attorney error that constitutes ineffective assistance will constitute relief from a procedural default." *Taylor v. St*ate, 32 A.3d 374, 385 n.44 (Del. 2011) (en banc). Moreover, counsel's ineffectiveness "is not

[1] Errors outside his control, i.e. perpetrated by his counsel, the State, the relevant court, or some combination thereof.

[2] *E.g.* 28 U.S.C. § 2254(a)(1)(A) (habeas claims barred unless "exhausted" in state court); 28 U.S.C. § 2254(e)(2) (no federal hearing involving facts habeas petitioner "failed" to develop in state court); *Shinn v. Ramirez*, 596 U.S. 366, 400-01 (2022) (evidence of state postconviction counsel ineffectiveness barred in federal habeas if not presented in state court.)

only cause to excuse the procedural default, but also an independent ground to reverse the prior convictions." *Flamer v. State*, 585 A.2d 736, 758 (Del. 1990) (citing *Murray v. Carrier*, 477 U.S. 478, 492 (1986)). Any trial error alleged by Cooke that is potentially barred is so affected because of trial and/or appellate counsel ineffectiveness. That ineffectiveness both overcomes the bars to the predicate free-standing claim and constitutes an independent ground for relief.

2. ISSUE I: COOKE'S LIKELY INCOMPETENCE.[3]

A. Indicia of incompetence.

Mirroring the lower court, the State erroneously contends neither the trial court nor counsel had reason to investigate Appellant's competency in 2012. *Answer,* 24-27.

The State erroneously relies on a lack of inquisition into Cooke's competence before and at the first trial.[4] *Answer,* 6, 24. Notwithstanding that first-trial counsel now concede Cooke was likely not competent in 2007, A991-3; A1023-25; A1031-33, Agharkar explained that competency is fluid and can vary over time, A1084-85, a comment Mechanick agreed with. AR3**.** Any finding Appellant was competent in 2007 is irrelevant to the question in 2012.

The State diminishes or ignores any of the indicia of Cooke's incompetence leading to the second trial. *Answer* 15-16, 24. For example, the State perceives the 2012 trial-court's failure to question Appellant's competence as evidence of lack of indicia of incompetence. *Answer,* 24. Given Cooke's Claim involves, *inter alia*, that court's failure to acknowledge the multiple indicia of Cooke's incompetence,

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[3] The State cites *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995) as supporting its assertion that Appellant's freestanding competency claims are barred. *Answer,* 18, n.17. *Unitrin* concerns corporate stock buybacks during takeover proceedings, not criminal-competency, Rule 61, or procedural bars, so is irrelevant and inapposite.

[4] For the same reason, the State's reliance on this Court's 2009 dicta noting a lack of evidence of Appellant's incompetence, *Answer,* 24-5, is misplaced.

Opening, 31-8, it is circular to use one basis of the Claim as evidence to disprove the claim. But more importantly, the State's perception is wrong. After accepting Cooke's waiver of counsel, the court directed then-standby counsel to prepare to resume their representation because Cooke would inevitably prove incapable of representing himself. A52; A54. Whether or not the trial court subconsciously recognized the fluid nature of competency, the court's prescient belief Cooke would prove incompetent to represent himself was one of the many indicia of his incompetence.

The State acknowledges interim counsel, Patrick Collins, believed Cooke was incompetent but makes no mention that his co-counsel Jennifer-Kate Aaronson shared that belief. *Answer,* 16. It also ignores that the attorneys' belief was based both on their interactions with Cooke and the expert views of their mitigation specialist, Melissa Lang, and mental health expert, Steve Eichel, Ph.D., A285-86 (Aaronson's 2010 representation that Cooke was potentially incompetent); A978-80 (Aaronson's Rule 61 testimony detailing her bases for that representation); A1036-43 (Collins's Rule 61 testimony about why he believed Cooke's inability to rationally understand his case met the *Dusky* incompetence factors); A1051-56 (Lang's description of Cooke's paranoia and delusional beliefs interfering with his ability to communicate with counsel and understand his case.); A1058-63 (Eichel

noting Cooke's "paranoid ideation," "bizarre belief system," and "delusional disorder").

The State places inappropriate weight on Eichel's lack of a final competency conclusion, *Answer,* 16, and suggested that the fact that interim counsel "were unable to further explore the issue" of Cooke's incompetence somehow erases their representations to the court as indicia of incompetence. *Answer,* 8. That position is nonsensical. Eichel, Lang, Aaronson and Collins's beliefs that Cooke was incompetent were not altered by his suing them and remained as on-the-record indicia of his incompetence. Moreover, Cooke's act of suing them (which caused the cessation of their collective exploration of his competence) was itself so bizarre and irrational that it was itself an indicator of Cooke's incompetence.

The State follows the lower court in ignoring the myriad indicia of incompetence throughout the public record and counsel's extensive files. *See, e.g.,* A900-17; A1175-85 (placement summaries and psychiatric evaluations of Cooke as a child and adolescent); A1124 (Lang Interview summary); A1129-58 (Eichel notes and emails); A1159 (Cooke civil suit). True, mental health evaluations from before 2012 do not *prove* incompetence, but they are confirmations that Cooke has consistently suffered symptoms of mental health disorders his entire life, further indicia of his possible incompetence ignored by the trial court and counsel.

B. Ineffective assistance of counsel performance

Repeating the lower court's error, the State claims Cooke "flat-out refused" to submit to any further mental health examinations. *Answer,* 9. But the record makes clear that while Cooke would often tell various professional visitors that he would no longer meet with them, when they returned to see him again he did meet with them. *See, e.g.,* A1131 (Lang noting Cooke told her to leave but then stopped her from leaving). Unfortunately, we cannot know whether Cooke would have ultimately agreed to see a mental health expert hired by 2012 counsel, because they never even made the attempt.

Even if the State was correct that Cooke would have refused further mental health evaluations (and they were not, as evidenced by Cooke's willingness to see Eichel despite his frustration with 2007 counsel for challenging his mental health), this does not excuse 2012 counsel's failure to explore mental health defenses, and at least attempt to have Cooke evaluated. Counsel had at their disposal the multiple evaluations and testimony from the experts who evaluated Cooke prior to his first trial, which allowed counsel to investigate Cooke's mental health issues even if he refused additional evaluations. Counsel's admissions that their failure to investigate Cooke's obvious mental health concerns were driven by a fear of being fired by Cooke, A2808-09, A2816-18, do not constitute a reasonable or ethical strategy by effective counsel, especially in a capital case where their client was facing (and ultimately received) the death penalty. The lower court's reliance on counsel's

admissions, O51, is similarly flawed, yet the State fails to address this in any way. 2012 counsel's failure to consult with any mental health expert and even attempt to have Cooke evaluated out of fear of being fired was unreasonable and constituted deficient performance.

C. Prejudice/harm

The multiple mental health evaluations from Cooke's childhood, before the first trial, and by Eichel, and the observations of the several attorneys and experts who worked with Cooke, are corroborative of Dr. Agharkar's diagnosis of Cooke, which the State and the lower court improperly ignored in crediting Dr. Mechanick's views over Agharkar. For example, the State and the lower court both find credible Mechanick's testimony patently false testimony that no previous testing indicated Cooke suffers brain damage. *See Answer,* 13. As previously described and as evidenced in the record, several prior evaluations of Appellant dating back to his childhood indicate cognitive deficits including perceptual impairments that required him to be placed in the "perceptually impaired class," A917, and noting his impairments "maybe [sic] related to neurological or brain dysfunction." A907; s*ee also* A900; A912; A914; A926.

The State also repeats Mechanick's clearly false testimony that neuropsychological testing by Abraham Mensch, Ph.D. (in 2006) did not indicate brain damage. *Answer,* 13. Mensch found Cooke suffered several neurocognitive

deficits indicative of frontal lobe damage. A1006-07.[5] Reliance on Mechanick's clearly erroneous testimony by the State and the lower court is misplaced.

The State also repeats the lower court's inappropriate reliance on Mechanick's opinion that Cooke's pervasive and pathological racial paranoia did not rise to the level of a delusional disorder, as testified to by Agharkar, but was instead a rational belief based on his life experiences. *Answer,* 13 (citing A2676). As did the lower court, so too does the State overlook Mechanick's clear factual errors and omissions. For example, Mechanick alone opined that Cooke's beliefs were rational, in contrast to Drs. Turner and Bernstein who evaluated Cooke before the first trial. A939-41 (Turner finding paranoid ideation, bizarre behavior, and delusional thoughts); A945-46 (Bernstein finding "substantially disturbed thinking."). True, the 2007 doctors differed in their final diagnoses from Agharkar; however, all three consistently concluded Cooke's beliefs – his symptomology – were not rational. *See Opening,* 9-10 (detailing the consistencies across the 2007 experts' reports). The lower court had no basis to credit Mechanick's outlier opinions and the State offers no new basis now.

Nor can the State provide reason to credit Mechanick's misapprehension of Cooke's understanding of the evidence. Mechanick opined that, because DNA

[5] One factor noted by Mensch in 2006 – the disparity in Cooke's IQ scores – is consistent with testing by Dr. Padilla in 1979. A909.

science is complicated, it was "not surprising" that Cooke "misunderst[ood]" the DNA evidence. *Answer,* 14. Cooke was never asked to understand the science behind DNA evidence. First-trial- and interim counsel all testified that Cooke could not comprehend the *meaning* of the DNA evidence even after numerous explanations. *See, e.g.,* A1018-19; A1035-38.

Neither the lower court or the State addressed 2010 counsel's concerns about Cooke, nor Eichel's conclusions, consistent with Agharkar's, that Cooke suffered from a "bizarre belief system" and delusional disorder consistent with paranoid thinking. *Opening,* 11-12, A1062-64.

D. State's Reliance on the "Preponderance of the Evidence Standard" is Misplaced.

The State seemingly concedes Cooke's argument, *Opening,* 28, that the Claim that counsel were ineffective for raising Cooke's incompetence must be assessed under the "reasonable probability" proof standard rather than the "preponderance of the evidence" standard for assessing competency at trial. *Answer,* 27. Confusingly, the State contradicts itself in the next breath, insisting that "preponderance of the evidence" is the proper standard. *Id.* at 28. The State offers no support for this assertion, and do not address the jurisprudence holding to the contrary. *See, e.g., Strickland v. Washington,* 466 U.S. 668, 680-1 (1984) ("reasonable probability" proof standard governing ineffective assistance claims must be applied).

The State correctly asserts that the lower court's factual findings are given deference unless clearly erroneous or reliant on incompetent evidence. *Id.* However, the State declines to address Cooke's numerous examples, *supra* and *Opening,* 31-38, of the lower court committing clear error or relying on incompetent evidence.

3. ISSUE II: COUNSEL'S INEFFECTIVE INVESTIGATION AND PRESENTATION OF A DEFENSE.

A. The lower court's dissection of this Claim.

1. Claim 2 was and remains a single claim.

According to the State, Cooke's argument that the lower court improperly split his single ineffectiveness claim into multiple separate claims is waived because it was not raised below. *Answer,* 35. That assertation is wrong.

It is not clear how Cooke would have objected to the lower court's improper dissection of his claim when that dissection first appeared in the court's opinion denying the Rule 61. *See*, *e.g.*, O51-53, 72-73 (counsel's failure[6] to raise incompetence addressed in isolation); O118-19 (same, re. failure to move to suppress statement); O126-27 (same, re. allegations of inadequate investigation and advice to client); O128-48 (same, re. inadequate investigation of Campbell testimony, *and* further dividing allegations into smaller independent claims); O149-51 (same, re. inadequate investigation of police misconduct); O152-16 (same, re. investigation of Cuadra identification, *and* referring to the allegations as "MULTIPLE CLAIMS."); O164-78, 181-214, 228 (dividing allegations concerning inadequacy of counsel's investigation into twenty-two separate claims). Cooke is not

[6] "Failure" here concerns counsel's performance, and is not a byword for "ineffective assistance of counsel." As addressed below, allegations concerning performance must be assessed inside the context of the case as a whole, and with consideration of all surrounding circumstances.

required to preemptively respond to the court's rewriting of his Claim in a way that contradicts established jurisprudence. As required, Cooke's Rule 61, and his argument to the lower court, pled a single ineffectiveness claim under Claim 2. His argument here is not a "new iteration" but a continuation of his consistent Claim.

Cooke pled, and continues to argue, his ineffectiveness claim in this manner because that is how the Supreme Court has explained such claims. In *Strickland*, the petitioner "challenged counsel's assistance in six respects."[7] *Strickland*, 466 U.S. at 675. The Court did not conduct six analyses but addressed the allegations as a single claim for relief. *Id.* at 698-701.

The reason for the Court's approach is manifested in its explanation of the performance element. Counsel's performance – their decisions – are "directly assessed for reasonableness in all the circumstances…" *Strickland*, 466 U.S. at 690-91 (emphasis added). That assessment "includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (citing *Strickland*, 466 U.S. at 689). As the lower court's opinion shows, it is impossible to consider counsel's performance in context when the circumstances of that performance are treated as distinct claims in isolation

[7]Failures to: request a continuance, request a psychiatric report, investigate and present character witnesses, seek a presentence investigation report, present meaningful arguments, and investigate the medical examiner's reports or cross-examine the medical experts. *Strickland*, 466 U.S. at 675.

of each other. Only by considering, for example, the DNA evidence alongside the eyewitness evidence alongside evidence of alternative suspects alongside police errors alongside Cooke's mental health, that counsel's decision as to their defense can be assessed in context.

Cooke pled Claim 2 in the prescribed manner. Concerning the performance element, Cooke pled and maintains now that counsel's decision as to what defense to present and how that decision was made without an adequate investigation was deficient. Cooke was prejudiced because, had counsel conducted an adequate investigation, they would have possessed evidence material, to, *inter alia*: Cooke's decision to testify; whether and which alternative perpetrator to point to; whether and how to confront material lay and police witnesses; whether, what, and how to present a defense case-in-chief; and multiple other questions. There is a reasonable probability that, given that information, counsel would have presented a defense that would have persuaded at least one juror to reach a different verdict. This was, and is, Cooke's Claim 2. That Claim should have been analyzed accordingly by the lower court.

2. Zebroski is inapposite.

The State argues this Court has previously rejected an argument that ineffectiveness claims cannot be considered "piecemeal." *Answer,* 36 (citing *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003)). The State mistakenly considers

"piecemeal" a term of art imbued with special legal meaning rather than a simple description. Review of *Zebroski* confirms the State's error.

Zebroski's Rule 61 motion contains six allegations of counsel-error. AR4-6. Notably, they are presented as distinct claims for relief, likely because they are generally unrelated; i.e. they offer no interrelated context. *See*, *e.g.*, *id.* (allegation 12(a): advice that Zebroski sit for police interview, provides no relevant context for counsel's investigation (12(b)) or requested voir dire (12(c))); c*f. Wiggins*, 539 U.S. at 523 (counsel's performance assessed in light of surrounding context.) Thus, Zebroski's pled "piecemeal" several separate claims that were appropriately addressed "piecemeal."[8] Cooke's Claim 2 was not pled "piecemeal" because it was not several separate claims. It should not have been reviewed piecemeal.

B. The State repeats the lower court's errors without support.

The State's refusal to engage with Claim 2's allegations as pled taints its understanding of the factual allegations contained therein, much as the same error tainted the lower court's analysis. For example, the State asserts that "the decision whether or not to pursue DNA evidence is a strategic trial decision that will be

[8] A fact this Court correctly identified when it identified the ineffectiveness issues as failure to request a suitable voir dire, failure to investigate and present a mitigation case, failure to request appointment of co-counsel, and failure to timely begin investigation. *Zebroski*, 822 A.2d at 1043. Again, the type of voir dire requested provides no context for counsel's decision when to investigate, or not to present a mitigation case.

upheld if reasonable." *Answer,* 40. This is correct as far as it goes. But the State neglects to consider the context of counsel's "(non)pursuit" of DNA evidence.

The State goes even further regarding Cooke's other allegations, explicitly treating each as complete claims in their own right. *E.g.*, *Answer* 44-45 ("Cooke contends that counsel were ineffective" for their cross-examination of Campbell); 48 ("Cooke cannot demonstrate deficient performance or prejudice" as to counsel's investigation into Cuadra's statements and testimony); 50 ("Cooke cannot show that counsel's decision [not to investigate and present evidence of other alternative suspects] amounted to ineffective assistance."); 52 ("…Cooke's allegations of deficient performance and prejudice [concerning counsel's non investigation into police errors and misconduct] are conclusory and hypothetical…"). *If* Cooke had pled these distinct claims, the State's response would be appropriate (albeit factually wrong). But he did not.

The allegations in the "performance" sections of Claim 2 detail both the investigation that was available to counsel, and the context and circumstances demonstrating why that investigation was required. Because the State fails to grasp this, its only response is strawman arguments. For example, the State argues that Cooke raises "for the first time" on appeal "counsel were ineffective for deciding to provide an 'innocent explanation' for the State's DNA evidence." *Answer,* 37. Not so. Cooke has consistently claimed counsel's decision of what defense to present

and how it was unreasonable because, in part, they had not investigated the credibility of the DNA evidence, or that Campbell's alibi-statement to police should be believed over her contrary testimony. A718, *et seq.* (Rule 61, Claim 2.) At the hearing below, counsel confirmed their defense theory included providing an innocent explanation for the presence of Cooke's DNA evidence. A2816; A2818-19. Counsel based that defense on Cooke's impossible and incredible testimony instead of investigating any other more objective evidence that would obviate the need for Cooke's harmful testimony.[9]

C. The State's erroneous application of the law to the facts.

1. Performance

The State and the lower court accept without question counsel's explanation that they did not conduct that investigation because Cooke opposed "mental health" defenses, would refuse any further evaluations, and would fire them if they tried. A2808-09; A2816-18. That acceptance is unsupportable factually, legally, or ethically.

Factually, Lang noted Cooke would "refuse" to meet her, but would then agree to meet her when asked. A2762.

[9] Reasonable counsel would also have investigated Mr. Cooke's mental state given his inability to comprehend either the evidence against him or the harm his intended testimony would cause him. *See* A773-75.

The lower court's conclusion, O51; O53, that Cooke fired those who investigated mental health is belied by the record. *See Opening,* 4-5 (citing A629) (Cooke does not fire first counsel even though they present a GMBI defense over his objections); *id.* at 5 (citing A1159-74; A978-79) (Cooke sued interim counsel for "'conspiring' with the trial judge and the State, withholding evidence, filing fraudulent motions, and keeping him in solitary confinement.") Indeed, the only counsel Cooke *did* fire was counsel, even though they did *not* investigate mental health issues. *Id.* (citing A369-7; A378-80; A440-41; A487-88).

Even if counsel's fear was factually supported, it was no reason not to investigate Cooke's obvious impairments. Their decision was an abdication of their obligations to Cooke in order to protect their interest in not losing their appointment. *Opening,* 27**.** The State does not address the factual, legal, or ethical errors in counsel's and the lower court's reasoning.

The State calls Cooke's argument that counsel "neglected DNA issues" "specious," *Answer,* 39, but fails to accurately justify its pejorative.

The State's reference to first counsel's consultation with an OPD attorney who possessed a graduate degree in forensic science, *id.*, is not paired with any explanation how that relates to second-counsel's DNA investigation.[10] Moreover,

[10] The record contains no evidence of this attorney's qualifications in DNA analysis. The only reference is the testimony of attorneys O'Connell and O'Neil. A1019;

the State's reliance on the performance of first counsel, who were found ineffective, A629, is misplaced.

Continuing to rely on the performance of prior counsel, the State also points to interim counsel's retention of a Dr. Adamowicz and NMS to review the DNA evidence. *Answer,* 39. But the State overlooks that Collins retained NMS to review the DNA statistics, *id.*, and Collins had not received any analysis from Adamowicz, *see* B372-73 (Collins reports his motion for funding for Adamowicz was not granted before he withdrew). Consequently, even though counsel "received first and interim counsel's files," the State's implication that those files contained analyses of the DNA evidence is misleading.

The State's reliance on the performances of prior counsel undercuts its position. First counsel were ineffective because conceded guilt, a decision they made having only consulted with their internal screener. Interim counsel recognized the materiality of the DNA evidence and started investigating it. These circumstances suggest the "professional norms" against which counsel's performance is assessed, *Strickland*, 466 U.S. at 688, include investigating the DNA evidence. The State ignores this context just as it ignores the specific context of the case-facts as summarized in the Opening Brief.

B370, B803, B901-02. While that testimony can show what first counsel knew at the time, it is inadmissible hearsay if offered for the truth of that attorney's expertise. D.R.E. 801(c)(2).

The State similarly ignores, or misstates, the context surrounding counsel's investigation of Campbell's evolving story. For example, the State incorrectly opines that Campbell's statement to police did not include an alibi. *Answer,* 46. But Campbell told police that Cooke never left the house the night of Bonistall's murder, A951, thus providing an alibi. Campbell also preemptively and independently corroborated Cooke's later explanation of how he came by Cuadra's backpack. A951. Campbell's statement therefore provided an independent corroboration of Cooke's explanation of how he got the backpack, a material issue as the prosecution's case included the theory that Cuadra's assailant killed Bonistall,

Counsel intended to cross-examine Campbell with her prior inconsistent statement and her multiple interactions with police with the goal of "prov[ing] that maybe she was mistaken about identifying her husband or James [using Cuadra's credit card]" and that "he [sic] was coerced into saying -- giving the --…" inculpatory testimony.[11] B1103, B11055. Given this context, counsel's failure to confirm Campbell's authorship of the letter, failure to investigate the number and manner of police interactions with her between statement and testimony, and/or failure to seek expert evidence on nature and effect of police coercion on witnesses, counsel's investigation was inadequate.

[11] Attorney Figliola's answer tails off without completion, but the surrounding context indicates his meaning as stated.

Concerning counsel's investigation and development of Cuadra's "identification" of Cooke as her assailant, the State claims counsel "deftly handled cross-examination of Cuadra and Detective Rubin." *Answer,* 48. That description is misleading, not least because the State's supports, *id.*, it with the erroneous claim the jury was made aware that Det. Rubin telling Cuadra she picked the "wrong guy" was highly improper.[12] Moreover, counsel's handling – deft or otherwise – would have been obviated by adequate pre-trial investigation, such as interviewing Cuadra or requesting police records on meetings with her, such as Det. Rubin's meeting with Cuadra to "firm up" her identification. In the context of the case, as summarized in the Opening Brief, *Opening,* 48, counsel's investigation was inadequate.

Counsel's inadequate efforts to investigate Campbell and Cuadra are indicative of their lack of uninterest in the police investigation. Despite the context of the case, as summarized in the Opening Brief, *Opening,* 51, counsel made no effort to investigate any deficiencies in the police investigation, another inadequacy in their overall investigation.

The State argues that the court's exclusion of evidence of Bonistall's romantic partners and counsel's failure to "chase every lead or [] violate ethical rules," do not render their decision to blame Bonistall's murder on an unidentifiable UPenn student

[12] Following the sidebar called to address that revelation, counsel did not request any curative action. Counsel confirmed this, explaining, "I didn't think it was appropriate. I only object when I think I'm going to win." A2818.

was unreasonable. *Answer,* 49. Moreover, the State insists, "Sentel, Jervey, Breckin, or Figgs" were in no way linked to the murder, meaning counsel had no reason to investigate them. *Id.*

The State appears to rely on the Rule 61 allegations and not the oral amendments made at the evidentiary hearing based on evidence received. Cooke conceded that Sentel was properly investigated and could not be considered a viable alternative perpetrator. B1149. The State does not address Cooke's Rule 61 allegations that unnamed magazine sellers, two men found with "burglary tools," several probationers and parolee, and numerous other individuals were suspects warranting counsel's interest. A744-66. The State also ignores clear evidence that all the suspects identified by Cooke assuredly were suspects. *E.g.,* A2733-35; A2735-37; A2733-39, A2744; A2747 (police reports concerning suspects were produced in *this* case and bear this case's identification number.)

Again, the State insists that counsel's investigation was sufficient because they "did investigate" many alternative suspects. *Answer,* 50. Again, the allegation is not that counsel did *nothing* but that what they did was inadequate in context.

Moreover, counsel's recollection that they investigated Warren is not supported by any documentation. It was established, though, that they did not seek production of the DVDs and CDs Warren pawned during his flight from Newark (to compare to those taken from Bonistall's apartment), A2736, and did not seek

production of records explaining why police sought his extradition, or why that extradition was dropped, A2815. Counsel confirmed they were not interested in investigating Jermaine Jervey, A2820. However, it was also established that they did not request, for example, Jervey's police interrogations. A2821.

Records only confirm that counsel investigated Sentel, Breckin, and the hypothetical UPenn student. However, that investigation also confirmed none were viable suspects. A2763 (Sentel); A2825 (Breckin); A2815 (UPenn student). Nevertheless, counsel decided to base their defense on the UPenn student despite having no evidence identifying him, providing motive, or showing opportunity. That decision was made without adequate/any investigation into the other viable alternative suspects.

Given all the surrounding circumstances, counsel's non-investigation into Cooke's mental health, and their cursory investigation into the DNA evidence, Campbell and Cuadra's changed stories, the police abandonment of all leads, and the several viable alternative suspects, were all inadequate. Based on that inadequate investigation, counsel's decision to present a defense based on Cooke's impossible testimony and a non-existent alternative-perpetrator was unreasonable.

2. Prejudice

The State's obstinate insistence that it controls Cooke's claims also impairs its analysis of the resulting prejudice. Rather than considering the "unaffected

findings" of the jury and "taking due account of the errors" of counsel, *Strickland*, 466 U.S. at 695 (emphasis added), the State instead treats the consequences of counsel's inadequate investigation in isolation based on their subject. As already addressed, this approach effectively rewrites Cooke's claims in a way that is contrary to the established jurisprudence and should be rejected. However, the State also makes a number of factual errors in its treatment of those consequences, and so those require brief reply.

For example, the State claims that Dr. Krane testified that "he was satisfied" that the lab protocols addressed his concerns about the DNA evidence and did not "negatively impact the conclusions in the State's DNA report and testimony." *Answer,* 41 (citing B161, B1052, 1055-61). The State misstates Krane's testimony.

It is true that Krane concluded both that the lab responded appropriately to the false-positive result in one of the runs, and that the mixed DNA profile taken from Bonistall's fingernails contained only Bonistall's and Cooke's DNA. *Answer,* 39. However, Dr. Krane also confirmed that at least one of his concerns with the lab's handling and testing of the DNA evidence was not allayed, and in fact were enhance: Dr. Krane explained that while "injection failures" and "sample swaps" do happen in DNA labs, the frequency of their occurrences in this case "is worrisome" and "seems to be occurring with a higher-than-expected frequency." A2770. He further explained that the most likely explanation for the false-positives seen in this case is

a "sample switch", i.e. a sample that was believed to be/recorded as from one source was in fact from a different source. A2768-69. The only way of identifying the two switched samples is to review the relevant .fsa file, but that particular .fsa file was missing. *Id.* Whether deliberately or accidentally, the one piece of data that could confirm what sample was mistakenly swapped with the control no longer exists.

Dr. Krane also explained that, based on the entirety of materials he eventually received, the lab's SOPs did not rectify the problem manifested by the false-positive. Only complete retesting, A2770, as opposed to simply re-prepping the run (as required by the SOPs), would confirm the swap was corrected.

The lower court opined that Dr. Krane's concerns did not warrant throwing out the "baby" of the DNA results, because of Dr. Krane's testimony that the mixed DNA profile contained only Cooke's and Bonistall's DNA. O36 ("[H]e's not telling me there's somebody else there.") The court, and now the State, missed what was truly "worrisome" about the DNA evidence: the lab was committing far more sample swaps and similar errors than would be expected, and its SOPs – while appropriate and followed – did not rectify that problem here. That "problem" raised the very real concern that any sample (such as, for example, Cooke's) contaminated *any other sample in the lab*, including, critically, the samples from Bonistall.

Certainly, this is not proof-positive of actual innocence. But Cooke has alleged ineffective assistance of counsel, which requires a reasonable probability the

result of trial would have been different in light of *all* the evidence missed by counsel.

Following an adequate investigation counsel would also have possessed: corroboration of Campbell's exculpatory statement, which she changed because of police coercion; evidence that Cuadra's identification of Cooke was tainted by police coercion; evidence that police dropped investigations of alternative suspects once the (likely contaminated) DNA evidence pointed to Cooke, as well as either sufficient evidence and understanding of Cooke's mental health to persuade him he did not need to testify, or an understanding they needed to alert the court of his incompetence. There is a reasonable probability that, with counsel possessing these fruits of an adequate investigate, the result of trial would have been different.

4. ISSUE III: COUNSEL'S FAILURE TO ADDRESS *BATSON* ISSUES.

As detailed above, ineffectiveness of counsel may demonstrate cause and prejudice to overcome procedural bars and constitutes a separate and distinct claim in and of itself. *Supra*, Section 1. The State does not dispute this but argues neither apply because there is no constitutional right to standby counsel. *Answer,* 55. The State is correct. However, Cooke has never claimed standby counsel's ineffectiveness, but rather that, "counsel's [in]effectiveness once they resumed the representation is a cognizable claim and reason to overcome the procedural bar." *Opening,* 58 (emphasis added).

The State does not address counsel's clear, but inconsistent, explanations for not raising *Batson* issues on appeal. A2764; A2813. Counsel's decision not to uphold Cooke's constitutional rights once they resumed the representation was unreasonable.

The State incorrectly argues that the *Batson* issues were not "clearly stronger than the ten appellate claims" that were appealed. *Answer,* 57. First, the ten claims raised were all denied. Second, five of those claims were subject to abuse of discretion review, *Cooke v. State*, 97 A.3d 513 (Del. 2014), whereas the *Batson* claim would have received more stringent review. *Jones v. State*, 938 A.2d 626, 631-32 (Del. 2007) (Prosecutor's race-neutral explanations are reviewed *de novo*; the trial court's "discriminatory intent" findings reviewed for clear error.).

The Rule 61 details the "totality of circumstances" that the trial court failed to consider when it reviewed the State's race-neutral explanations, an issue the State declines to address. A822-26. The State also declines to address the fact the prosecutor expressly invoked race in their jury selection. *Opening,* 60, citing A424. Considering the applicable standard of review and the record-facts, the *B*at*son* issues were stronger than several of the claims raised on appeal.

The State wrongly accuses Cooke of seeking to avoid prejudice. *Answer,* 57. Cooke clearly alleged and discussed prejudice. *E.g.*, *Opening,* 58-59 ("2. Prejudice"); 59-60 (Addressing "[t]he State's discriminatory intent" via *Strickland* prejudice.)

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

The State agrees with the lower court that counsel reasonably decided not to challenge the admission of the statement over Cooke's objection once the representation resumed. *Answer,* 61. The State also asserts counsel's filing of a pre-trial motion to suppress demonstrates their effectiveness. *Answer,* 62.

As addressed in section 2, *supra*, and in the Opening Brief, *Opening,* 27, counsel are obliged to make their own strategic decisions, not rely on the strategic decisions of their client, especially when that client displays multiple indicia of mental/cognitive impairment, or even incompetence. Moreover, counsel's pre-trial motion demonstrates the unreasonableness of their inaction at trial. Counsel clearly believed Cooke's statement was suppressible. Nothing had changed once trial had begun. Their failure to readdress suppression when they resumed representation is inexplicable and unreasonable.

On prejudice, the State argues Cooke possessed the capacity to make a knowing and intelligent waiver of his *Miranda* rights. *Answer,* 62-64. As described more fully in Section 2, *supra,* and in the Opening Brief, *Opening,* 28-42, the court and counsel had myriad indicia of Cooke's mental/cognitive impairments, let alone incompetence. Those indicia were present and similarly apparent at his interrogation but were ignored by police. Cooke told his interrogators at least ten times that he did not understand: A321 ("I can't comprehend you"); A323-24 ("I can't comprehend

man . . . I don't comprehend stuff"); A339-40 ("I don't comprehend anything you're saying anyway . . . I still can't comprehend the thing, whatever you're trying to say"); A345-46 ("I don't comprehend. If I don't comprehend, what what can you do about it? Please. If I don't comprehend what you gonna force me to comprehend?"); A355 ("You can't force me to comprehend if I don't comprehend it"); A362 (after Det. Rubin begins reading *Miranda* rights: "I can understand a little bit. I can comprehend a little bit of it.").

The State argues Cooke's remarks were "self-serving." *Answer,* 63. Even if that were the case, the interrogation police should have stopped immediately once Cooke expressed that he did not understand his *Miranda* rights or the proffered waiver. *Crawford v. State*, 580 A.2d 571, 574 (Del. 1990) (citing *Edwards v. Arizona*, 451 U.S. 477 (1981).)

The lower court failed to even address Cooke's multiple invocations of his right to counsel throughout the interrogation. The State suggests the interrogators "appropriately clarify[ied] that Cooke was willing to proceed without counsel." *Answer,* 64. This belies the record. Cooke asked multiple times for a lawyer; on each occasion, police continued with the interrogation:

> Cooke: So, I mean, where's the lawyer at then? Where's the lawyer that supposed to be here?
>
> Cocoran: I don't know.
>
> Cooke: I mean I don't have no money. I don't have anything. What, what do I have?

Corcoran: I don't know.

A2368.

This Court's and United States Supreme Court jurisprudence clearly require that, when Cooke clearly indicated his desire for counsel but did not understand he did not have to pay for one if he could not afford it, the interrogation had to stop. *Opening,* 62 (citing *Crawford* [], 580 A.2d 571; *Edwards* [], 451 U.S. 477.). The continuation of the interrogation even after Cooke had asked for counsel violated Cooke's Fifth and Sixth Amendment rights.

The State disputes any possible prejudice because, even if the statement was suppressed it could have been used to impeach Cooke when he testified. *Answer,* 64. That assumes Cooke would have testified; as Cooke has consistently argued, the context and totality of the evidence matters. How counsel understood Cooke's clear mental/cognitive impairments vis-à-vis his statement necessarily interacts with their understanding of his overall competence. By investigating the former, counsel would have necessarily also learned how Cooke's impairments affected his overall competence, or at least to waive his silence right; or, counsel would have learned they could present evidence on Cooke's impairments to mitigate his damaging testimony. In short, in the context of the entire case, counsel's performance was deficient and prejudicial.

6. ISSUE V: THE DENIAL OF A CONTINUANCE.

The State argues this claim is procedurally barred under Rule 61(i)(4) as previously litigated, and that the cause and prejudice exception does not apply. *Answer,* 66-67. The State misconstrue this claim. As described in Claim II, *supra*, in the Opening Brief, *Opening,* 65-6, and Rule 61, A872-73, the prejudice resulting from the court's denial of Cooke's request for a continuance derived from counsel's deficient failure to raise and present evidence of Cooke's cognitive and mental health issues prior to Cooke being allowed to proceed *pro se.* It was therefore counsel's ineffective assistance that led to Cooke seeking *pro se* status and the continuance being denied. This claim is substantially different from what was presented on direct appeal, A575-83, thus the Rule 61(i)(4) previous litigation bar does not apply. Because this claim is based on counsel's ineffectiveness, contrary to Cooke's contentions, the cause and prejudice exception to the bars does apply and this claim is properly before this Court.

7. ISSUE VII: DENIAL OF DISCOVERY

Cooke's Rule 61 contains multiple allegations that certain favorable and material evidence existed in the State's possession or control. *Generally*, A741-53; A753-72; A780-804. The existence of said evidence implicates both the prosecution's *Brady* obligations and counsel's obligations to conduct a reasonable investigation, including requesting discovery.

The State argues generally that Cooke has not proven the complained-of evidence was material.[13] To the extent that the lack of proof is because the complained-of evidence is not in the record, Cooke agrees; the State has sole possession/control of it, hence Cooke's claims (which include as elements the fact that he was not provided said evidence). This, of course, highlights the inherent problem with Rule 61's discovery rules regarding prosecution suppression of evidence; the movant cannot prove his claim unless the State produces the identified evidence, but the State is not required to produce the identified evidence unless the movant shows his claim will likely succeed, a showing that depends on his confirming the contents of the complained-of evidence. Where the State refuses, as it did here, to confirm even whether the evidence's existence, the State prevents all judicial review of any *Brady* (or related) claim.

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[13] *Strickland*-prejudice mirrors *Brady*-materiality. *Strickland*, 466 U.S. at 694. For ease, this section will use materiality to refer to both unless specifically stated otherwise.

In his Opening Brief, Cooke opined that courts have rejected a general rule that the prosecutor has final say over whether some piece of withheld evidence must be produced. *Opening,* 69. He also noted the lower court's reliance on *Pennsylvania v. Ritchie* to hold the opposite misinterpreted that case. *Id.* The State counters, insisting Cooke is wrong and *Ritchie* holds that a prosecutor's *Brady* determination is "final." *Answer,* 70. Notwithstanding that the State does not address specific *Ritchie* holding Cooke cites (state laws barring disclosure of certain classes of evidence do not trump due process, *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987)), the State's misstates *Ritchie*.

Ritchie holds, "where a defendant makes only a general request for exculpatory material under *Brady* []," the prosecutor possesses final authority on disclosure "unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention." *Ritchie*, at 60 (emphases added). Following his conviction, Cooke became aware that certain materials and other evidence likely existed in the State's possession or control, and made specific requests for production, identifying what that evidence was and why he believed it exists. A97, DE630. The lower court's blanket rejection of those requests was in error.

The State adopts the lower court's clearly erroneous conclusion that the State made "near-blanket production" of evidence pre-trial. *Answer,* 71. It is true the

prosecution State produced a great deal of paper, including many police reports. However, the Rule 61 proceedings establish that its production was far from "near-blanket."

For example, the produced police reports were redacted to the point of near uselessness. A718-20. Where intelligible, those reports indicate other, unproduced, evidence exists or *should* exist. For example, police sought an extradition warrant for Warren because he was a suspect in this case, and obtained details of various DVDs and CDs pawned by Warren when he fled Newark shortly after the murder. A2737. And it is established that Warren was dropped as a suspect without documented reason. The allegations in the warrant application, the titles of the DVDs and CDs, and the reasons why Warren was dropped as a suspect, were not produced. It is reasonable to infer that the warrant-allegations are favorable to Cooke, as they explain why police suspected Warren. Cooke can only speculate as to DVD/CD titles or why Warren was dropped as a suspect, it is true, but that exemplifies how the discovery restrictions prevented him from proving his allegations.

But even notwithstanding the actual content of police records, the non-existence of such records is also *Brady* material. For example, if police did *not* fully investigate Warren, and dropped him as a suspect without reason once Cooke became a suspect, *th*at is favorable to Cooke and material because it would show the paucity, or bias, of the police investigation.

The specific facts of these proceedings further demonstrate why the State's *Brady*-assurances here cannot be "final." After assuring the court it had no "*Brady* material," B681, *et seq.*, the State later produced various records that Cooke had previously requested. The State cannot be entrusted with the final determination of whether a piece of evidence is material; rather, that determination must consider the evidence presented at trial, and (for the ineffectiveness allegations) all the missing evidence detailed in Claim 2. The lower court failed to conduct that analysis, and the State asks this Court to repeat that error. That request should be rejected.

Finally, it is important to address the State's reference to the Victim's Bill of Rights ("VBR") as barring production of much of the evidence requested by Cooke. *Answer,* 72 (citing both the lower court's Order and the State's invocation of the VBR, below). The Victim's Bill of Rights, in relevant part, prohibits the State from producing the "residential address, telephone number or place of employment of the victim or a member of the victim's family…" Del. C. § 9403(a). Cooke nowhere alleged that the State suppressed, or that counsel failed to request, the victim's name or other details, not least because it was freely produced pre-trial. The State has never explained how it can ignore restrictions on production of victims' information, but must prevent production of any all witnesses' information.

The VBR's plain language reveals the absolute bar on witness information imposed by the lower court is misplaced. Section 9403 prohibits disclosure of the

"identity" of a "witness," i.e. "any person other than a law-enforcement officer or probation officer who has knowledge of the existence or nonexistence of any fact related to any crime…" Del. C. § 9401(8). Section 9403 does not require that information obtained from witnesses, or indeed any information other than witnesses' identities, be withheld. Yet here, on multiple occasions the State redacted not only the identities of witnesses interviewed by police, but also the subject, content, and result of those interviews, far exceeding the VBR's parameters. *E.g.* B34; B36; B39.

Even if the VBR is so expansive, its expansion is mitigated by the Rules of Criminal Procedure and by due process.

Section 9403 makes clear that any prohibition on production applies "except to the extent that disclosure is required by the Rules of Criminal Procedure." Del. C. § 9403(a). Thus, any material that is required to be produced under Rule 16 is not barred from production by the VBR. Rule 16(C) of the Rules of Criminal Procedure specifically mandates that the prosecution produce, if asked, any evidence in its "possession, custody or control" that is "material to the preparation of the defendant's defense…" or is "intended for use by the state as evidence in chief." Del. Crim. R. C. P. 16. While the prosecution certainly is in the best position to know what evidence it will use at trial, the prosecution does not have access to defense counsel's work product, communications with their client, or any other information

concerning their trial preparation. The prosecution cannot, therefore, be in a position to have final say whether any evidence is material to counsel's preparation.

It is true that none of the above-cited evidence is entirely or dispositively exculpatory. But materiality is not limited to exculpatory evidence, but applies to both guilt/innocence and penalty results, and includes impeachment evidence, *Giglio v. United States*, 405 U.S. 150 (1972), and evidence that would affect the defense's preparation for trial, *United States v. Bagley*, 473 U.S. 667, 683 (1985). Due process requirements supersede the VBR's restrictions. *See Ritchie*, 480 U.S. at 59 (holding that a state law prohibiting disclosure of CYS records does not trump the constitutional obligation to produce favorable material.) Thus, the VBR cannot and does not prevent production of anything covered by *Brady et al*. The State's insistence otherwise should be rejected, and the lower court's holding otherwise should be reversed.

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