No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM BURTON
Petitioner

v.

STATE OF DELAWARE
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE
Volume I of II
(A1-125)

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Case Number 287,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM BURTON,	§	
	§	No. 287, 2018
Defendant-Below,	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware
v.	§	
	§	Cr. ID. No. 1301022871(N)
STATE OF DELAWARE,	§	
	§	
Plaintiff-Below,	§	
Appellee.	§	

Submitted: December 12, 2018
Decided: December 26, 2018

Before **STRINE**, Chief Justice, **VALIHURA**, and **SEITZ**, Justices.

ORDER

This 26th day of December, 2018, having considered the briefs and the record below, it appears to the Court that:

(1) After a Superior Court bench trial, the trial judge found William Burton guilty of drug dealing, aggravated possession of cocaine, two counts of illegal possession of marijuana, and possession of drug paraphernalia. While his direct appeal was pending, evidence irregularities were found in an unrelated case involving testimony from the Office of Chief Medical Examiner ("OCME"). The Public Defender's office filed a motion for postconviction relief on behalf of a number of defendants, including Burton, based on the OCME misconduct. The

Superior Court denied the motion as to Burton without reaching the merits to allow Burton to pursue the motion on his own.[1] We stayed Burton's direct appeal and remanded to allow Burton to file motions in his case to supplement the record and for a new trial in light of the OCME evidence irregularities. The Superior Court denied Burton's motions, and this Court affirmed on appeal.[2]

(2) Burton filed a motion for postconviction relief in August 2016. The court appointed counsel, who filed an amended motion. In the amended motion, Burton alleged that the State violated *Brady v. Maryland*[3] by withholding evidence related to the OCME misconduct. He also claimed that his trial counsel was ineffective under *Strickland v. Washington*[4] for agreeing to stipulate to the State's trial evidence without his consent. The Superior Court found that Burton's claims were not procedurally barred under Rule 61 and denied both claims on the merits.[5] Burton has appealed from this decision.

(3) We review the Superior Court's decision to deny postconviction relief for abuse of discretion.[6] We review questions of law or constitutional violations *de novo*.[7] Before addressing the merits, Burton must meet the procedural requirements

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[1] App. to Opening Br. at A522-23 (Letter from Judge Carpenter on *pro se* Motion).
[2] *Burton v. State*, 2016 WL 3381847 (Del. June 8, 2016).
[3] 373 U.S. 83 (1963).
[4] 466 U.S. 668 (1984).
[5] *State v. Burton*, 2018 WL 2077325 (Del. Super. Apr. 30, 2018).
[6] *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).
[7] *Id.*

of Superior Court Criminal Rule 61."[8] The Superior Court must apply the version of Rule 61 in effect at the time the motion for postconviction relief was filed.[9]

(4) For the *Brady* claim the Superior Court implicitly decided that Burton's claim was formerly adjudicated in Burton's earlier motion and thus barred under Rule 61(i)(4).[10] But the court applied the "miscarriage of justice" exception under Rule 61(i)(5) to reach the merits of his claim.[11] Unfortunately, the Superior Court applied the incorrect version of Rule 61 when reviewing Burton's motion. Burton filed his motion for postconviction relief on August 11, 2016. Thus, the June 1, 2015 version of Rule 61 applied. Under that, and subsequent, versions of the rule there is no longer a miscarriage of justice exception.[12] The June 1, 2015 version's only exceptions to Rule 61(i)(4) are if the movant "pleads with particularity that new evidence exists that creates a strong inference that the movant is actually innocent" or "claim[s] that a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court or the Delaware Supreme

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[8] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).
[9] *Redden v. State*, 150 A.3d 768, 778 (Del. 2016).
[10] The Superior Court failed to make a definitive statement that the issue was formerly adjudicated but framed the discussion under Burton's argument that the issue "should not be barred procedurally under Rule 61(i)(4)." The court then went on to cite the superseded "miscarriage of justice" exception before analyzing the merits. *Burton*, 2018 WL 2077325, at *2.
[11] The Superior Court also referenced the "interest of justice" exception, but this exception was removed in 2014. *Coles v. State*, 2017 WL 3259697, at *2 (Del. Jul. 31, 2017) (interest of justice exception no longer applicable after 2014 amendments to Rule 61).
[12] *State v. Sturgis*, 2018 WL 6046759, at *3 (Del. Super. Nov. 19, 2018) (finding that the miscarriage of justice exception no longer applies under the new version of Rule 61).

Court, applies to the movant's case and renders the conviction or death sentence invalid."

(5) When the correct version of Rule 61 is applied, Burton's *Brady* claim is barred. Burton has already raised his *Brady* claim in his November 2015 motion for a new trial.[13] Thus, the claim is formerly adjudicated. Burton correctly points out that some additional information about the OCME misconduct has come to light since then, and there were minor weight discrepancies in the substances seized from him. But, the additional information does not provide "a strong inference" of Burton's "actual[] innocen[ce]" as the new rule requires.[14] Simply alleging general problems at the OCME or slight weight differences is insufficient to imply actual innocence in Burton's case, especially when Burton has not claimed actual innocence. Further, Burton has not directly alleged that the substances collected during the investigation of his criminal activity were not illegal drugs. Thus, Burton's *Brady* claim is barred by Rule 61.

(6) Burton's Strickland claim is not barred by Rule 61.[15] A *Strickland* ineffective assistance of counsel claim requires that the movant show "a reasonable

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[13] App. to Opening Br. at A327-33 (Order Denying Motion for New Trial).
[14] Super. Ct. Crim. R. 61(d)(2)(i) (2016).
[15] Timely ineffective assistance of counsel claims cannot be raised on direct appeal, and must instead be argued in a postconviction motion. *Watson v. State*, 80 A.3d 961 2013 WL 5745708 at *2 (Del. 2013) (TABLE) ("this Court will not consider a claim of ineffective assistance that is raised for the first time in a direct appeal.").

probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different."[16] If Burton cannot show prejudice by counsel's alleged errors, we need not decide if "counsel's representation fell below an objective standard of reasonableness."[17] Here, Burton has alleged that his trial counsel was ineffective for stipulating to the State's drug evidence, but, as the Superior Court correctly decided, he cannot show prejudice by counsel's alleged errors. As the Superior Court held, it is unlikely trial counsel would have achieved anything by contesting the drug evidence. Burton knowingly, intelligently, and voluntarily agreed to stipulate to the State's drug evidence. The evidence of Burton's guilt was also overwhelming. Burton confessed to flushing cocaine down the toilet, and the drugs were seized from his room while he was present.[18] Thus, Burton's *Strickland* claim fails.

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[16] *Strickland*, 466 U.S. at 694 (1984).

[17] *Id.* Purnell v. State, 106 A.3d 337, 342 (Del. 2014) ("In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.") (quoting *Strickland*, 466 U.S. at 697); *Ploof v. State*, 75 A.3d 811, 828 (Del. 2013) (declining to examine the first prong where prejudice is not established).

[18] App. to Opening Br. at A60 (Tr. of Detective Leary Testimony) (describing the substances found); App. to Answering Br. at B1 (Arrest/Incident Report) ("[Burton] then freely admitted he had 'flushed all his cocaine'").

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Collins J. Seitz, Jr.
Justice

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
	)	
v.	)	
	)	
WILLIAM D. BURTON,	)	Cr. A. No. 1301022871
	)	
Defendant.	)	
	)	
	)	

Date Decided: April 30, 2018

On Defendant William Burton's Motion for Postconviction Relief. **DENIED.**

ORDER

On January 31, 2013 following up on a tip from a past-proven reliable informant an administrative search was conducted in the residence of William Burton (Defendant) who was at the time a Level II probationer and registered sex offender. The informant stated that an active probationer was selling crack cocaine from his residence. During the search of Defendant's residence police discovered in his bedroom baggies, a digital scale, a plate with an off-white substance, a razor blade, a grinder, smoking papers, and clear zip-lock bags with a plant like substance consistent in appearance with marijuana. Police also discovered a clear plastic bag containing a white, powdery substance consistent in appearance with cocaine located

in a jacket in Defendant's bedroom closet. The powdery substance and plant like substance field tested positive for cocaine and marijuana respectively. The evidence seized was found to have preliminary weights of 1 gram of marijuana and 29 grams of cocaine. Defendant was arrested and a New Castle County Grand Jury indicted Defendant on charges of Drug Dealing, aggravated possession of Cocaine, two counts of Marijuana possession and Possession of Drug Paraphernalia. Following a one-day bench trial the Court found Defendant guilty of aggravated possession of cocaine, drug dealing, possession of marijuana, and possession of drug paraphernalia. Defendant was sentenced to life in prison as a habitual offender for drug dealing cocaine tier 4 quantity. The tier 4 quantity for cocaine is 20 grams or more of cocaine or of any mixture containing cocaine.[1]

Parties' Contentions

Defendant makes two claims for postconviction relief; That the State violated Defendant's right to due process, committing a *Brady* violation by withholding evidence favorable to Defendant in violation of the United States and Delaware Constitutions, and that Trial Counsel was ineffective in permitting Defendant to stipulate to State's evidence without Defendant's knowledge or consent. The State contends that Defendant's claim of a *Brady* violation has previously been addressed

[1] 16 *Del. C.* §4751C

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by the Delaware Supreme Court in affirming the decision of this Court. In response to Defendant's ineffective assistance of counsel claim State contends that Defendant has not raised any concrete allegations of prejudice.

Discussion

The Court must address Defendant's motion in regard to Rule 61(i) procedural bars to relief before assessing the merits of his motion.[2] The State has conceded and the Court agrees that Defendant's motion is not time barred or repetitive. Rule 61(i)(3) bars relief if the motion includes claims not asserted in the proceedings leading to the final judgment.[3] This bar is also not applicable as to the Defendant's claim of ineffective assistance of counsel, which could not have been raised in any direct appeal.[4] Finally, Rule 61(i)(4) bars relief if the motion is based on a formally adjudicated ground.[5]

Suppression of *Brady* Evidence

Defendant claims that additional information has come to light and therefore reconsideration is warranted in the interest of justice and thus should not be barred procedurally under Rule 61(i)(4). This claim forms the basis of Defendant's Due

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[2] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).
[3] Super. Ct. Crim. R. 61(i)(3).
[4] *See State v. Berry*, 2016 WL 5624893, at *4 (Del. Super. Ct. June 29, 2016); *see also Watson v. State*, 2013 WL 5745708, at *2 (Del. 2013).
[5] Super. Ct. Crim. R. 61(i)(4).

Process argument that the State withheld exculpatory evidence in violation of the Supreme Court of the United States' holding in Brady v. Maryland. [6] Defendant claims that evidence was available pertaining to the Office of the Chief Medical Examiner ("OCME") drug evidence scandal and that this evidence is favorable to him and that it was withheld by the State in prior proceedings before this Court and the Supreme Court. Defendant offers accusations made against the OCME forensic chemist responsible for testing the evidence related to his conviction, the suspension of the same forensic chemist for unspecified reasons, and the resignation of two other OCME staff members as new evidence of the alleged *Brady* violation.

The Court considers *Brady* claims under Rule 61(i)(5) narrow "miscarriage of justice" exception.[7] The Supreme Court set forth the proper analysis for claims of a *Brady* violation.

The reviewing Court may also consider any adverse effect from nondisclosure on the preparation or presentation of the defendant's case. There are three components of a Brady violation: (1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the

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[6] 373 U.S. 83 (1963). ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.")

[7] *Wright v. State*, 91 A.3d 972, 985 (Del. 2014).

State; and (3) its suppression prejudices the defendant." In order for the State to discharge its responsibility under Brady, the prosecutor must disclose all relevant information obtained by the police or others in the Attorney General's Office to the defense. That entails a duty on the part of the individual prosecutor "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[8]

The first prong of *Brady* must be reviewed in the light of the Court's decision in *State v. Irwin*. In *Irwin* the Court set forth a bright line that a defendant will only be allowed to present evidence or question State's witnesses regarding the OCME investigation only if there is a discrepancy in weight, volume or contents from what is described by the seizing officer.[9] In *Irwin* the Court acknowledges that discrepancy in weight due to a multitude of factors is not uncommon.[10] Furthermore a balance must be struck as to the explanation of any discrepancy to the finder of fact so that they may determine if the evidence offered at trial is that which was seized from the defendant.[11] The discretion to limit the extent of the evidence regarding the OCME investigation remains with the trial judge.[12] Additionally,

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[8] *Id.*
[9] *State v. Irwin*, 2014 WL 6734821 at *12
[10] *Id.*
[11] *Id.* at *13
[12] *Id.* at *12

unlike other scandals, there has been no evidence to suggest that OCME staff tampered with evidence in order to achieve positive results or to secure convictions.[13]

This Court applied the *Irwin* test to the facts of this case when considering Defendant's motion for a new trial, and declines to reiterate that analysis here.

Moving to the second prong of *Brady* Defendant offers accusations directed against the forensic chemist responsible for testing the evidence related to his conviction, the suspension of the same forensic chemist for unspecified reasons, and the resignation of two other OCME staff members. There was no indication of wrongdoing at the OCME until after Defendant was found guilty and sentenced in late 2013. Defendant's direct appeal and motion for new trial came after the revelation of the OCME scandal in 2014. These two proceedings asserted that the State was in possession of *Brady* material related to the OCME scandal which the State withheld from Defendant. This Court and the Delaware Supreme Court found no merit to these claims. Information regarding the OCME investigation has become widespread and a matter of public record since 2014. Defendant has offered no

[13] *Brown v. State*, 108 A.3d 1201, 1204-05 (Del. 2015) (distinguishing from *U.S. v. Hampton*, 66 F.Supp3d 247 (D.Mass 2015), noting that a laboratory chemist in Massachusetts had pleaded guilty to multiple charges of tampering with evidence by adding controlled substances to the samples she tested in order to achieve a positive test result).

evidence that there has been misrepresentation or concealment on the part of the State prior to any of his proceedings.

The third prong in determining if a *Brady* violation occurred is to determine if Defendant has been prejudiced as a result of suppression of evidence. To date Defendant has claimed violations of his Constitutional rights, appealed his case to the Delaware Supreme Court, and now moves for postconviction relief. Defendant at no time has argued that any new evidence has created a strong inference that he is actually innocent of the drug charges for which he was convicted.[14] Defendant did not challenge the chain of custody in his initial trial and made no indication that the evidence seized from his residence was not the evidence that was presented at his trial. This Court held a bench trial in which Defendant was found guilty beyond a reasonable doubt. No evidence has been proffered to indicate that Defendant has been prejudiced as a result of the OCME investigation and the fallout therefrom.

Defendant's case mirrors that of the similarly situated defendants considered in the decision of *State v. Miller*.[15] "With regard to the defendants who were convicted at trial, the motions ignore that the identity and weight of the drugs was undisputed in all three cases. Facts concerning the controlled substances and the OCME lab reports were stipulated to and admitted into evidence without

[14] *Cannon v. State*, 127 A.3d 1164, 1167 (Del. 2015).
[15] *State v. Miller*, 2017 WL 1969780 (Del. Super Ct. 2017)

objection."[16] Furthermore "Evidence of the unfortunate practices and events transpiring at the OCME did not exist until early 2014, and there can be "no retroactive Brady violation for failing to report what was not known."[17]

Defendant had the opportunity to contest the evidence seized from his home and presented at trial, but did not do so. Defendant had the opportunity to contest the evidence presented against him while his case was stayed in light of revelations of wrongdoing at the OCME, but again failed to do so. There was sufficient evidence of guilt to convict beyond a reasonable doubt in Defendant's case. Defendant has been unable to present evidence to support that the events at the OCME affected his case specifically other than accusations leveled at OCME staff members generally. As such any potential impeachment evidence based on the OCME scandal does not place the conviction of Defendant in such a light so as to "undermine confidence" in his guilty verdict.[18]

Ineffective Assistance of Counsel

Defendant asserts that his trial counsel was ineffective in failing to contest the evidence presented at trial thereby violating his constitutional rights. Defendant

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[16] *Id.* at *7
[17] *Id.* at *8
[18] *Id.*

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agreed to a bench trial in order to preserve the right to appeal the Court's ruling on his suppression motion.

Delaware adopted the two-prong test proffered in *Strickland v. Washington* to evaluate ineffective assistance of counsel claims.[19] To succeed on an ineffective assistance of counsel claim, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different."[20]

To avoid the "distorting effects of hindsight," counsel's actions are afforded a strong presumption of reasonableness.[21] The "benchmark for judging any claim of ineffectiveness [is to] be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[22] The Court's objective in evaluating counsel's conduct is

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[19] *See Strickland v. Washington*, 466 U.S. 668 (1984); *see also Albury v. State*, 551 A.2d 53 (Del. 1988).

[20] *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990); *see also Strickland v. Washington*, 466 U.S. 668 (1984).

[21] *Neal v. State*, 80 A.3d 935, 942 (Del. 2013) (citing *Strickland v. Washington* at 689).

[22] *State v. Wright*, 2015 WL 648818, (Del. Super. Ct. Feb. 12, 2015)(citations omitted).

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to "reconstruct the circumstances of counsel's challenged conduct, and to *evaluate the conduct from the counsel's perspective at the time.*"[23]

If Defendant can demonstrate that counsel's conduct failed to meet an objective standard of reasonableness the second prong of the *Strickland* analysis requires the Court to determine what, if any, effect counsel's ineffectiveness had on the outcome of Defendant's trial.[24] "[The Court] will not set aside the judgment in a criminal proceeding if the error had no effect on the outcome."[25] Defendant must show that but for counsel's ineffectiveness a more favorable result is not just conceivable, but rather the likelihood of a favorable outcome is substantial.[26]

Defendant bases his claim of ineffective assistance of counsel argument on the grounds that by relying on the record of Defendant's suppression hearing Counsel was unreasonable. There are two issues that can be extracted from this argument; 1) Defendant voluntarily waived his right to a trial by jury, and 2) a strategic choice was made in waiving a trial by jury.

Strickland provides that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and

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[23] *Neal*, 80 A.3d 935 at 942. (citing *Strickland v. Washington*, at 689) (emphasis supplied).
[24] *Id.*
[25] *Id.* (citing *Strickland v. Washington*, at 692).
[26] *Id.*

strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."[27]

The decision to rely on the record developed at the suppression hearing in order to preserve that issue for appeal by proceeding with a bench trial is a strategic one. Counsel avers that as a matter of practice the decision to agree to a bench trial would have been clearly discussed with Defendant and that the consequences of doing so would be evaluated. Reviewing Counsel's actions from their prospective at the time the Court finds that they were reasonable. Information regarding the OCME scandal was not known until after Defendant's conviction. In light of information available to Counsel at the time strategic decisions were made in order to most effectively represent Defendant throughout various proceedings before the Court. Counsel's actions were representative of rational professional judgement and thus reasonable.

Similarly, the Court conducted a colloquy with Defendant and found that his decision to waive a trial by jury was knowing, intelligent, and voluntary. The colloquy included having discussed the decision with his attorney and understanding the benefits and potential repercussions of that decision. The decision to waive a

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[27] *Strickland v. Washington*, 466 U.S. 668, 690–91(1984).

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jury trial was made strategically with the advice of counsel. To claim now that the decision to waive a trial by jury equates to ineffective assistance of counsel is to apply the "distorting effects of hindsight" to a less than favorable outcome.

Defendant's claim fails the second prong of the *Strickland* test as well. Defendant has failed to offer any evidence that a more favorable outcome was substantially likely but for the ineffective assistance of counsel. Defendant claims that repercussions stemming from the OCME scandal might be sufficient to exculpate him, but fails to acknowledge that his motion for a new trial and subsequent appeal to the Delaware Supreme Court were reviewed in light of the Court's holding in *Irwin*. Defendant's proceedings after his trial are indicative of the fact that he suffered no prejudice as a result of ineffective assistance of counsel.

Defendant cannot show that the State withheld evidence in violation of *Brady*. This Court continues to hold that there can be no retroactive Brady violation for failing to report what was not known. Defendant's claims based on the fallout from the situation at the OCME have failed to undermine the confidence of his guilty verdict.

Defendant cannot show that Trial Counsel's representation fell below an objective standard of reasonableness. Defendant has also failed to demonstrate that any prejudice stemming from his counsel's representation can overcome the

overwhelming evidence of his guilt. The Defendant's Motion for Postconviction Relief pursuant to Rule 61 is hereby **DENIED** without further proceedings.

IT IS SO ORDERED.

The Honorable Calvin L. Scott, Jr.

EFiled: Jun 08 2016 12:17PM EDT
Filing ID 59116668
Case Number 699,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM BURTON,	§	
	§	No. 699, 2013
Defendant Below-Appellant,	§	
	§	Court Below: Superior Court
v.	§	of the State of Delaware
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below-Appellee.	§	

Submitted: June 8, 2016
Decided: June 8, 2016

Before **STRINE**, Chief Justice; **HOLLAND** and **VAUGHN**, Justices.

ORDER

This 8th day of June 2016, upon consideration of the parties' briefs and the record below, it appears to the Court that the defendant in this case alleges that his conviction should be set aside because his home was searched in violation of the Fourth Amendment and that he should have received a new trial because of the misconduct at the OCME. Both of these arguments were addressed and rejected in written decisions of our Superior Court, and we affirm the defendant's conviction on the basis of the Superior Court's decisions.[1]

[1] *See State v. Burton*, 2013 WL 4852342 (Del. Super. Sept. 9, 2013); *State v. Burton*, ID. No. 1301022871 (Del. Super. Nov. 30, 2015); *see also Cannon v. State*, 127 A.3d 1164, 1167–68 (Del. 2015); *Aricidiacono v. State*, 125 A.3d 677, 678–80 (Del. 2015); *Brown v. State*, 117 A.3d 568, 580–81 (Del. 2015); *Brown v. State*, 108 A.3d 1201, 1205–06 (Del. 2015).

NOW, THEREFORE, IT IS ORDERED that the Superior Court's judgments of September 9, 2013 and November 30, 2015 are AFFIRMED.

BY THE COURT:

/s/ Leo E. Strine, Jr.

Chief Justice

EFiled: Jan 04 2016 10:21AM EST
Filing ID 58365624
Case Number 699,2013

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

STATE OF DELAWARE,	)	
	)	
v.	)	
	)	ID. No. 1301022871
WILLIAM BURTON,	)	
	)	
Defendant.	)	
	)	
	)	

Decided: November 30, 2015

On Defendant William Burton's Motion for a New Trial
DENIED

DECISION ON REMAND

Sonia Augusthy, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware. Attorney for the State.

Kevin J. O'Connell, Esquire, Assistant Public Defender, Public Defender's Office, Wilmington, Delaware. Attorney for Defendant.

Scott, J.

PROCEDURAL HISTORY

On January 31, 2013, Defendant William Burton ("Burton") was arrested on several drug related charges, including Possession with Intent to Manufacture or Deliver a Controlled Substance, Possession of a Controlled Substance in a Tier 5 quantity (cocaine), Possession of Marijuana, and Possession of Drug Paraphernalia. On June 3, 2013, Burton filed a motion to suppress evidence based upon the search. The State responded to that motion on August 8, 2013. The Court denied Burton's motion to suppress on August 21, 2013.

Following the denial of the suppression motion, Burton waived his right to a jury trial and chose to proceed with a stipulated bench trial. The trial was held before this Court on September 24, 2013. The Court found Burton guilty.

On December 30, 2013, Burton filed a notice of appeal to the Delaware Supreme Court. Prior to any further action being taken on the appeal however, Burton filed a motion to stay the matter and remand to the Superior Court pending the Honorable Judge William C. Carpenter, Jr.'s opinion regarding the Office of the Chief Medical Examiner ("OCME"), which was issued on November 17, 2014.[1]

[1] *See State v. Irwin*, 2014 WL 6734821 (Del. Super. Nov. 17, 2014).

Burton filed this Motion for New Trial on January 30, 2015. The State filed its response on March 27, 2015.

In response to the parties' submissions, the Court instructed the parties to file supplemental briefing on the merits of a new trial in this case, within the relevant limits established in *State v. Irwin*.[2] Specifically, the Court instructed to parties to address whether there is any discrepancy in weight, volume, or contents of the drug evidence in this case that would call into question that the evidence seized was not what was tested. Burton filed his supplemental response on July 6, 2015, and the State filed its reply on July 14, 2015. Both parties' supplemental responses contain no more than a conclusory statement regarding *Irwin* and its application to this case. Instead, the submissions focus on Burton's newly raised argument of judicial estoppel.

PARTIES' CONTENTIONS

The parties agree that Burton is unable to provide any specific evidence of a discrepancy in weight, volume, or content of the evidence that would call into question the evidence seized and tested by the OCME in this case.

Burton argues that the Court should order new testing of the drug evidence in this case and, should such testing reveal any discrepancy, the Court should then

[2] 2014 WL 6734821.

order a new trial. In support of this position, Burton argues that such an order is required to avoid judicial estoppel. Burton asserts that the Court is estopped from acting inconsistently with the State's position and the court's order in two cases decided by the Honorable T. Henley Graves.[3]

The State argues that the Court is not obligated to order re-testing of the drug evidence in this case to avoid taking inconsistent positions with the *Dollard* and *Young* cases. Instead, the State argues that judicial estoppel is not applicable in this case because the previous position by the State and decision by the Court are not in this case. Moreover, the State argues that judicial estoppel is inapplicable, even if the Court finds the State's position in this case is inconsistent, because judicial estoppel is narrowly construed and rarely applied against the government in criminal prosecutions.

DISCUSSION

I. Burton failed to meet is burden for establishing the necessity for a new trial.

Rule 33 of the Superior Court Rules of Criminal Procedure states that the Court "may grant a new trial to [a] defendant if required in the interest of justice."

[3] Burton offers that the two cases are *State v. Dollard* (ID # 1206010837A) and *State v. Young* (ID # 1206010872), yet provides only a plea and sentencing transcript in *Young* for the Court to review in evaluating Burton's argument. Moreover, the emphasis of Burton's judicial estoppel argument rests on the *Dollard* case, for which Burton proffers case analysis and application to this case without any citation.

The applicable standard of review to determine whether the interests of justice require a new trial in the factual circumstances of this case has not yet been established. The Court looks to several relevant Delaware cases in determining the proper standard of review in this case.

Regarding the recent OCME drug evidence scandal, the Delaware Supreme Court has found that, "there is no evidence that the OCME staff 'planted' evidence to wrongly obtain convictions. Rather, the employees who stole the evidence did so because it in fact consisted of illegal narcotics that they could resell or take for personal use."[4] This finding is consistent with the Delaware Superior Court's resolution of the evidentiary issues created by the OCME investigation. The court in *State v. Irwin*[5] established a bright line rule to determine what circumstances must exist in a case before allowing questioning regarding the investigation in that case at trial. In *Irwin*, the Court held that,

> [I]f a case was sent to the OCME drug lab for testing, the defense will be free to question the State's witnesses or to present evidence regarding the OCME investigation ***only if there is either evidence of tampering of the packaging submitted by the police or a discrepancy in weight, volume or contents from that described by the seizing officer***. If evidence of tampering is not present and there is no discrepancy, the OCME investigation is not relevant under Delaware Rule of Evidence 402 or at least would be misleading and unfair under

[4] *Brown v. State*, 108 A.2d 1201, 1205 (Del. 2015).
[5] 2014 WL 6734821.

> Rule 403. In such cases, therefore, evidence of the investigation should not be introduced.[6]

Although *Irwin* only specifically addresses the requirements for challenging the OCME investigation at trial, it is both directly and indirectly applicable to this case.

The *Irwin* case is directly applicable to this case because Burton seeks a new trial on the basis of possible evidence tampering in the OCME drug lab. As such, Burton would be required to satisfy the standard established in *Irwin* before having the right to challenge the investigation at trial. As admitted by Burton, he is "unable to provide the Court with specific evidence of a discrepancy in weight, volume or contents that would call into question the evidence seized and tested by the OCME in this case."[7] Thus, Burton cannot satisfy the bright line test establish in *Irwin* to introduce evidence of the investigation at a new trial.

Moreover, the Court finds that the *Irwin* test is appropriately applicable as the test to determine whether a new trial is necessary, where the basis for such a motion is the OCME investigation. This finding is consistent with the Delaware Supreme Court's decisions resolving issues raised by the OCME investigation on defendants' motions for postconviction relief. For example, in ***Bunting v. State***,[8]

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[6] *Id.* at 12. (emphasis added).
[7] Burton's July 6, 2015 Letter to the Court. (Docket # 48).
[8] 2015 WL 2147188 (Del. May 5, 2015).

the Supreme Court denied the defendant's postconviction motion raising a chain of custody argument based on the OCME investigation. In so holding, the Supreme Court held recognized that the defendant specifically waived his right to have each person in the chain of custody testify at his 2005 trial, and that there was no legitimate issue with regard to chain of custody in the defendant's case.[9] The Supreme Court held that, "[The defendant] has not even alleged, let alone offered any proof, that the integrity of his trial proceedings in 2004 was compromised by the OCME investigation..." and concluded that, under the circumstances, the defendant's "conclusory and unsubstantiated assertion that the validity of the chain of custody of the drug evidence at his 2004 trial somehow has been called into question by the 2014 OMCE investigation is insufficient" to satisfy Rule 61(i)(5).[10]

The Supreme Court's decision in *Bunting* is premised on its previous decision in *Brown v. State*, where the Supreme Court, among other things, rejected the defendant's postconviction claim that he was entitled to a new trial based on the newly discovered evidence of misconduct at the OCME.[11] In *Brown*, however, the defendant had pleaded guilty instead of going to trial, and the court held that

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[9] *Id.* at 2.
[10] *Id.* at 3.
[11] 108 A.3d 1201 (Del. 2015).

the defendant's knowing, intelligent, and voluntary guilty plea waived any right to test the chain of custody of the drug evidence.[12]

Based on the decisions in *Irwin*, *Bunting*, and *Brown*, the Court finds that the *Irwin* test is also applicable in the context of a defendant's motion for new trial based on the OCME investigation. As concluded above, Burton cannot satisfy the *Irwin* test. Furthermore, the Court finds it appropriate to apply the reasoning in *Brown* to the facts of this case as well. Where a defendant knowingly, intelligently, and voluntarily agreed to stipulated facts at trial regarding the drug evidence in that matter, the defendant has waived his right to test the chain of custody of that drug evidence.[13] In this case, the Court finds that Burton waived his right to test the chain of custody of the drug evidence when he knowingly, intelligently, and voluntarily agreed to a stipulated bench trial instead of a jury trial. At Burton's bench trial, the State entered the drugs and medical examiner's report without objection, and Burton cross-examined the police officer, but did not challenge that seized substance was illegal drugs. Importantly also, the Court finds no discrepancy in the trial held in this case. Thus, Burton stipulated that the drug evidence entered by the State was, in fact, illegal drugs. As such, Burton has waived his right to challenge the chain of custody of the drug evidence.

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[12] *Id.* at 1205-06.
[13] *See Id.*

Burton has offered no evidence of a discrepancy in weight, volume, or content of the drug evidence in his case that would call into question the evidence seized and tested by the OCME. Moreover, Burton waived his right to challenge the chain of custody of the drug evidence when he knowingly, intelligently, and voluntarily agreed to a stipulated bench trial, which included stipulations of facts regarding the drug evidence entered by the State at Burton's trial. Accordingly, the interests of justice do not require a new trial in this case.

II. Burton's judicial estoppel argument is meritless.

Under the doctrine of judicial estoppel, "a party *may* be precluded from asserting in a legal proceeding, a position inconsistent with a position previously taken by him in the same or in an earlier legal proceeding."[14] The purpose of the doctrine is to protect the integrity of judicial proceedings.[15] "Since the doctrine of judicial estoppel bars only inconsistent positions the primary determination made by a court is whether or not a party is attempting to establish an inconsistent or different cause of action ***arising out of the same occurrence.***"[16] The doctrine of judicial estoppel has never been applied in Delaware against the government.[17]

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[14] *State v. Chao*, 2006 WL 2788180, *9 (Del. Super. Sept. 25, 2006).
[15] *Id.*
[16] *Id.* (emphasis added).
[17] *Id.*

The Court's evaluation of whether judicial estoppel applies is limited to the State's previous positions taken in the same or in an earlier proceeding with Burton. Burton's entire judicial estoppel argument is based on the proceedings in two different cases; Burton never alleges that the State has taken an inconsistent position, or that the Court has made an inconsistent ruling, than one previously made in the same or earlier proceeding involving Burton. As such, judicial estoppel is inapplicable in this case. Furthermore, and for the reasons discussed above, the Court finds no necessity to re-test the drug evidence in this case.

CONCLUSION

Accordingly, Defendant's Motion for New Trial and request for re-testing of the drug evidence in this case are **DENIED**.

IT IS SO ORDERED.

/s/ _____
The Honorable Calvin L. Scott Jr.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	
	)	
WILLIAM BURTON	)	ID. No. 1301022871
and	)	
BERNARD J. GUY,	)	ID. No. 1301022875
	)	
Defendants.	)	

Submitted: May 17 and June 3, 2013
Decided: September 9, 2013

Upon Consideration of Defendants' Motions to Suppress Evidence, **DENIED.**

ORDER

Sarita R. Wright, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for State

Kevin J. O'Connell, Esquire, Public Defender's Office, Wilmington, Delaware, Attorney for William Burton

Albert J. Roop, Esquire, Collins & Roop, Wilmington, Delaware, Attorney for Bernard J. Guy

RAPPOSELLI, J.

State v. Burton/Guy
ID. No. 1301022871
ID. No. 1301022875
September 9, 2013

Upon consideration of the Defendants' Motions to Suppress Evidence, the State's opposition, and the record of the case, it appears that:

1. Defendant William D. Burton ("Burton") was indicted for Drug Dealing Cocaine, Aggravated Possession of Cocaine, Illegal Possession of Marijuana, and Possession of Drug Paraphernalia. Defendant, Bernard J. Guy ("Guy") was indicted for Illegal Possession of Heroin. An evidentiary hearing was heard on August 16 and 23, 2013.

2. The State presented evidence through witnesses Detective Joseph Leary, Probation Officer Vettori, and Supervisor Craig Watson that on January 31, 2013, as part of Operation Safe Streets, Detective Leary of the Wilmington Safe Streets Unit received a tip from a past proven reliable informant ("PPR Informant") that a black male known as "David" who lived at 1232 N. Thatcher Street in Wilmington was selling crack cocaine from this residence. The PPR Informant stated further that "David" lived on the second floor and that he was on probation and was a sex offender.

3. Detective Leary testified that he had previously worked with the PPR Informant in acquiring information that has led to successful arrests. Probation and Parole Officer Daniel Collins corroborated some of the information by checking probation records, which confirmed that Burton (middle name "David"), a Level 2 sex-offender, resided at that address. Detective Leary then sent a photograph to the PPR Informant who identified the person as the same "David." Officer Collins requested authorization from Supervisor Craig Watson to conduct an administrative search, which was granted by Supervisor Watson following a conference.

4. At approximately 8 p.m. on January 31, 2013, both members of the Wilmington Safe Streets Unit and Probation and Parole responded to the residence. While conducting a brief surveillance from about 1 block away, they observed Burton entering the residence with another black male. Officers Collins and Vettori proceeded to knock on the door, which was answered by Guy. When the officers told Guy that they were there to see Burton, Guy told them to wait outside while he went back inside the residence. After several minutes passed, the officers knocked again and when Guy answered, he told the officers that Burton was not there. However, after instructing Guy to open the door so that they could confirm for themselves, the officers entered the residence, and immediately saw Burton at the top of the stairs. So too, upon entering the residence, Guy's behavior became aggressive and dangerous. In particular, Guy threatened to have his dog, described as a large black dog, attack the officers. Both officers testified that they had great concern for their safety given Guy's size (at least one foot taller than the officers), and his aggressive and hostile behavior. Guy displayed such aggression toward them that the officers decided backup needed to be called. When the officers were unable to deescalate Guy's behavior, they placed handcuffs on him and conducted a pat-down of his person which yielded 17 bags of heroin.

5. During this time, the officers secured Burton with handcuffs and informed him they would conduct an administrative search of his room. Upon entering the room, they observed baggies, a white plate with an off-white substance, a razor blade with white residue, a black digital scale, clear zip-lock bags containing marijuana, a grinder, smoking papers, etc. The white and green substances tested positive for cocaine (preliminary weight of 29 grams) and marijuana (preliminary weight of 1 gram), respectively. Both defendants move

this Court for an order to suppress evidence seized following the administrative search of Defendant Burton's residence on January 31, 2013.

6. "As a general rule, the burden of proof is on the defendant who seeks to suppress evidence."[1] However, once the defendant has established a basis for his motion, the burden shifts to the government to show that the search or seizure was reasonable.[2] "The burden of proof on a motion to suppress is proof by a preponderance of the evidence."[3]

I. Defendant Burton

7. Burton claims that Probation and Parole's administrative search of his residence violated his rights under the Fourth Amendment of the United States Constitution, Article I, Section 6 of the Delaware Constitution, Title 11, Section 4321 of the Delaware Code, and Probation and Parole Procedure 7.19. The crux of Burton's argument is that the officers failed to make an independent determination of the reliability of the informant that provided information as the basis of the administrative warrant and further failed to corroborate the information provided by the informant. In support of this argument, Burton relies on the cases of *Culver*

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[1] *State v. Caldwell*, 2007 WL 1748663, at *2 (Del. Super. May 17, 2007) (quoting *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995)).

[2] *Caldwell*, 2007 WL 1748663, at *2 (citing *Johnson*, 63 F.3d at 245)

[3] *State v. Abel*, 2011 WL 5221276, at *2 (Del. Super. Oct. 31, 2011) (quoting *State v. Iverson*, 2011 WL 1205242, at *3 (Del. Super. March 31, 2011)).

v. State[4] and *Sierra v. State*.[5] This Court distinguishes the facts of this case from both *Culver* and *Sierra*.

8. In *Culver*, the "police received the tip from an 'unknown caller with no past proven reliability.' The caller did not have personal knowledge of criminal activity, but rather stated that 'it was obvious that [Culver] was involved in drug activity based on the volume of vehicles that would come to his residence, stay there for a few minutes and leave.'"[6] The police then relayed that tip to a parole officer, who used it as the basis for executing an administrative warrant. In finding that the warrant was improperly executed, the *Culver* Court affirmed that Probation and Parole Procedure "7.19 requires probation officers to assess any 'tip' relayed to them and independently determine if a reasonable suspicion exists that would, in the ordinary course of their duties, prompt a search of a probationer's dwelling."[7]

9. The Delaware Supreme Court has held that probation officers may conduct a warrantless search of a probationer's residence as long as that search is supported by reasonable suspicion.[8] The validity of a warrant does not require satisfying all of the technical requirements, but rather is determined by assessing overall reliability.[9]

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[4] *Culver v. State*, 956 A.2d 5, 8 (Del. 2008).

[5] *Sierra v. State*, 958 A.2d 825, 827 (Del. 2008).

[6] *Culver*, 956 A.2d, at 8.

[7] *Id.* at 7.

[8] *Id.* at 11; *Sierra*, 958 A.2d, at 828; *Donald v. State*, 903 A.2d 315, 318 (Del. 2006).

[9] *Pendleton v. State*, 990 A.2d 417, 420 (Del. 2010) ("substantial compliance with departmental guidelines alone-not absolute compliance-sufficiently withstands review of an administrative search.").

10. In this case, the PPR Informant had information that went beyond an inference or belief of criminal activity. The PPR Informant identified Burton as "David", confirmed this via photograph, knew the exact location of the alleged drug activity, not only by address but also by floor on the house, knew the exact drug and that Burton was both on probation and was a sex offender. This information indicates that the informant had some personal knowledge not readily available to the public. Thus, the reasonableness of the search in this case can be distinguished from *Culver* in regards to both the quality of information, and source of the information. The informant in this case expressly identified criminality distinct from speculative hunch of the informant in *Culver*. So too, the informant in this case was past proven reliable, unlike in *Culver* where there was no evidence regarding the informant's past reliability.

11. This Court also distinguishes the facts of this case from *Sierra*. In *Sierra* the officer did not know the identity of the Confidential Informant ("CI"), nor whether the CI "was 'past proven reliable.'"[10] These are clearly distinct from the facts of this case where the information came from a PPR Informant known to Detective Leary and who had been past proven reliable.

12. In summary, as to Burton, the Court finds that the officers had reasonable grounds to search Burton's residence, and all evidence seized pursuant to that search was lawful and met statutory and constitutional requirements.

II. Defendant Guy

13. Guy argues that he was subjected to an unlawful search and seizure in violation of both federal and state constitutions and 11 Del. Section 1902. In

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[10] *Sierra*, 958 A.2d at 827.

support of this argument, Guy rests on *Holden v. State,*[11] claiming that the record does not support an objective showing of the required suspicion. The Court disagrees.

14. An officer may "forcibly stop and detain a person" if he has a reasonable articulable suspicion that a crime has just been, was being, or was about to be committed.[12] This is an objective test, in which the necessary level of suspicion "is considerably less than proof of wrongdoing by a preponderance of the evidence" and "is obviously less demanding than that for probable cause."[13]

15. A frisk of an individual is justified when "a reasonably prudent man in the circumstances could be warranted in the belief that his safety or that of others was in danger."[14] When such a safety concern is present, the use of handcuffs may be justified if reasonable under the totality of the circumstances.[15] The "officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."[16] "[D]ue weight must be given . . . to the specific reasonable inferences which he is entitled to draw from the facts in

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[11] *Holden v. State,* 23 A.3d 843, 850 (Del. 2011).

[12] *Coleman v. State,* 562 A.2d 1171, 1174 (Del. 1989); *Holden,* 23 A.3d. at 847 (citing 11 *Del. C.* § 1902).

[13] *United States v. Sokolow,* 490 U.S. 1, 7 (1989).

[14] *Holden,* 23 A.3d at 850; *State v. Abel,* 68 A.3d 1228, 1238 (Del. 2012), *as amended* (Jan. 22, 2013).

15 *State v. Biddle,* 9506006939, 1996 WL 453306 (Del. Super. June 25, 1996) *on reargument,* 9506006939, 1996 WL 527323 (Del. Super. Aug. 9, 1996) *aff'd,* 712 A.2d 475 (Del. 1998).

[16] *Terry v. Ohio,* 392 U.S. 1, at 27 (1968).

light of his experience."[17] This Court must examine the totality of the circumstances "as viewed through the eyes of a reasonable, trained police officer in the same or similar circumstances, combining objective facts with such an officer's subjective interpretation of those facts."[18]

16. In this case, Guy's uncooperativeness began at the outset of the interaction, when he lied to the officers regarding Burton's presence in the home. When the officers attempted to go into the residence, Guy threatened to unleash an attack dog on them. The dog was described as a large black dog that was both seen and heard by the officers. Guy, approximately one foot taller than the officers, continued to shout and exhibit extremely hostile behavior. Despite continued efforts on the part of the officers to calm Guy down, his hostility continued to the point where both officers testified that they feared for their personal safety, and called for immediate back up. Thus, unlike the *Holden* decision, wherein the motorcyclist defendant was neither violent, aggressive nor demonstratively hostile, there is no question in this case that the explicit threats and continued hostility of Guy amounted to a reasonable concern for officer safety justifying the protective search.

17. In summary, the Court finds that the officers had reasonable suspicion to detain Guy and conduct the pat-down that led to the seizure of evidence. Therefore, the evidence seized pursuant to the pat-down was lawful and met statutory and constitutional requirements.

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[17] *Id.*

[18] *Jones v. State*, 745 A.2d 856, 861 (Del. 1999) (citing *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).

18. For these reasons, Defendants' Motions to Suppress are **DENIED**.

IT IS SO ORDERED.

/s/ Vivian L. Rapposelli
Judge Vivian L. Rapposelli

cc: Prothonotary

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DELAWARE HEALTH AND SOCIAL SERVICES

OFFICE OF CHIEF MEDICAL EXAMINER
FORENSIC SCIENCES LABORATORY

Richard T. Callery, M.D., F.C.A.P.
Chief Medical Examiner
Director, Forensic Sciences Laboratory

Controlled Substance Laboratory Report
CONFIDENTIAL

Requested By: Office of the State Prosecutor
Department of Justice: Criminal Division
820 N. French St., Carvel Building, 7th floor
Wilmington, DE 19801

Case No.: FE2013-01768

Report Date: May 15, 2013
Complaint No: 3013007212

Case Name:
Party of Interest: Bernard Guy
Party of Interest: William Burton

Agency:
Joseph Leary Jr., Vincent Disabatino
Wilmington Police Department

Jurisdiction: Wilmington

Items Submitted:

Item(s) submitted by Vincent Disabatino at 1:59 p.m. on March 4, 2013:

Container # A: Envelope which is sealed initialed and dated; Described as 17 H
Item # AI: Seventeen glassine bags each containing tan powder with a total net weight of 0.37gm
Container # B: Envelope which is sealed initialed and dated; Described as 1 W; 2 PM
Item # BI: One plastic bag containing white powder with a net weight of 28.45gm
Item # BII: Two small ziplock bags each containing plant material with a total net weight of 0.93gm

Results:

ITEM	DRUG DETECTED	DRUG WEIGHT
Item AI(1-17)	Diacetylmorphine (Heroin)	0.37 grams
Item BI	Cocaine	28.45 grams
Item BII(1-2)	The evidence contains portions of the plant Cannabis sativa L.	0.93 grams

The OCME's standard testing procedure may include screening tests (reagent color tests,) Thin Layer Chromatography, Microscopic Examination, Gas Chromatography-Mass Spectrometry, Gas Chromatography-NPD Detection and/or Hypergeometric Sampling for cases with multiple exhibits.

May 15, 2013

Irshad Bajwa — **Date**
Forensic Analytical Chemist

Delaware Office of the Chief Medical Examiner
This test is accredited under the laboratory's ISO/IEC 17025 accreditation issued by ANSI-ASQ National Accreditation Board/FQS. Refer to certificate and scope of accreditation AT-1653.

DHSS OCME
200 S. Adams St.
Wilmington, DE 19801

A42

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,

Plaintiff,

v. ID #1301022871

WILLIAM D. BURTON,

Defendant.

BEFORE: HONORABLE VIVIAN L. MEDINILLA, J.

APPEARANCES:

SARITA R. WRIGHT, ESQ.
DEPARTMENT OF JUSTICE
for the State

KEVIN J. O'CONNELL, ESQ.
OFFICE OF THE PUBLIC DEFENDER
for Defendant William D. Burton

ALBERT J. ROOP, ESQ.
for Defendant Bernard Guy

SUPPRESSION HEARING TRANSCRIPT
AUGUST 16, 2013

PATRICIA L. GANCI, RMR, CRR
SUPERIOR COURT OFFICIAL REPORTERS
500 N. King Street, Suite 2609, 2nd Floor
Wilmington, Delaware 19801-3725
(302) 255-0653

copy as well. And Officer Watson is going to go through step by step as to what factors he considered on that checklist.

Is there a summary by Officer Watson as to individual reasons underlying each checklist? No, Probation and Parole does not do that. The purpose of the checklist is to confirm that all of these factors were discussed.

THE COURT: All right. Well, I'll determine if the testimony that comes in is within the scope of the checklist and we can go through it one at a time.

MR. O'CONNELL: Thank you.

THE COURT: All right.

MS. WRIGHT: Thank you, Your Honor. And the State calls Detective Joseph Leary.

THE CLERK: Please state your name.

THE WITNESS: Joseph Francis Leary, Jr.

JOSEPH F. LEARY, JR., having duly been sworn, was examined and testified as follows:

THE CLERK: You may be seated. Please spell your first and last name for the Court.

THE WITNESS: Joseph, J-O-S-E-P-H, Leary, L-E-A-R-Y.

MS. WRIGHT: May I proceed, Your Honor?

THE COURT: Yes.

MS. WRIGHT: Thank you.

DIRECT EXAMINATION

BY MS. WRIGHT:

Q. Good afternoon, Detective.

A. Good afternoon.

Q. For the record, by whom are you employed?

A. I'm employed by the City of Wilmington Police Department. I've been employed by the City of Wilmington Police Department since June of 1999.

Q. What are your current duties with the Wilmington Police Department?

A. I'm assigned to the Drug, Organized Crime and Vice Unit. I've been an investigator in the Drug, Organized Crime and Vice Unit since April of 2001.

Q. Within your role in the vice unit, do you have any particular duties?

A. I am currently assigned to a task force called Operation Safe Streets. Operation Safe Streets is Wilmington police officers partnered up with probation officers. It is a combination of Probation and Parole and Wilmington Police working together.

Q. Can you give examples for the Court what you mean by "working together"? What are your general day-to-day duties with Safe Streets working with Probation and Parole?

A. Generally we check -- we work with the probation officers. They do a checklist of people that they check on that have -- that are on probation. Mainly we target Level III probationers who have some *type of violent crime history or checklist stuff that is* coming from probation that rates people higher or lower. We have an extensive number of people that we do. We approximately do 240 curfews a month of people that we check and make sure that they're in curfew and do those things, and we do walk-throughs, make sure that people are compliant with probation.

We also continue to do the police end of it at the same time, and we assist police officers who make contact with probationers on the street who are in violation. We do administrative searches based on arrests that they do and also arrests that we do.

Q. Now, when you say you do administrative searches, to be clear, who actually does the searches?

A. We are there as police officers to protect the

probation officers while they're doing it. We're there to assist and we follow-up with the arrests, but we are present.

Q. When you say "assist," in what manner do you assist?

A. We are -- we're usually there just as protection for the probationers -- probation officers while they conduct their searches. There's three members assigned to us right now.

Q. Detective, if I can take you back to January of this year. Can you tell us, on or about January 31, 2013, can you tell us what, if any, information you received in regard to the case you're here for today?

A. I actually was -- I received a phone call from a past-proven and reliable confidential informant in reference to a black male subject that he knew as David that lived at 1232 North Thatcher Street and that that subject was selling crack cocaine from the residence.

Q. Did the informant explain to you -- first of all, 1232 North Thatcher Street, that's Wilmington, Delaware?

A. Yes, New Castle County, State of Delaware.

Q. Now, can you tell us whether or not the

confidential informant informed you where, if at all, the subject was selling?

A. Yes, he said that when you went into the residence, you would go directly up the steps and that *the defendant -- or that David's room was the room* straight up at the top of the steps. He didn't know what the number was that was on the door, but he did remember exact location where it was.

Q. And, Detective, when you say past-proven and reliable, can you explain to the Court when you put *past-proven and reliable* and when you relay that information to Probation and Parole, past-proven and reliable, what do you mean?

A. Are you asking in general?

Q. In general.

A. A past-proven, reliable informant is a person who provides information that leads to an arrest or someone who does, especially for us in the drug unit, that does controlled purchases, has proven themselves with information, and we were able to substantiate that information either through an arrest or through using a second confidential informant.

A lot of times when we first take people on board, we'll take that informant and we'll do a controlled purchase at a residence. And then we'll take another informant, a confidential informant, that's already past-proven and reliable and do a second buy to *make sure that that same person is providing the same* information.

Q. So when you refer to a confidential informant, just to clarify, if you use an informant for the first time, what title are you giving them?

A. They're a confidential informant, but they are *not a past-proven, reliable confidential informant.*

Q. Now, can you tell us, once you received this information from your past-proven and reliable informant, what did you do?

A. I -- once we got into work that day, I spoke with SBO Collins, who is one of the members of Operation *Safe Streets, and asked him to run a DACS check, which* is the probation's system that we don't have access to as police officers, to see if anyone on probation named David lived at 1232 North Thatcher Street.

Q. And what was -- can you tell us what, if anything, Officer Collins told you as a result of the search?

A. He did the search, and he advised me that there is a William David Burton, 125 of 56, that's a Level II probationer, that lives at that residence.

Q. Now, Detective, I know you mentioned that the *informant said that David was on probation. Did he* provide any other information regarding Suspect David's status, other than just being on probation?

A. Yes, he said that he was a sex offender.

Q. And when you received that information from Officer Collins, what did you do?

A. I took a picture with my cell phone, and I sent the picture of William David Burton to the confidential informant. At which time the confidential informant replied back that that's the same person that he knows as David.

THE COURT: Sent a picture of who?

THE WITNESS: Of William David Burton, the defendant.

THE COURT: Okay.

THE WITNESS: To the informant.

BY MS. WRIGHT:

Q. And to be clear, you're referring to William David Burton, the defendant. Is he in the courtroom today?

A. Yes, he's sitting in the Defense table wearing a white DOC jumpsuit.

Q. Thank you.

What happened after your past-proven, reliable informant confirmed David's identity?

A. SBO Collins contacted his supervisor, who is Craig Watson, and advised him of the facts of what I told him and requested to do an administrative search.

Q. I apologize for cutting you off. Can you tell *us whether or not you were a part of that conversation?*

A. I was not part of that conversation.

Q. Now, you said that Officer Collins received approval?

A. Yes, he did.

Q. What did you do once you received -- once *Probation and Parole gave approval for the* administrative search?

A. We responded out to the residence.

Q. At what time did you respond to the residence, approximately? Morning? Afternoon? Evening?

A. It was in the evening. I want to say it was approximately 2,000, which is 8 p.m.

A45

Q. Now, when you say we went to the location, can you tell us who was with you?

A. It was everybody from Operation Safe Streets, every -- each member that was working that night.

Q. Do you know approximately how many?

A. Approximately five.

Q. Now, what happened when you arrived at that location?

A. Norm -- what we do normally so that it looks like we're just doing a home visit or a probation check, we don't send the entire unit up there when we have information like this so it doesn't cause alarm to the people inside or anything else that's going on to -- to lower the risk to the officers.

So SBO Collins and I want to say it was his partner that went up and initially started knocking at the door, trying to gain entry to speak with the defendant.

Q. Let me stop you right there. Before knocking on the door, can you tell us what, if anything, Wilmington Police or Probation and Parole observed prior to entering 1232 or knocking on the door at 1232 Thatcher Street?

A. The streets were cleared. There was one vehicle parked in front of the residence. There was a porch. There's a porch on the front of the residence. And other than that, there was nothing else to observe until -- at that point.

Q. Can you tell us whether or not you observed anybody entering 1232 Thatcher Street before?

A. No.

Q. If I can have a moment.

Detective, do you recall writing a report in this case?

A. I did.

Q. Would you say your memory's better then or now with regards to details before approaching 1232 North Thatcher Street?

A. Then.

Q. And, Detective, do you have a copy of your report with you?

A. I do.

Q. If I can refer you to page 2 of your report. You can just read to yourself quietly the second paragraph, starting approximately 2005 hours.

A. Mr. Guy was already -- Bernard Guy was already in the residence. He was not outside.

Q. Okay.

Now, if I can -- if I can ask you, what happened when the probation officers knocked on the door?

A. The porch of the door was actually locked. That was the area that the defendant, Bernard Guy, first made contact with SBO Collins, and he was immediately hostile towards police, or towards SBO Collins. And I can't remember who the other person that was out front with him at the time.

Q. Now, you said that Defendant Bernard Guy. Is he in the courtroom as well?

A. Yes, he is. He's sitting in the wheelchair wearing the orange shirt.

Q. Detective, can you tell us whether you personally observed Defendant Bernard Guy being hostile with the officers?

A. No, we were parked just slightly down the block waiting for them to wave us up once they started to make entry into the -- into the residence.

Q. Can you tell us what, if anything, Officer Collins told you about Bernard Guy's behavior?

A. He said that he was very hostile. He advised that he went back into the residence, and that's when we all exited the vehicles and approached at that point. A short time later Mr. Guy -- you could hear SBO Collins screaming back and forth. I don't recall exactly what the conversation was. Again, we were -- we were some distance away.

We immediately responded up. As we were responding up, Defendant Guy opened the door and he continued to be hostile towards SBO Collins and his partner who were the first two to enter.

Q. Can you tell us when Bernard Guy returned to the door what, if anything, he told Officer Collins?

A. He said that, "David is not home." He said, "David's not home." Guy opened the door. Yeah, that's what I have. That he said that David was not home.

Q. Now, you said after the back and forth between Collins and the defendant, Guy, you exited your car?

A. Yes.

Q. Can you walk us through what you observed as you approached?

A. As we approached, you could still hear, you know, the conversation going back and forth. The

defendant, Mr. Guy, was still — he had just opened the door, as I've stated, and we got up to the front of the residence. This had been several minutes had passed at this point. As we entered, again, SBO Collins and his partner, I know their -- it was SBO Vettori was this other person that was out front. I'm sorry. It's here in the report. They were the first two in. I was immediately behind them entering the residence.

Q. *Can you tell us what you observed when you* immediately walked into the residence?

A. Defendant Guy was still extremely hostile. He was standing. He was being aggressive towards the probation officers and very loud and hostile towards the members of Operation Safe Streets.

THE COURT: You were the third person in?

THE WITNESS: Yes, ma'am.

THE COURT: It was SBO Collins was the next person?

THE WITNESS: SBO Vettori.

THE COURT: Vettori?

THE WITNESS: Vettori.

BY MS. WRIGHT:

Q. Detective, if you can explain just how -- how much time elapsed between when Officers Vettori and Collins walked into the residence and you walked into the residence?

A. I was immediately behind them.

Q. Immediately behind them. Now, Detective, for the record, how old approximately is Bernard Guy?

A. He is 63 years old still.

Q. And can you tell us whether or not Bernard Guy was in a wheelchair? You said he was standing up. Can you explain for the Court what you mean?

A. He was standing up. He didn't even have his cane initially. Again, he -- he was in -- at this point he was -- once I got there, because it's a narrow environment, he was in a common area which was just at the base of the steps, was just several feet from the front door, maybe approximately 12 feet. It was like -- it would have been like an old living room area, but it was kind of like a common dining area and then there was a kitchen to follow. He was just in that doorway when I made contact -- initially made contact with him.

Q. And if you can explain further. You keep on using the word "hostile." Can you explain in detail what, if anything, the defendant said to officers that may have caused alarm or concern?

A. He was just very aggressive in the manner and in his tone, the way that he was dealing with us.

Q. Were there any specific threats?

A. I'm trying to recall. I'm not recalling any specific terms that he was using. He was just very aggressive, enough that I -- that I felt fear for everyone's safety that was in the place. And I ordered him to place his hands behind his back.

Q. So despite his age, you're saying that he still caused -- can you explain that just for the Court?

A. He's six foot seven, 262 pounds, according to the pedigree, when he was standing in front of me. He was very hostile, and he was not the gentleman that you see today sitting in the wheelchair. He was very aggressive in his manner with the way that he was talking to us and with his dealings.

Q. Now, can you tell us when you walked in, what, if anything, else did you observe about the house in terms of presence of any other people, animals, anything?

A. The very -- when you first -- you go through a porch area, then there's the door to gain entry. The very first room in the residence had been converted into a small bedroom. That was one of the rooms that was being rented. And then it was the base of the steps, and there was a doorway just to the left. And at the top of this -- then I could see up at the top of the steps. That's ... As I was passing SBO Collins and Vettori were already on their way up the steps because SBO Collins had already observed the defendant exiting the bathroom area.

Q. When you say "defendant," can you just explain what defendant you're referring to?

A. Defendant Burton.

Q. Just so we can get a clear picture, Collins, Vettori and yourself walk in?

A. Yes.

Q. Collins and Vettori go immediately upstairs?

A. Yes.

Q. And it's just you dealing with Bernard Guy?

A. There's other officers that are behind me. But, yes, I'm the first person that made contact with Mr. Guy.

Q. So based on Mr. Guy's behavior that you described, what did you do?

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,

v. ID No. 1301022871

WILLIAM BURTON, 1301022875
BERNARD GUY

Defendants.

BEFORE: HON. VIVIAN L. MEDINILLA, J.

TRANSCRIPT OF MOTION TO SUPPRESS

JOHN P. DONNELLY, RPR
CHIEF COURT REPORTER
SUPERIOR COURT REPORTERS
500 N. KING STREET WILMINGTON, DELAWARE 19801
(302) 255-0563

August 21, 2013
Courtroom No. 6C
11:45 a.m.

SARITA R. WRIGHT, ESQUIRE
DEPARTMENT OF JUSTICE
Wilmington, Delaware 19801
for State of Delaware

KEVIN J. O'CONNELL, ESQUIRE
PUBLIC DEFENDER'S OFFICE
Wilmington, Delaware 19801
for Defendant Burton

ALBERT J. ROOP, ESQUIRE
Wilmington, Delaware 19801
for Defendant Guy

THE COURT: Good afternoon.

MS. WRIGHT: Still good morning. May I bring in Officer Watson?

THE COURT: Yes, thank you. This is the continuation of our August 15 suppression hearing. May I see the clerk for a minute?

(Officer Watson retakes the witness stand.)

THE COURT: State your name for the record.

THE WITNESS: William Craig Watson.

THE COURT: I will just remind you you are still under oath. Thank you.

CROSS EXAMINATION

BY MR. O'CONNELL:

Q. Good morning, Officer Watson. How are you today?

A. Good morning, how are you?

Q. Very good. Thank you for asking.

Before we proceed, could you tell Judge Rapposelli what you reviewed, what documents you reviewed or whatever you reviewed prior to coming to court on August 15th, and testifying?

A. I reviewed the pre-arrest checklist with Officer Collins. As part of that checklist --

Q. That is what's been admitted, I think, as State's Exhibit 1. There is -- can you see it?

A. Yes.

Q. Checklist. You reviewed that before you came into court?

A. Correct.

Q. Okay.

A. We reviewed the checklist. We attempted to corroborate as much information --

Q. I don't think I made my question clear. Before you came in and testified on August 15th, last Friday?

A. Yes.

Q. In order to get ready to testify, did you review anything before you came into the courtroom?

A. I reviewed the checklist and my report, my arrest incident report.

Q. Is that arrest incident report, is that --

MR. O'CONNELL: May I approach him?

THE COURT: Yes.

BY MR. O'CONNELL:

Q. *Is that this document?*

A. Yes, that is the second page of the document.

was not home. We asked if we would come in and check his room to make sure he wasn't home. Sometimes people don't really check. We wanted to make sure he was not present. He told us he was not going to allow us in the house. If we did not leave, he was going to have his dog, which was on the porch with him barking, he was going have his doing attack us if we did not leave.

Q. When he did that -- Bernard Guy, is he in the courtroom today?

A. He is.

Q. Can you point him out?

A. Seated behind the table to my left in a blue collar shirt.

Q. Can you tell us --

THE COURT: Let the record reflect the witness has identified the first gentleman in the white as William Burton, and let the record reflect the witness identified Bernard Guy as the gentleman in the blue shirt.

BY MS. WRIGHT:

Q. What did you do after defendant Guy threatened to have his dog attack you?

A. At that point we contacted the radio for the

additional Safe Streets members who were in the area to respond to the residence to back us up.

Q. Can you tell us when defendant Guy threatened to sic his dog on you, was the door open or closed at this point?

A. I recall the door had been open at that point. He had opened it to speak to us at that point, when that is why I felt we were eminently in danger of being attacked by a dog.

Q. Can you tell us; did you at some point enter that house?

A. Yes, as soon as assisting members arrived, Mr. Guy backed up and allowed us entry into the residence.

Q. Can you tell us; what did you observe upon entering 1232 Thatcher?

A. As soon as we walked in into the main front door, through the porch we observed Mr. Burton was coming walking from a room to the left top of the steps, to the room that was directly at the top of the steps which was later found to be his room.

Q. Can you tell us, Officer, what was defendant Guy's behavior like when he was at the door with you?

A. He was still extremely loud, very hostile. He was shouting at us. He was not cooperative with directions.

Q. Upon entering and seeing defendant Burton, what did you do?

A. Myself and Officer Collins went to the top of the stairs to make contact with Mr. Burton.

THE COURT: Officer, let me go back for a minute. Did you hear the dog?

A. We could we hear the dog.

Q. Could you see the dog?

A. We could see it on the porch.

Q. What kind of dog would you say it was?

A. I don't remember what breed it was. It was a large dog.

Q. When you say that the defendant Guy, he was extremely loud and shouting, what was he shouting?

A. He was yelling that he didn't want us at his house. We needed to leave. Again, you know, I am going to have my dog attack you. He didn't give any commands for the dog to attack us.

Q. What directions, you indicated he was not following directions, what directions were you asking?

A. Calm down, just relax. He was in our way initially, asking him to let us check for Mr. Burton, make sure he was there or not there. He was not compliant with those directions.

THE COURT: Thank you.

MS. WRIGHT: No further questions.

CROSS EXAMINATION

BY MR. O'CONNELL:

Q. Officer, good afternoon.

A. Good afternoon.

Q. You indicated you were with Officer Collins from Probation and Parole?

A. Yes.

Q. When did you first meet up with him?

A. Start of out shift, top of my head I don't know what our shift was that night.

Q. When you indicate that you conducted some surveillance of 1232 Thatcher Street; how long did you do surveillance?

A. We were there more than a few minutes when we observed two males enter.

Q. Where had you come from before -- you were with Officer Collins, correct?

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

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The State of Delaware)
)
v.) Case Number: 1301022871
)
William D. Burton)
)

STIPULATION of WAIVER OF JURY

IT IS HEREBY STIPULATED, subject to the Court's approval, that the above Criminal Case be tried by the Court without a jury.

Sarah Wright Attorney for the State

Attorney for the Defendant

2013 SEP 24 PM 12:14
PROTHONOTARY
KENT COUNTY DE

I HAVE READ AND UNDERSTAND THE ABOVE STIPULATION AND HEREBY WAIVE ALL RIGHT TO A JURY TRIAL. THIS WAIVER WILL APPLY IN ALL RETRIALS, SHOULD THEY BE ORDERED.

Defendant

SO ORDERED this 24 **day of** Sep, ____

JUDGE

forms\criminal\jurywaiv.wpd
REVISED 7/09

ASO

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,

Plaintiff,

v. ID No. 1301022871

WILLIAM D. BURTON,

Defendant.

BEFORE: HONORABLE CALVIN L. SCOTT, JR., J.

APPEARANCES:

SARITA R. WRIGHT, ESQ.
DEPARTMENT OF JUSTICE
for the State

KEVIN J. O'CONNELL, ESQ.
OFFICE OF THE PUBLIC DEFENDER
for the Defendant

STIPULATED TRIAL TRANSCRIPT
SEPTEMBER 24, 2013

PATRICIA L. GANCI, RMR, CRR
SUPERIOR COURT OFFICIAL REPORTERS
500 N. King Street, Suite 2609, 2nd Floor
Wilmington, Delaware 19801-3725
(302) 255-0653

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- - - - -

September 24, 2013
Courtroom No. 6E
10:30 a.m.

PRESENT:

As noted.

- - - - -

MR. O'CONNELL: Good afternoon, Your Honor.
MS. WRIGHT: Good afternoon, Your Honor.
THE COURT: Good afternoon. Has your client gone through the colloquy?
MR. O'CONNELL: He has not. The paperwork should be in the file in terms of the waiver of jury trial. And I think that the parties ...
(Whereupon, defendant enters the courtroom.)
MR. O'CONNELL: There has been no colloquy with respect to the plea offer and the rejection of that. If the Court would like to engage in that before we proceed? It's high stakes poker. He's (b) section habitual offender eligible.
THE COURT: Okay. Why don't we start with

that? Was there a plea?
MR. O'CONNELL: There was, Your Honor. To my right is -- you can stay standing -- William Burton. He and I -- there was a suppression hearing in this case that resulted in a denial by Judge Rapposelli in an opinion dated September 9. The plea offer extended by the State is to Aggravated Possession of Cocaine, a Class B Felony. So he'd be facing two to 25 years. The State was recommending and asking that the defendant agree to 20 years, suspended after 15, followed by Level IV and Level III.
He also has in the offing a parole violation. He has a conviction dating back to 1977 that he was on parole for. So he'll have, in all probability, additional time above and beyond whatever the Court sentenced in this case. So, it's almost like a life sentence anyway.
THE COURT: Was that the only plea offer you received?
MS. WRIGHT: After the suppression hearing, yes, Your Honor.
MR. O'CONNELL: Yes, Your Honor.
MS. WRIGHT: And, Your Honor, as part of that

plea the State would have waived habitual (b) status. He's habitual offender eligible. So in exchange for waiving habitual (b), which is a mandatory life sentence, the State was recommending 15 years at Level V.
THE COURT: Mr. Burton, did you have a chance to discuss this plea with your attorney?
THE DEFENDANT: Yes.
THE COURT: And are you rejecting it?
THE DEFENDANT: Yes.
THE COURT: Okay.
MR. O'CONNELL: Likewise, Your Honor, he did execute a waiver of jury trial in favor of a bench trial. I believe that paperwork is in the Court file. I did explain to him his right to a jury trial. I also met with him on two occasions and discussed with him the nature of a stipulated trial in that in this case it's our belief that the suppression issue is really the most important issue in this case and that there was a pretty thorough record made before Judge Rapposelli that we're willing to rely upon for suppression purpose. And that for purposes of a trial today, we'll rely upon that record, plus the additional record that the State will

make with respect to where the drugs were found and what they were and how much was found.
THE COURT: Okay. Mr. Burton, I'm informed that you desire to waive your right to a jury trial. Is that correct?
THE DEFENDANT: Yes.
THE COURT: Before accepting your waiver, there are a number of questions I'm going to ask you to ensure that it's a valid waiver. If you do not understand any of the questions at any time and you wish to interrupt the proceedings to consult further with your attorney, please say so.
Can you tell me what your full name is?
THE DEFENDANT: William David Burton.
THE COURT: And how old are you?
THE DEFENDANT: 57 years old.
THE COURT: Okay. And how far did you go in school?
THE DEFENDANT: 12th grade, Your Honor.
THE COURT: Okay. Have you taken any drugs, medicine, or any alcoholic beverages within the last 24 hours?
THE DEFENDANT: Just my diabetic medication.

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THE COURT: Okay. Do you understand that you're entitled to a trial by jury on the charges filed against you?

THE DEFENDANT: Yes.

THE COURT: Do you further understand that you would have the opportunity to take part along with your lawyer in the selection of the jurors?

THE DEFENDANT: Yes.

THE COURT: Do you understand that a jury trial means that you would be tried by a jury consisting of 12 people and all 12 jurors must agree on your guilt or innocence or level of guilt?

THE DEFENDANT: Yes.

THE COURT: Do you understand that if I approve your waiver of a jury trial the Court alone, and that would be me, would try the case and determine your innocence or guilt or level of guilt?

THE DEFENDANT: Yes.

THE COURT: Have you discussed this decision with your lawyer?

THE DEFENDANT: Yes.

THE COURT: Has he discussed with you the advantages and disadvantages of a jury trial?

THE DEFENDANT: Yes.

THE COURT: Do you want to discuss the issue further with your attorney?

THE DEFENDANT: No.

THE COURT: Although your attorney may advise you, the final decision is yours. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: What is your decision?

THE DEFENDANT: To waive.

THE COURT: I find the waiver to be knowing, intelligent, and voluntary, and I will sign the order.

You may proceed. You may have a seat.

MS. WRIGHT: Thank you, Your Honor. The State is ready to proceed on this matter. The State would like to call Detective Joseph Leary.

THE CLERK: Please state your name.

THE WITNESS: Joseph Francis Leary, Jr.

JOSEPH F. LEARY, JR., having duly been sworn, was examined and testified as follows:

THE CLERK: Thank you. You may be seated. Please spell your first and last name for the Court.

THE WITNESS: Joseph, J-O-S-E-P-H; Leary, L-E-A-R-Y.

DIRECT EXAMINATION

BY MS. WRIGHT:

Q. Good morning. Can you please tell the Court what agency you work for and your rank and your current duties?

A. Work for the City of Wilmington Police Department. Currently assigned to the Drug, Organized Crime, and Vice Unit as a detective. I've been so employed with the City of Wilmington since June of 1999.

Q. Detective, I'm going to take you to January 31st of this year, 2013. Were you working in your official capacity that day?

A. Yes, I was.

Q. Can you tell the Court where you were at approximately 8 p.m.?

A. 1232 North Thatcher Street.

Q. That's New Castle County, correct?

A. New Castle County, State of Delaware.

Q. Can you tell us why you were at that location?

A. We responded there to conduct an administrative search of Defendant William Burton's room.

Q. You said "Defendant William Burton." Is he in the courtroom today?

A. Yes, he's sitting at the Defense table wearing a white DOC jumpsuit.

MS. WRIGHT: May the record reflect that the detective identified the defendant, William Burton?

BY MS. WRIGHT:

Q. Detective, can you tell us what happened when you made contact with 1232 North Thatcher Street?

A. Once the residence was secured, the probation officers assigned to our unit began to conduct an administrative search.

Q. And can you tell us first, was William Burton at that house, 1232 North Thatcher Street?

A. Yes, he was. He was -- after entering the residence, he was located on the second floor coming out of the bathroom. SBO Collins made initial contact with him.

Q. That's Probation Officer Daniel Collins?

A. Yes.

Q. Can you tell us about that contact that Officer Collins had with the defendant?

A. He responded directly upstairs and placed him into handcuffs during the administrative search.

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Q. Did the defendant say anything about what he was doing as he was exiting the bathroom?

Well, did he point out any particular room in that building, 1232 North Thatcher Street?

A. He identified the room in the back as his bedroom.

Q. Can you tell us what, if anything, was found in -- first of all, where was the bedroom and what was found inside?

A. It was located directly at the top of the steps to the rear of the residence.

Q. And to be clear, the defendant said that that was his bedroom?

A. It was identified by him as his bedroom, yes.

Q. Can you tell us what was found in that bedroom?

A. During the search, SBO Collins located the below-listed items. Inside a small dresser he located one white-in-color plate with an off-white chunky substance and a razor blade. He located two Ziploc bags containing a green plant-like substance, a grinder, Top smoking papers, and $150, all in the same small dresser.

Next to the plate in the same dresser a black digital scale was also located. Inside a white-in-color

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cooler contained baking soda and a glass jar which contained an off-white chunky substance. During further search, he searched Mr. Burton's closet. Inside the closet he located a black-in-color jacket with red lettering that contained a clear plastic bag which contained a white powder substance.

MS. WRIGHT: Your Honor, may I approach?

THE COURT: Yes.

MS. WRIGHT: And, Your Honor, may I approach freely?

THE COURT: Yes.

BY MS. WRIGHT:

Q. Detective, I'm handing you what's been -- it's a little different -- premarked as State's Exhibit 1 without objection. Can you tell us what that is?

A. This is the Wilmington Police Department's drug evidence envelope.

Q. And when all of these items were collected from the defendant's bedroom, who was responsible for logging in that evidence?

A. I was. Once everything was collected by the probation officers, everything was turned over to me to be tagged as evidence.

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Q. And can you tell us, State's Exhibit 1, what's inside that?

A. It contains one clear, knotted, plastic bag containing a white powdery substance, two clear Ziploc bags containing a green plant-like substance which is here.

Q. And that white bag, the white -- the clear bag with the white substance, where was that seized from?

A. That was seized from Mr. Burton's black jacket which had red lettering on it.

Q. I'm handing you what's been marked as State's Exhibit 2, again without objection. Can you tell us what that is?

A. It's the ME's report.

Q. And can you tell us what was the result of the testing for the clear bag with the white substance inside that was seized from the defendant's bedroom?

A. It tested positive for cocaine and had a weight of 28.45 grams.

Q. And with regards to the green plant-like substance that was seized from the defendant's bedroom, what's the result of that final testing?

A. Tested positive for cannabis and had a weight

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of .93 grams.

Q. Finally, Detective, I'm handing you what's been marked as State's Exhibit 3, again without objection. Do you recognize that?

A. That's the box that we placed all of the other items for evidence in.

Q. If you can, just tell the Court what's inside State's Exhibit 3.

A. Baking soda, the grinder, digital scale, Tops paper, a razor blade, and safety pin. Inside the bag is the glass jar and a white-in-color plate covered in powder.

Q. Detective, can you tell us what, if any, significance does the baking soda and the glass jar that you recovered have?

A. The -- it appeared that he was popcorning, using a process known as popcorning. He would take the crack cocaine, or powder -- the baking soda and the cocaine and they would mix it. They would put it in a glass jar, and then they would put it in a microwave. And it's called popcorning because it pops as it -- during the process of it being cooked together.

Q. And can you tell us the significance of a

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razor?

A. The significance of the razor and the plate is that they were -- once it was done, it was scraped out of the jar, placed into the plate, and then chopped up into smaller quantities for sale.

Q. Detective, if you can just briefly explain to the Court your training and experience with regards to people who possess cocaine with the intent to deliver it?

A. I've been a drug investigator for the past 12 years. I have been to numerous D.E.A. schools, basic and advance level, been to testing schools provided by the D.E.A. for field testing, to schools on how to actually make different controlled substances.

Q. What about your experience with regards to the drug dealing in terms of the amounts of the substance seized?

A. The weights themselves are -- are dictated by -- by law on how they've -- they go. The purer the amount -- that amount itself is not a possession weight. The -- 28 grams of coke is a lot of coke for one person to just have in his possession.

Q. And, Detective, can you just tell us overall

why in this case -- and with regards to the cocaine that was seized, what is your opinion as to whether the defendant had that for drug dealing? And can you tell us what of all of these factors that you considered in making this opinion?

A. The actual amount of weight, the fact that he had the plate, the razor blade, the jar, and baking soda, all in his room in one area to be used and for -- to be able to break it down into smaller amounts. And there were some -- I noted it in the report, but we don't have them -- some tear-off bags that were also located in the room.

Q. Thank you, Detective.

MS. WRIGHT: The State has no further questions at this time.

MR. O'CONNELL: Just a couple, Your Honor.

CROSS-EXAMINATION

BY MR. O'CONNELL:

Q. You indicated that there was all of the elements necessary to popcorn some crack cocaine. Is that correct?

A. The process that -- this particular process they were using to cook it in, yes.

Q. Is there a microwave in that room?

A. Not in that room. It's downstairs.

Q. There was a microwave downstairs?

A. Yes, in the kitchen area.

Q. Is this his apartment or -- how is that building broken up?

A. The kitchen, a dining room were -- well, not much of a dining room, but another room that was like a common area. And then there was -- I want to say there was -- the rest of the house was broken up into rooms. I want to say there was at least four rooms, one downstairs and then three -- three upstairs, if I remember correctly.

Q. Understood.

MR. O'CONNELL: One moment, Your Honor.

(Defense counsel conferring with defendant.)

MR. O'CONNELL: No further questions. Thank you, Detective.

THE COURT: Anything else?

MS. WRIGHT: No redirect, Your Honor.

THE COURT: You may step down.

THE WITNESS: Thank you, Your Honor.

MS. WRIGHT: Your Honor, at this point the

State would rest -- actually, Your Honor, I believe we already moved the items into evidence just formally, if we could, those items that have been marked without objection.

THE CLERK: State's Exhibits 1 through 3 so marked, Your Honor.

THE COURT: Thank you.

MR. O'CONNELL: Your Honor, we have no evidence. I have discussed with Mr. Burton his right to testify. In this situation, he is sufficient to rely upon the record made at the suppression hearing and he waives his right to testify.

THE COURT: Thank you. Anything else?

MR. O'CONNELL: Argument? I have no argument, Your Honor.

MS. WRIGHT: The State has no argument since it's a stipulated trial.

THE COURT: Okay. And you're proceeding on Counts I through V?

MS. WRIGHT: That's correct, Your Honor. Counts I, II, III, and IV would consolidate, Your Honor. And because they're both counts of Possession of Marijuana, there were two separate bags, I'm not sure

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why there are two counts there. And then Possession of Drug Paraphernalia. Count VI does not apply to the indictment of this defendant.

THE COURT: The Court --

MR. O'CONNELL: Want to have him stand? Or I don't know what the Court's process is here.

THE COURT: No. He can be seated. The Court finds that the State has met their burden beyond a reasonable doubt; that the defendant is guilty of Count I, Drug Dealing; Count II, Aggravated Possession; Count III, Possession of Marijuana; Count IV merges into Count III; and Count V, Possession of Drug Paraphernalia.

MS. WRIGHT: Your Honor, at this point the State does not believe a presentence investigation is necessary. The State would just ask for a deferred sentencing because the State would file a petition to declare the defendant a habitual offender.

MR. O'CONNELL: We agree. We discussed this beforehand, Your Honor. The State does need some time to put together their petition. The defendant, you know, is anxious to move the process along, and I'm about to go into a lengthy murder trial. I know Ms. Wright is going into a murder trial as well. But

any Friday in three weeks, something like that.

THE COURT: Okay. We will advise you of the dates. We will defer sentencing at this point.

MS. WRIGHT: Thank you, Your Honor.

MR. O'CONNELL: Thank you, Your Honor. I have no further matters before the Court. May I be excused?

THE COURT: Yes.

MR. O'CONNELL: Thank you.

(Whereupon the proceedings concluded at 12:32 p.m.)

STATE OF DELAWARE:

NEW CASTLE COUNTY:

I, Patricia L. Ganci, Official Court Reporter of the Superior Court, State of Delaware, do hereby certify that the foregoing is an accurate transcript of the proceedings had, as reported by me in the Superior Court of the State of Delaware, in and for New Castle County, in the case therein stated, as the same remains of record in the Office of the Prothonotary at Wilmington, Delaware, and that I am neither counsel nor kin to any party or participant in said action nor interested in the outcome thereof.

This certification shall be considered null and void if this transcript is disassembled in any manner by any party without authorization of the signatory below.

WITNESS my hand this __10th____ day of __March_____, 2014.

/s/_____
Patricia L. Ganci, RMR, CRR

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

STATE OF DELAWARE

VS.

WILLIAM D BURTON

Alias: No Aliases

DOB: 01/25/1956
SBI: 00124982

CASE NUMBER:
1301022871

CRIMINAL ACTION NUMBER:
IN13-02-1843
DDEAL TIER 4(F)
IN13-02-0823
TIER 5 POSS(F)
IN13-02-0826
POSS DRUG PARAP(M)
IN13-02-0825
POSS MARIJ(M)

COMMITMENT

SENTENCE ORDER

NOW THIS 13TH DAY OF DECEMBER, 2013, IT IS THE ORDER OF THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged. The defendant is to pay the costs of prosecution and all statutory surcharges.

AS TO IN13-02-1843- : TIS
DDEAL TIER 4

Effective January 31, 2013 the defendant is sentenced as follows:

- The defendant is declared a Habitual Offender and is sentenced pursuant to 11 Del. C. 4214(b) on this charge. "The Life sentence imposed herein is not subject to the award of good time."

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5

AS TO IN13-02-0823- : TIS
TIER 5 POSS

- The defendant is placed in the custody of the Department

A57

STATE OF DELAWARE
VS.
WILLIAM D BURTON
DOB: 01/25/1956
SBI: 00124982

of Correction for 10 year(s) at supervision level 5

- Suspended after 2 year(s) at supervision level 5

- For 18 month(s) supervision level 3

AS TO IN13-02-0826- : TIS
POSS DRUG PARAP

- The defendant is placed in the custody of the Department of Correction for 6 month(s) at supervision level 5

- Suspended for 6 month(s) at supervision level 3

Probation is concurrent to criminal action number IN13-02-0823 .

AS TO IN13-02-0825- : TIS
POSS MARIJ

- The defendant is placed in the custody of the Department of Correction for 3 month(s) at supervision level 5

- Suspended for 3 month(s) at supervision level 3

Probation is concurrent to criminal action number IN13-02-0826 .

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
WILLIAM D BURTON
DOB: 01/25/1956
SBI: 00124982

CASE NUMBER:
1301022871

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

Have no contact with Bernard Guy

Defendant shall receive mental health evaluation and comply with all recommendations for counseling and treatment deemed appropriate.

Defendant shall be evaluated for substance abuse and follow recommendation for treatment, counseling and screening.

Pursuant to 29 Del.C. 4713(b)(2), the defendant having been convicted of a Title 11 felony, it is a condition of the defendant's probation that the defendant shall provide a DNA sample at the time of the first meeting with the defendant's probation officer. See statute.

JUDGE CALVIN L SCOTT JR

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
WILLIAM D BURTON
DOB: 01/25/1956
SBI: 00124982

CASE NUMBER:
1301022871

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	120.00
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	100.00
PROSECUTION FEE ORDERED	100.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	4.00
DELJIS FEE ORDERED	4.00
SECURITY FEE ORDERED	40.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	60.00
SENIOR TRUST FUND FEE	
TOTAL	428.00

APPROVED ORDER 4 November 1, 2016 13:58

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Copy of 33

STATE OF DELAWARE :

: ID # 1301022871

v. :

WILLIAM BURTON :

NOTICE OF PETITIONER'S MOTION FOR POSTCONVICTION RELIEF

TO: JOSEPH R. BIDEN III, ESQUIRE
ATTORNEY GENERAL
Carvel State Office Building
Attorney General's Office
820 N. French Street
Wilmington, DE 19801

PLEASE TAKE NOTICE, that the undersigned counsel will present the Petitioner's Motion For Postconviction Relief at a date and time convenient to the Court.

J. BRENDAN O'NEILL, ESQUIRE (#3231)
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(302) 577-5121
Attorneys for Petitioner

DATED: APRIL 30, 2014

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	:	
	:	ID # 1301022871
v.	:	
WILLIAM BURTON	:	

MOTION FOR POST-CONVICTION RELIEF

Petitioner, William Burton, by and through counsel from the Public Defender's Office, hereby moves this Honorable Court to vacate his conviction for offenses in violation of Delaware's criminal drug laws listed in Title 16 of the Delaware Code. The grounds for the motion are that during the time Petitioner Burton's case was pending, the State failed to disclose to Petitioner Burton that there was ongoing governmental misconduct in the State's crime laboratory. By failing to do so, the State violated Petitioner's rights under *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner Burton's drug case began with his arrest in 2013. Petitioner Burton's drug case ended in 2013 when he was sentenced for his drug conviction. By indictment, the State had accused Petitioner Burton of drug crimes. In its effort to garner proof of the charges against Petitioner Burton, the State sent the suspected illegal drugs to the crime lab for testing.

In February 2014, Delaware's Department of Justice (DOJ) first disclosed that from 2010 into early 2014, employees at the State's crime laboratory were stealing and/or tampering with alleged drug evidence while the evidence was being stored at the crime lab. In correspondence dated April 14, 2014 the DOJ noted as follows:

> [A]ccess to the drug evidence locker was not restricted to, or monitored by, a single individual. The door to the locker was left open at times, and even when locked, the locker could be accessed by any OCME employee who had a pass key and pass code.
>
> Also, due to problems in record keeping, in some cases evidence logs could reflect a discrepancy of hours or days between the time the police log notes evidence as having been submitted to the OCME and the time the OCME records it as having been received.

While the petitioner's drug case was pending, crime lab employees were illegally tampering with and/or stealing drug evidence from the lab. The State failed to disclose to that fact until long after his case was closed. Evidence of the misconduct would have been material to petitioner's case. The misconduct by lab employees was relevant to the impeachment of witnesses the State would have had to call to prove that the suspected drugs were illegal and were linked to the petitioner. The State's failure to disclose this material evidence violated Petitioner Burton's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article 1, Section 7 of the Delaware Constitution.

ENTITLEMENT TO RELIEF UNDER RULE 61

The defendant's claim is not procedurally barred. Generally, *Superior Court Criminal Rule* 61(i) (1)-(4) prevents this Court from considering post-conviction claims that are not filed within a year after the judgment of conviction is final; are contained in a repetitive motion; were not previously asserted in proceedings leading to the judgment of conviction; or were formally adjudicated in proceedings leading up to judgment of conviction and on appeal. However, "Rule 61(i) (5) provides an exception to the procedural bars for '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.' A colorable claim of a *Brady v. Maryland*[, 373 U.S. 83 (1963)] violation falls within this exception."[1] Here, because the petitioner's claim involves a "*Brady* violation," it is not procedurally barred.

GOVERNMENT MISCONDUCT AT THE OFFICE OF THE CHIEF MEDICAL EXAMINER

On January 14, 2014, during a trial in Kent County Superior Court, it was discovered that drugs which had been sealed in an evidence envelope and stored at the crime laboratory in the Delaware Office of the Chief Medical Examiner, (OCME), were missing and had been replaced with blood pressure pills.[2] This discovery was made even though an officer testified that it did not appear there had been tampering with the envelope.[3] In February, the crime lab was shut down, the Delaware State Police (DSP) confiscated the drugs at the lab and launched

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[1] *State v. Wright*, 67 A.3d 319, 324 (Del. 2013). *See Jackson v. State*, 770 A.2d 506, 515-16 (Del. 2001) (finding trial court erred in barring the petitioner's *Brady* violation claim as untimely).

[2] *See generally State v. Walker*, ID#1202002406 (Del.Super.), trial testimony of Sgt. Jeremiah Lloyd, excerpt attached as Ex. D.

[3] Ex.D at 15-16, 22-23.

a criminal investigation into the crime lab's operation.[4] Additionally, Chief Medical Examiner Richard T. Callery was suspended and became the target of a separate criminal investigation.[5]

To date, the investigation of the crime lab has revealed that suspected drug evidence had been tampered with and/or unlawfully removed since at least 2010.[6] In fact, the Department of Justice, (DOJ) has explained that it learned that since 2010,

> access to the drug evidence locker was not restricted to, or monitored by, a single individual. The door to the locker was left open at times, and even when locked, the locker could be accessed by any OCME employee who had a pass key and pass code.
>
> Also, due to problems in record keeping, in some cases evidence logs could reflect a discrepancy of hours or days between the time the police log notes evidence as having been submitted to the OCME and the the OCME record it as having been received.[7]

While there are 53 people employed at the OCME it is not clear how many had access to the locker.[8]

Since the State's initial notification to defense counsel about the scandal, the number of cases affected by the crimes and/or government misconduct has grown significantly. The full scope of the scandal is still unknown. To date, police have not named any suspects. Attorney General Biden recognized the scope of the government misconduct that occurred at the OCME when he stated that "Delaware must have its own independent, state of the art crime laboratory.

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[4] *See* O'Sullivan, Sean "Source:No Video, No Clerk, Lax Security At Lab" *The Delaware News Journal* (April 5, 2014), attached as Ex.B.

[5] Ex.B.

[6] *See* O'Sullivan, Sean "Drug Scandal Hits Medical Examiner's Office" *The Delaware News Journal* (February 22, 2014), attached as Ex.A.

[7] *State v. Lindsay Taylor*, ID # 1306002910 (Del.Super.), April 15, 2014 letter from DOJ to defense counsel, attached as Ex.K.

[8] Ex.B.

A new crime lab is the right thing to do for Delaware's criminal justice system and the right thing to do for taxpayers."[9]

ARGUMENT

The Principles Of Brady v. Maryland Require This Court To Vacate The Defendant's Conviction

The State's failure to disclose evidence favorable to a defendant violates his right to due process of law. *Brady v. Maryland*, 373 U.S. 83 (1963). A "*Brady* violation" is established when: "(1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the State; and (3) its suppression prejudices the defendant."[10] Prejudice from a *Brady* violation is established when there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). In this case, the State's failure to disclose to the petitioner that drug evidence at the crime lab was being tampered with and/or stolen while the substance in the petitioner's case was there is a *Brady* violation. It is a substantial violation that undermines confidence in the petitioner's conviction. Thus, the petitioner's conviction(s) must be vacated.

The Evidence Of Governmental Misconduct In The Crime Lab Is Impeachment Evidence Favorable To The Petitioner

Evidence that is favorable to a defendant must be disclosed to him if it is material either to guilt or punishment. *Brady*, 373 U.S. at 87. Because the jury's evaluation of a witness's credibility may be determinative of a defendant's guilt or innocence, *Brady* requires the State

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[9] O'Sullivan, Sean, "AG Biden Calls For New State Crime Lab" *The Delaware News Journal* (April 24, 2014), attached as Ex.C.

[10] *Mitchell v. State*, 2014 WL 1202953* 4 (April 8, 2014) (*quoting Wright v. State*, 67 A.3d 319, 325 (Del. 2013)) (internal quotations omitted).

to disclose impeachment evidence. *Bagley*, 473 U.S. at 676; *Jackson v. State*, 770 A.2d 506, 515 (Del. 2001). Impeachment evidence is part of an effective cross examination which is essential to the defendant's right to confront witnesses against him.[11] Thus, "jurors should have every opportunity to hear impeachment evidence that may undermine a witness' credibility." *Jackson*, 770 A.2d at 515.

In Petitioner's case, evidence of government misconduct at the crime lab is impeachment evidence favorable to the petitioner. In every drug trial, the State must prove beyond a reasonable doubt that the substances alleged to be illegal drugs are just that. Before it can present this "drug evidence" to a jury, however, the State must establish a chain of custody by adequately tracing the continuous whereabouts of the substance from the time of seizure at the crime scene until the time of trial.[12] Factors considered in establishing a chain of custody include 'the nature of the article, the circumstances surrounding its preservation and custody, and ***the likelihood of intermeddlers having tampered with it.***' "[13] In other words, the State must "convince the Court that it is improbable that the original item had been exchanged with another or otherwise tampered with." [14]

The State generally follows the same procedure in each drug trial to establish chain of custody of "drug evidence." In addition to the officer who seized the substance, the State

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[11] *Jackson*, 770 A.2d at 515 (Del. 2001) (*citing Davis v. Alaska*, 415 U.S. 308, 316 (1974)); U.S. Const. amend. VI; Del. Const. art. I § 7.

[12] *Tricoche v. State*, 525 A.2d 151, 153 (Del. 1987). Authentication is established if there is "evidence sufficient to support a finding that the matter in question is what its proponent claims." *D.R.E.* 901(a).

[13] *Whitfield v. State*, 524 A.2d 13, 16 (Del. 1987) (*quoting United States v. Gay*, 774 F.2d 368, 374) (10th Cir. 1985) (emphasis added). "The State was required to eliminate possibilities of misidentification and adulteration, not absolutely, but as a matter of reasonable probability." *Tricoche*, 525 A.2d at 153 (*quoting Tatman v. State*, 314 A.2d 417, 418 (Del. 1973)). *See Clough v. State*, 295 A.2d 729, 730 (Del. 1972) ("The test is reasonable probability that no tampering occurred.").

[14] *Tricoche*, 525 A.2d at 153 (*quoting United States v. Howard-Arias*, 679 F.2d at 366).

presents the testimony of the drug custodian from the relevant police agency that the suspected drug evidence was locked in a safe until it was delivered by him/her to the crime lab. [15] He/she also testified that he/she later retrieved the analyzed evidence from the crime lab, inspected the contents, then brought the evidence to court. [16]

The State next presents a drug analyst to testify about the chain of custody and his/her forensic testing of the suspect drugs. The analyst renders an opinion, based on his/her test results, that the evidence is an illegal drug. The analyst also testifies about the retrieval of the substance from the crime lab after testing.

Testimony by forensic analysts during the period of the government misconduct at the crime lab has established that suspected drug evidence was "kept in a large evidence room" which purportedly had "secured limited access" when not being tested. [17] After testing, the evidence is returned to the drug custodian for the relevant law enforcement agency.

There can be no doubt as to the impeaching nature of the evidence of the governmental misconduct in the petitioner's case. That drugs were tampered with and/or stolen shows that security was not at the level to which forensic analysts testified or would have testified since 2010. More importantly, it undermines any confidence in the testimony that the drugs in a

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[15] *See State v. Wright*, ID# 1206005342 (Del.Super.), trial testimony of Detective Disabitino, excerpt attached as Ex.E. The law with respect to establishing chain of custody, particularly with respect to drug evidence is set forth at 10 *Del.C.* §4331. To the extent that statute allows the State with any "short cuts" it has been preempted by *Bullcoming v. New Mexico*,131 S. Ct. 2705 (2011)) which requires the physical presence in the chain of custody upon the defendant's request to protect his right to confrontation. In fact, this current scandal is exactly the type of situation which arises when the State is allowed to take short cuts in establishing chain of custody.

[16] *See, e.g., Wright*, ID# 1206005342, trial testimony of Theresa Moore, excerpt attached as Ex.E.

[17] *Martin v. State*, 60 A.3d 1100, 1109 (Del. 2013) ("the defendant must be able to confront the certifying analyst when her report is submitted into evidence") (*citing Bullcoming*,131 S. Ct. 2705)). *See also* OCME Guidelines for the Collection and Submission of Forensic Evidence, at 18-19, excerpt attached as Ex.F.

particular envelope presented were those seized in the petitioner's case and were of the same quantity. The evidence directly contradicts evidence of chain of custody. It reveals that the drug evidence locker was not properly restricted. The door to the locker was left open and there was unfettered access to the locker. Also, record keeping problems reveal discrepancies of times between the police log showing when it was delivered and OCME record stating when it had been received.

The lab's wholesale disregard for important security provisions undermines the lab's results in every case. The lab's purpose is to provide the State with scientifically reliable evidence that suspected drugs are/were: 1) the illegal drugs the State has charged; and 2) the drugs taken from the defendant. However, what actually was going on at the time renders any crime lab testimony a mockery. The crime lab is supposed to be a place of scientific reliability. Instead, Delaware's crime lab was in shambles. In fact, the evidence undermines the analyst's opinion that the testing procedures were legitimate and that the tested drugs were the same as the drugs taken from the defendant. As such, the evidence is valuable for impeachment purposes and therefore, the State was required to disclose it.

The State Suppressed The Evidence Of The Crime Lab Corruption

The State suppressed impeachment evidence in the petitioner's case when it failed to disclose that drugs were being tampered with and stolen from the crime lab. While there is no indication that any individual prosecutor had any knowledge, prior to January 14, 2014, of the corruption in the crime lab, the State is still responsible for a failure to disclose that corruption as *Brady* material.[18] Each "individual prosecutor has a duty to learn of any favorable evidence

[18] *See Kyles v. Whitely*, 514 U.S. 419, 437-438 (1995) (finding it irrelevant whether or not the prosecutor knew police suppressed material evidence); *Arizona v. Youngblood*, 488 U.S. 51, 55 (1988) (*quoting Brady*, 373 U.S. at 87) (explaining that suppression of *Brady* material violated

known to others acting on the government's behalf in the case, including police." *Id.* at 438. This duty extends beyond police to any investigating agency.[19] "[A]ny argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police, [or government agent], for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." *Id.*

No matter how hard the DOJ may try to distance itself, there is no doubt that the crime lab is an investigative arm of that agency and is a partner with it and other Delaware law enforcement agencies in prosecuting all drug cases. Law enforcement and DOJ have relied solely on the crime lab at the OCME to test the substances in all drug cases.[20]

The degree to which the crime lab is an agent of the DOJ is also evidenced by the collaboration of the OCME and the DOJ to obtain federal grant monies. Grant documents prepared by the OCME in 2010 and 2011 emphasize that the crime lab's key objectives include supporting law enforcement agencies through the scientific analysis of drug evidence and improving the ability to adjudicate cases more efficiently. In fact, in order to obtain funds, Chief Medical Examiner Callery and Attorney General Biden were required to jointly sign a March 20, 2007 written Memorandum of Understanding which certified that the Delaware DOJ

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the defendant's right to due process "irrespective of the good faith or bad faith of the prosecution.").

[19] *See, e.g., Martinez v. Wainwright*, 621 F.2d 184, 186 (5th Cir. 1980) (holding the State's failure to give defendant a witness's criminal record that was in the possession of the medical examiner was a *Brady* violation); *Deberry v. State*, 457 A.2d 744, 751-52 (Del. 1988) (holding State's duty to preserve under *Brady* applies to all investigative agencies within the State).

[20] The OCME evidentiary guidelines also reveal the law enforcement nature of the crime lab. All evidence submitted for forensic examination "must be in connection with investigations that take place in Delaware or are in some way connected to the state of Delaware." Ex.F at p.7. Significantly, OCME makes its staff "available to provide consultation at crime scenes" in major drug scenes. Ex. F at p. 9. In fact, OCME dedicated its guidelines to those who are in careers to provide "state of Delaware with the highest degree of law enforcement, forensic science and medical-legal death investigation services while maintaining the traditions of fairness, professionalism, and integrity." Ex.F at p.3.

would investigate "allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results . . ."[21] Without the certification by the head of the DOJ, the crime lab would not have been eligible for federal funds it has received. Funds received under these joint requests have been provided to DOJ, DSP and the OCME.[22]

Here, the crime lab was part of the prosecution team that sought the petitioner's conviction. A member of the team was corrupt and, by design, concealed the misconduct from the petitioner. Thus, the State must be deemed to have suppressed the impeachment evidence in this case.

The Suppression Of The Crime Lab Corruption Has Created A Probability Sufficient To Undermine Confidence In The Outcome Of The Petitioner's Case.

Evidence of the crime lab corruption is material as there is a reasonable probability that had it been disclosed to the defense in this case, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. The evidence of corruption would have thwarted the State's ability to authenticate the substance at issue and to establish that the substance consisted of unlawful drugs. The Delaware Supreme Court has listed six factors to consider

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[21] *See* Memorandum of Understanding Delaware Office of the Chief Medical Examiner and Delaware Department of Justice In Accordance With The Justice For All Act, 2007, attached as Ex.G. The parties are required to sign this memo each year it requests money.

[22] Since 2010, Delaware has received $365, 836 from the United States Department of Justice, Office of Justice Policy, National Institute for Justice "Paul Coverdell Forensic Science Improvement Grants Program" ("Coverdell Grant"). *See* 42 U.S.C. § 3797 *et seq*. Under the Justice for All Act, the Coverdell Grant was created to provide states and local government with money to help improve the quality and timeliness of forensic science and medical examiner services. http://www.nij.gov/topics/forensics/lab-operations/capacity/nfsia/pages/welcome.aspx (last visited March 25, 2014) (setting forth awards for 2010-2012); Paul Coverdell Forensic Science Improvement Act Grant Request for Proposals, 2013, attached as Ex.H (setting forth funds available in Delaware from 2013 award). In addition to the OCME, both the DSP and the DOJ have received money under this grant. *See* Delaware Criminal Justice Counsel CJC Standard Form, National Forensic Science Improvement Act Grant, Fiscal Year 2012, attached as Ex.I.

when determining whether the suppressed evidence is material: 1) favorability; 2) admissibility; 3) probative value; 4) cumulative nature; 5) weight of other evidence; and 6) deference to the trial judge. *Stokes v. State*, 402 A.2d 376, 380 (Del. 1979). Examining the evidence in our case reveals that all of these factors support a finding of materiality.

The impeachment evidence in our case is material as it goes right to the heart of the case – that the substance is an illegal drug and that it belonged to the defendant. A significant factor in establishing chain of custody of the suspect drugs – ***"the likelihood of intermeddlers having tampered with it"*** is jeopardized by evidence of tampering and theft of drugs. *Whitfield*, 524 A.2d at 16. The State's evidence that the substance in our case consisted of illegal drugs and/or the State's evidence linking that substance to the petitioner has been compromised and is subject to a legitimate challenge from the defense. The State recently shut down its crime lab and publicly acknowledged that its own lab is so unreliable that the State has to contract with an outside private lab for drug testing in cases now set for trial. The whole crime lab operation is suspect. The State has conceded that

> during the course of the criminal investigation, [it] learned that access to the drug evidence locker was not restricted to, or monitored by, a single individual. The door to the locker was left open at times, and even when locked, the locker could be accessed by any OCME employee who had a pass key and pass code.
>
> Also, due to problems in record keeping, in some cases evidence logs could reflect a discrepancy of hours or days between the time the police log notes evidence as having been submitted to the OCME and the OCME record it as having been received.[23]

As a consequence, not even the DOJ can be assured of the integrity of any crime lab evidence or testimony stemming from testing that occurred between 2010 and launching the

[23] Ex.K.

investigation. In fact, the Attorney General, himself, has advocated for keeping this lab closed and starting from scratch with a new lab.[24]

There can be no question that, had defense counsel been aware of the information before trial, cross examination of the forensic analyst would probably have changed the outcome of the trial.[25] The cross examination would have seriously jeopardized, if not obliterated, the State's ability to prove an element of the offense. This Court must conclude that there is a reasonable probability of a different outcome had the *Brady* material been disclosed.[26]

In the context of a plea agreement, the determination of materiality is whether "there is a reasonable probability that, but for the government's failure to disclose *Brady* evidence, the defendant would have refused to plead guilty and gone to trial." [27] The petitioner was entitled to make the decision as to whether to enter a plea agreement "with full awareness of favorable material evidence known to the government."[28]

With information that would have made it significantly more difficult for the State to establish an element of the offense, there is a reasonable probability that he would not have

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[24] Ex.C.

[25] *See* Proffer of cross examination and discovery questions, attached as Ex.J.

[26] *See Atkinson v. State*, 778 A.2d 1058, 1062 (Del. 2001) ("Because the State withheld this evidence making it unavailable for effective cross-examination, we must conclude that there is a 'reasonable probability of a different result' had the favorable evidence the State withheld been provided in a timely fashion.").

[27] *Gibson v. State*, 514 S.E.2d 320, 325 (1999) (*citing Sanchez v. United States*, 50 F.3d at 1454; *Banks v. United States*, 920 F.Supp. 688, 692 (E.D.Va.1996) (noting that Second, Sixth, Eighth, and Ninth Circuits follow this standard)).

[28] *United States v. Hammer*, 404 F. Supp. 2d 676, 795-96 (M.D. Pa. 2005) ("In determining whether the *Brady* violations impact [a defendant's] guilty plea, the standard of review is whether there is a reasonable probability that but for the failure to disclose the *Brady* material, [he] would have refused to plead guilty and instead would have proceeded with the guilt-phase trial.") (*citing Kyles*, 514 U.S. at 435; *United States v. Nagra*, 147 F.3d 875, 881 (9th Cir.1998)).

entered into the same plea bargain with the State. Instead, he would have negotiated a more favorable plea agreement or have gone to trial. Thus, whether the petitioner went to trial, entered a plea agreement and/or stipulated that the substance in his case was an illegal drug, the State's suppression of the government misconduct at the OCME crime lab requires his drug convictions to be vacated.

WHEREFORE, based on the foregoing, Petitioner respectfully requests this Court to vacate his convictions.

Respectfully submitted,

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(302) 577-5121

Attorneys for Petitioner

DATED: April 30, 2014

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	No. 1301022871
	)	(to be supplied by Prothonotary)
v.	)	
	)	
William David Burton, III	)	
Name of Movant on Indictment	)	
	)	
	)	
William David Burton, III	)	
Correct Full Name of Movant	)	

MOTION FOR POSTCONVICTION RELIEF

Shawn Agnew
Prothonotary
BY:
FILED:
TIME:
DATE: 6/11/2014

MOTION

1. County in which you were convicted New Castle

2. Judge who imposed sentence: Judge Hon. Calvin Scott

3. Date sentence was imposed: December 13,2016

4. Offense(s) for which you were sentenced and length of sentence (s):Habitual

Offender(Life0 Drug ealing tier 4(2 1/2years) Aggrevated Possession, possession of marijuana,

possession of drug paraphenalia(3 1/2 years

5. Do you have any sentence(s) to serve other than the sentence(s) imposed because of the judgment(s) under attack in this motion? Yes ☐ No ☒
If your answer is "yes," give the following information:
Name and location of court(s) which imposed the other sentence(s):

Date sentence(s) imposed:

Length of sentence(s)

6. What was the basis for the judgment(s) of conviction? (Check one)
Plea of guilty ☐
Plea of guilty without admission of guilt ("Robinson plea") ☐
Plea of nolo contendere ☐
Verdict of jury ☐
Finding of judge (non-jury trial) ☒

7. Judge who accepted plea or presided at trial Hon. Judge Scott

8. Did you take the witness stand and testify? (Check one)
No trial ☐ Yes ☐ No ☒

9. Did you appeal from the judgment of conviction? Yes ☒ No ☐
If your answer is "yes," give the following information:

Case number of appeal 699-2016

Date of court's final order or opinion June 8th, 2016

10. Other than a direct appeal from the judgment(s) of conviction, have you filed any other motion(s) or petition(s) seeking relief from the judgment(s) in state or federal court?
Yes ☐ No ☒ How many? ( )
If your answer is "yes," give the following information as to each:

Nature of proceeding(s)

Grounds raised:

Was there an evidentiary hearing? No

Case number of proceeding(s)

Date(s) of court's final order(s) or opinion(s)

Did you appeal the result(s)? No

11. Give the name of each attorney who represented you at the following stages of the proceedings relating to the judgment(s) under attack in this motion:

At plea of guilty or trial Kevin O'Conell

On appeal same

In any postconviction proceeding none

12. State every ground on which you claim that your rights were violated. If you fail to set forth all grounds in this motion, you may be barred from raising additional grounds at a later date. You must state facts in support of the ground(s) which you claim. For your information, the following is a list of frequently raised grounds for relief (you may also raise grounds that are not listed here): double jeopardy; illegal detention, arrest, or search and seizure; coerced confession or guilty plea; uninformed waiver of the right to counsel, to remain silent, or to speedy trial; denial of the right to confront witnesses, to subpoena witnesses, to testify, or to effective assistance of counsel; suppression of favorable evidence; unfulfilled plea agreement.

Ground one: Evidence contamination.Broken chain of custody.
Supporting facts (state the facts briefly without citing cases):Failed to acknowledge evidence

contained in rule 16 discovery package of evidence contamination.

Ground two: Ineffective assistance of counsel.
Supporting facts (state the facts briefly without citing cases): Counsel was ineffect when(1); at the

time of surpression counsel failed to make the court aware that probable evidence contamination, EXISTED

due to an break in the chain of custody.(2)Failed at the time of trial, to confront or cross examine WITNESS

of defendant. This arbitrary waiver is an direct violation of defendants, 5th,6th,and 14th

amendment right.

Ground three:
Supporting facts (state the facts briefly without citing cases):

If any of the grounds listed were not previously raised, state briefly what grounds were not raised, and give your reason(s) for not doing so:

Wherefore, movant asks that the court grant him all relief to which he may be entitled in this proceeding.

Signature of attorney (if any)

I declare the truth of the above under penalty of perjury.

8/9/16
Date Signed

Signed Signature of Movant
(Notarization not required)

Forms\mtnpcrwp
Revised 9/2002

SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DE 19801-3733
TELEPHONE (302) 255-0670

57

September 27, 2016

Sonia Augusthy, Esquire
Daniel McBride, Esquire
Department of Justice
820 N. French Street
Wilmington, DE 19801

Kevin J. O'Connell, Esquire
Office of Public Defender
820 N. French Street
Wilmington, DE 19801

2016 SEP 27 PM 4:10

RE: State v. William Burton
ID No. 1301022871

Dear Counsel:

The Court has recently received a *pro se* Rule 61 motion filed by Mr. Burton. While this case has previously been handled by either Judge Scott or Judge Medinilla, it was referred to me because of a vague reference to a medical examiner issue.

The case was indicted in March of 2013 and Mr. O'Connell was assigned to represent the defendant. Mr. O'Connell filed a suppression motion which was denied on September 9, 2013 by Judge Medinilla. On September 24, 2013 a non-jury trial was held before Judge Scott and the defendant was convicted of all counts. He was subsequently declared a habitual offender and sentenced in December of 2013. The case was appealed, and while the appeal was pending, the Public Defender's Office filed a Rule 61 motion relating to the medical examiner

investigation. This was a standard motion filed by that office regarding hundreds of similar cases.

At the request of defense counsel, the appeal before the Delaware Supreme Court was stayed to allow the Superior Court to consider a motion for a new trial. That motion was subsequently denied in December of 2015 by Judge Scott having the benefit of this Court's ruling in *State v. Irwin, State v. Nyala* and *State v. Nesbitt* regarding the medical examiner investigation. Thereafter the Supreme Court confirmed the conviction in June of 2016.

Based upon the above, the Court has significant concerns about the appropriateness of the Rule 61 previously filed while the appeal of this matter was continuing. It was not filed by counsel of record, and it appears simply to be a standard pleading filed in these types of cases. As such, to ensure Mr. Burton may proceed appropriately and to put this case in proper procedural context, the previous Rule 61 motion is hereby denied based upon the decisions of this court and the Delaware Supreme Court previously issued in the medical examiner investigation. All issues raised in the motion filed by the Public Defender's Office have been previously addressed in those opinions and have been found to not provide a basis to overturn the conviction. This decision allows Mr. Burton to proceed with the Rule 61 he has now filed. Since the issues raised relate to trial matters, this case will now be referred to Judge Scott. Since the motion also appears to raise issues regarding ineffective assistance of counsel, the Public Defender's Office is hereby relieved of any further continuing representation of this matter.

2016 SEP 27 PM 4:10

Judge William C. Carpenter, Jr.

WCCjr:twp

cc: Judge Calvin Scott
Judge Vivian Medinilla
Prothonotary
Investigative Services

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	:	
	:	
v.	:	
	:	**I.D. No. 1301022871**
	:	
WILLIAM BURTON	:	
Defendant.	:	

PETITIONER WILLIAM BURTON'S AMENDED MOTION FOR POSTCONVICTION RELIEF PURSUANT TO DELAWARE SUPERIOR COURT CRIMINAL RULE 61

Christopher S. Koyste, Esquire (# 3107)
Law Office of Christopher S. Koyste LLC
Attorney for the Petitioner
709 Brandywine Blvd.
Wilmington, DE 19809
(302) 762-5195

Dated: August 17, 2017

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INTRODUCTION

COMES NOW, Defendant William Burton ("Mr. Burton"), by and through undersigned counsel, Christopher S. Koyste, hereby moves this Honorable Court, pursuant to Superior Court Criminal Rule 61(a)(1) to overturn his convictions and order a new trial. As a preliminary matter, Mr. Burton also requests that this Honorable Court schedule an evidentiary hearing pursuant to Superior Court Criminal Rule 61(h)(1).

PROCEDURAL HISTORY

Mr. Burton was arrested on January 31, 2013 and charged by indictment on March 18, 2013 with one count each of Drug Dealing, Aggravated Possession, and Possession of Drug Paraphernalia and with two counts of Possession of Marijuana. (Appendix 1;[1] Docket Entry 1,[2] 2). On April 9, 2013, an unindicted count of Drug Dealing was dismissed. (DE3).

On June 3, 2013, trial counsel filed a motion to suppress, challenging the search and seizure of the alleged drug evidence. (DE7). A hearing on the motion to suppress was held on August 16, 2013 and on August 21, 2013. (DE13, 14). On September 9, 2013, the defense's motion to suppress was denied. (DE16). A stipulated bench trial was subsequently held on September 24, 2013, and Mr. Burton was found guilty of all counts. (DE20).

On December 11, 2013, the State filed a motion to declare Mr. Burton an habitual offender. (DE21). On December 13, 2013, the State's motion was granted, and Mr. Burton was sentenced under 11 *Del. C.* § 4214(b) for the offense of Drug Dealing Cocaine Tier 4. (DE22). A notice of appeal was filed with the Delaware Supreme Court on December 30, 2013. (DE24).

On April 30, 2014, while Mr. Burton's case was still pending appeal, the Public Defender's Office filed a "Motion for Postconviction Relief to Vacate Title 16 Conviction Related to Drug Evidence." (DE33). On June 19, 2014, the Delaware Supreme Court stayed the appeal indefinitely and remanded the matter to the Superior Court for record development. (DE34, A137). On January 30, 2015, trial counsel, who was also acting as appellate counsel, filed a motion for a new trial in the Superior Court. (DE39). The State filed a response to the defense's motion on March 27, 2015, and

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[1] Hereinafter referred to as (A_).

[2] The Superior Court Docket Sheets for Case No. 1301022871 are attached as A1-10 and assigned DE #.

trial counsel filed a reply to the State's response on April 17, 2015. (DE43, 44).

On June 25, 2015, the Court ordered the parties to submit supplemental filings regarding the pending motion for a new trial in light of recent Superior Court decisions in *State v. Irwin*, *State v. Dilip Nyala*, and *State v. Hakeem Nesbitt*, as well as related Delaware Supreme Court decisions. (DE45). Trial counsel filed a supplement on July 8, 2015, in which an additional request for re-testing of the suspected drug evidence was made. (DE48). The State filed its supplement on August 10, 2015. (DE47). Subsequently, the defense's motion for a new trial and request for re-testing of drug evidence in this case were denied. (DE49). On June 8, 2016, the Delaware Supreme Court affirmed the judgment of the Superior Court on direct appeal. (DE52).

Mr. Burton filed *pro se* motions for postconviction relief and for the appointment of counsel on August 11, 2016. (DE53, 54). On September 27, 2016, the Court issued a letter raising significant concerns about the appropriateness of the Rule 61 previously filed by the Public Defender's Office while the case was still pending appeal. (DE57). To put the case in the proper procedural context and enable Mr. Burton to proceed with the Rule 61 he has now filed, the standard pleading filed by the Public Defender's Office in this case was denied on September 27, 2016. (*Id.*). On October 21, 2016, the Office of Conflicts Counsel was directed to appoint counsel for Mr. Burton for the purpose of representation in his Rule 61 motion for postconviction relief. (DE58). This is Mr. Burton's Amended Motion for Postconviction Relief pursuant to Rule 61.

ENTITLEMENT TO RELIEF UNDER RULE 61

Jurisdiction.

Petitioner William Burton is an inmate seeking to set aside his non-suspended sentence of life plus two years on one count each of Drug Dealing, Aggravated Possession, Possession of Drug Paraphernalia, and Possession of Marijuana. Mr. Burton raises constitutional claims alleging that his conviction and sentence resulted from a violation of his due process rights under the Fourteenth Amendment to the United States Constitution and under Article I, § 7 of the Delaware Constitution.

None of Mr. Burton's claims are procedurally defaulted.

This Court has jurisdiction to entertain the merits of the claim raised herein, and that claim is not procedurally barred.[3] Mr. Burton's motion is made pursuant to Delaware Superior Court Criminal Rule 61. Mr. Burton's conviction became final on June 8, 2016 when the Delaware Supreme Court affirmed his conviction; thus, this postconviction motion is timely.[4] (DE52).

Rule 61(i)(2) does not bar this Motion.

This Amended Motion is not barred under Del. Super. Ct. Crim. Rule 61 as a second or subsequent motion and therefore, should not be summarily dismissed. Pursuant to Rule 61(i))(2), "no second or subsequent motion is permitted under this Rule unless that second or subsequent motion satisfies the pleading requirements of subparagraphs (2)(i) or (2)(ii) of subdivision (d) of this

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[3] Claims of ineffective assistance of counsel are not normally raised on direct appeal but rather in a collateral setting. *See Duross v. State,* 494 A.2d 1265, 1267 (Del. 1985); *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994) ("This Court has consistently held it will not consider a claim of ineffective assistance of counsel on direct appeal if that issue has not been decided on the merits in the trial court.").

[4] Del. Super. Ct. Crim. R. 61(m)(2) ("If the defendant files a direct appeal," a judgment of conviction becomes final for the purpose of Rule 61 "when the Supreme Court issues a mandate or order finally determining the case on direct review."); Del. Super. Ct. Crim. R. 61(b)(4) ("A motion may not be filed until the judgment of conviction is final.").

rule."[5]

Rule 61(d)(2) provides:

> A second or subsequent motion under this rule shall be summarily dismissed, unless the movant was convicted after a trial and the motion either: (i) pleads with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted; or (ii) pleads with particularity a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court or the Delaware Supreme Court, applies to the movant's case and renders the conviction or death sentence invalid.[6]

Although the Public Defender's Office filed a Rule 61 motion for postconviction relief in this case prior to Mr. Burton's August 11, 2016 *pro se* motion for postconviction relief, this Amended Motion is not barred under Rule 61(d)(2) as a second motion, because the initial April 30, 2014 Rule 61 motion was improperly filed by the Public Defender's Office and failed to satisfy the procedural requirements of a valid Rule 61 motion. Accordingly, it should have been rejected at the outset under Rule 61(c)(1) and should not be considered a legitimate first motion for postconviction relief.

The "Motion for Postconviction Relief to Vacate Title 16 Conviction Related to Drug Evidence" filed by the Public Defender's Office on April 30, 2014 was filed while Mr. Burton's appeal with the Delaware Supreme Court was still pending. (DE33). Mr. Burton's trial counsel had filed a notice of appeal only four months prior on December 30, 2013. (DE24). Furthermore, Mr. Burton's appeal was not stayed by the Delaware Supreme Court and his case not remanded to the Superior Court for record development until over one month later on June 9, 2014. (DE34, A66).

Rule 61(b)(4) unambiguously states that "[a] motion [for postconviction relief] may not be

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[5] Del. Super. Ct. Crim. R. 61(i)(2).
[6] *Id.*

filed until the judgment of conviction is final."[7] Rule 61(m)(2) further specifies that "[i]f the defendant files a direct appeal or there is an automatic statutory review of a death penalty," then "[a] judgment of conviction is final for the purpose of this rule . . . when the Supreme Court issues a mandate or order finally determining the case on direct review."[8] As Mr. Burton's conviction was clearly not final on April 30, 2014, the Public Defender's postconviction motion indisputably failed to conform to the procedural requirements of Rule 61.

Rule 61 further specifies that "[i]f a motion does not substantially comply with the requirements of subdivision (b) of this rule, the prothonotary shall return it to the movant, if a judge of the court so directs, together with a statement of the reason for its return, and shall retain a copy of the motion and of the statement of the reason for its return."[9] As the Public Defender's motion patently failed to comply with the requirements of Rule 61(b)(4) and Mr. Burton's case was not in the correct procedural posture for a postconviction motion at that time, this motion should have been rejected at the outset and not been entered onto the docket.

A further defect of significance which merited an initial preliminary rejection of the Public Defender's motion arises from the standard boilerplate nature of the pleading, filed in a significant number of cases potentially affected by the misconduct that occurred at the Office of the Chief Medical Examiner ("OCME") and thus, was not filed by Mr. Burton's attorney of record. Under Del. Super. Ct. Crim. R. 47, the Court will not consider *pro se* motions by a criminal defendant who is represented by counsel unless the Court has granted permission for the defendant to participate

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[7] Del. Super. Ct. Crim. R. 61(b)(4).
[8] Del. Super. Ct. Crim. R. 61(m)(2).
[9] Del. Super Ct. Crim. R. 61(c)(1).

with counsel.[10] Had Mr. Burton attempted to file the postconviction motion that the Public Defender's Office filed, it would have been rejected under Rule 47, as he was still represented by trial counsel and was not proceeding *pro se*. Yet the motion was accepted, evidently because it was filed by counsel, despite not being filed by Mr. Burton's counsel, and without any indication that Mr. Burton's counsel had been consulted about and/or had approved of this motion being filed on behalf of his client.

More importantly, there is a fundamental conflict of interest with the Public Defender's Office filing a motion for postconviction relief in a case in which the Office also represented the defendant at trial and/or on direct appeal. It is indisputable that ineffective assistance of counsel claims are not normally considered on direct appeal and are therefore properly raised in a motion for postconviction relief.[11] The Public Defender's Office, however, cannot raise a claim of ineffective assistance of counsel against itself. Thus, should this Court regard Mr. Burton's Amended Motion as a second postconviction motion and consequently subject to the resulting procedural bar, then by precipitately filing a motion for postconviction relief, the Public Defender's Office inadvertently, but negligently, insulated itself against any claim of ineffective assistance of counsel Mr. Burton could ever raise.

This is similar to the issue that arose in *MacDonald v. State*, when defense counsel encouraged their client to hastily consent to a plea agreement that, along with surrendering his right

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[10] Del. Super. Ct. Crim. R. 47.

[11] Claims of ineffective assistance of counsel are not normally raised on direct appeal but rather in a collateral setting. *See Duross,* 494 A.2d at 1267; *Desmond*, 654 A.2d at 829 ("This Court has consistently held it will not consider a claim of ineffective assistance of counsel on direct appeal if that issue has not been decided on the merits in the trial court.").

to file an appeal, included an agreement to not pursue postconviction relief from his conviction.[12] The Delaware Supreme Court found the entry of the defendant's guilty plea to be problematic in several respects, one of which was that defense counsel permitted their client to relinquish his right to seek postconviction relief.[13] This was a particularly significant defect, as it created a conflict of interest in that defense counsel had insulated themselves from any potential claims that they had provided their client with ineffective assistance of counsel.[14]

Similarly, regardless of whether it was inadvertent, the Public Defender's Office essentially insulated themselves against any future claims of ineffective assistance of counsel by prematurely filing a motion for postconviction relief before Mr. Burton's case had an opportunity to be resolved through direct appeal. There is no indication in the record that Mr. Burton was aware that this motion was going to be filed on his behalf by the Public Defender's Office or that he gave consent for it to be filed. This is evident in light of the standard language of the motion pertaining to both guilty plea and trial cases and the simultaneous filing in hundreds of cases and is particularly noticeable when compared with the factually tailored motions customarily filed by counsel in postconviction proceedings. Thus, considering the motion filed by the Public Defender's Office a valid first postconviction motion capable of triggering the extremely exacting standard for overcoming the resulting procedural bar as set forth in Rule 61(d)(2), notwithstanding the motion's failure to comply with the clear procedural requirements of Rule 61 and despite it not being filed by counsel of record, would unfairly deprive Mr. Burton of his right to seek postconviction relief and be heard by this Court. It would effectively permit non-counsel to waive, on Mr. Burton's behalf,

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[12] *MacDonald v. State*, 778 A.2d 1064, 1070 (Del. 2001).
[13] *Id.* at 1071, 1073.
[14] *Id.* at 1073.

his right to seek postconviction relief, through no fault, choice or action of Mr. Burton himself.

Most significantly, in addressing the motion filed by the Public Defender's Office, this Court does not appear to have intended for Mr. Burton's *pro se* Rule 61 motion, and therefore this Amended Motion, to be procedurally barred under Rule 61(d)(2).[15] The previously filed Rule 61 motion was never addressed until September 27, 2016, three years after it was filed, and after Mr. Burton had filed his own *pro se* motion. (DE57). By letter/order, this Court noted that it had "significant concerns about the appropriateness of the Rule 61 previously filed" by the Public Defender's Office, as it was filed while "the appeal of this matter was continuing, [ ] was not filed by counsel of record," and "appears simply to be a standard pleading filed in these types of cases." (A177).

Furthermore, this Court, apparently recognizing that the first motion placed Mr. Burton in the wrong procedural posture and at a serious disadvantage, denied the motion filed by the Public Defender's Office "to ensure Mr. Burton may proceed appropriately and to put this case in proper procedural context." (*Id.*). The Court's letter/order also stated that denying the previously filed motion "allows Mr. Burton to proceed with the Rule 61 he has now filed" and noted that since the *pro se* motion appears to raise issues of ineffective assistance of counsel, the Public Defender's Office was relieved of further representation on the matter. (*Id.*). Implicit in that statement is that claims of ineffective assistance of counsel would not be barred on the basis of the previously filed motion. Notable, prior to the Court's denial of the previously filed Rule 61 motion, no response to it was ever filed by any party.[16]

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[15] This procedural bar is restated in subsection (i)(2) of Rule 61.

[16] Pursuant to Del. Super. Ct. Crim. R. 61(b)(6), "[a] motion may be amended as a matter of course at any time before a response is filed or thereafter by leave of court, which shall be

In light of this record, treating the previously filed Rule 61 motion as a valid first postconviction motion appears inconsistent with the intent of the Court's September 27, 2016 letter/order. Rather, the Court appeared to be offering an avenue through which Mr. Burton could proceed to the postconviction relief stage, notwithstanding the motion previously filed by the Public Defender's Office. Furthermore, counsel is only appointed for second postconviction motions if the second motion satisfies the highly demanding standard for overcoming the procedural bar set forth in Rule 61(d)(2).[17] Yet Mr. Burton was appointed counsel for his *pro se* postconviction motion despite no attempt to demonstrate that he had met the pleading requirements set forth in subsection (d)(2). This further evidences that the Court's intent in denying the Public Defender's Office's Rule 61 motion was not to treat it as a valid first postconviction motion. Accordingly, Mr. Burton's Amended Motion should not be summarily dismissed as a second motion for postconviction relief.

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freely given when justice so requires," indicating that Mr. Burton's *pro se* Rule 61 motion could have been considered as an amendment to the previously filed Rule 61 motion.

[17] Del. Super. Ct. Crim. R. 61(e)(4); *cf.* Del. Super. Ct. Crim. R. 61(e)(1) ("The judge shall appoint counsel for an indigent movant's first timely postconviction motion and request for appointment of counsel if the motion seeks to set aside: (i) a judgment of conviction after a trial that has been affirmed by final order upon direct appellate review and is for a crime designated as a class A, B, or C felony under 11 Del. C. § 4205(b); (ii) a judgment of conviction after a trial that has been affirmed by final order upon direct appellate review and resulted in the imposition of a sentence under 11 Del. C. § 4214(b) . . . .".

LAW APPLICABLE TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

The right to counsel, guaranteed by the United States Constitution under the Sixth Amendment and made applicable to the states through the Fourteenth Amendment, has long been held to mean the right to the effective assistance of counsel.[18] The Sixth Amendment right to counsel has been extended to all critical stages of a criminal proceeding, including sentencing.[19] Article I, § 7 of the Delaware Constitution similarly provides that a criminal defendant has "a right to be heard by himself or herself and his or her counsel."[20] Thus, a defendant in a criminal case is guaranteed the right to legal representation under Delaware state law as well.[21]

Constitutional ineffective assistance of counsel claims are evaluated under the two-prong standard established in *Strickland v. Washington* and its progeny.[22] To prevail, a petitioner must show that counsel's performance both: 1) fell below "an objective standard of reasonableness"[23] and 2) resulted in prejudice.[24] Prejudice is established by showing "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different."[25] Reasonable probability has been defined as "a probability sufficient to undermine confidence in the outcome."[26]

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[18] *Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("[T]he right to counsel is the right to the effective assistance of counsel.") (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970)).

[19] *Gardner v. Florida*, 430 U.S. 349, 358 (1977); *Shelton v. State*, 744 A.2d 465, 513 (Del. 1999).

[20] Del. Const. art. I, § 7.

[21] *Potter v. State*, 547 A.2d 595, 600 (Del. 1988).

[22] *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005).

[23] *Strickland*, 466 U.S. at 688.

[24] *Id.* at 687.

[25] *Id.* at 694.

[26] *Id.*

STATEMENT OF FACTS

Offenses.

On January 31, 2013, Detective Joseph Leary, a member of the Operation Safe Streets task force, received a phone call from an individual he identified as "a past-proven and reliable confidential informant." (A29). The informant notified Detective Leary that a black male subject, who he knew only as "David," was selling crack cocaine out of his residence at 1232 North Thatcher Street. (*Id.*). The informant further stated that David's room was at the top of the stairs and that the individual was a sex offender. (A30). Detective Leary was subsequently advised by SBO Daniel Collins of Probation and Parole that an individual named William David Burton lived at that residence and was on Level II probation. (*Id.*). At that point, Detective Leary sent a photo of the defendant, William David Burton, to the confidential informant via text message, and the informant responded that this was the same individual he knew to be David. (*Id.*).

SBO Collins then held a telephone conference with Supervisor Craig Watson of Probation and Parole, who, based upon a discussion of the pre-arrest pre-search checklist, approved an administrative search of Mr. Burton's residence. (A30, 33). While executing the administrative search, Probation and Parole immediately encountered Mr. Burton's co-defendant, Bernard Guy, who appeared hostile and threatening toward SBO Collins and his partner, prompting Detective Leary and additional police officers to respond as back-up. (A 31, 35). Upon entering the residence, SBO Collins and his partner encountered Mr. Burton exiting the bathroom area and heading towards his bedroom. (A 32, 35).

While searching Mr. Burton's bedroom, SBO Collins located the following items: a white-in-color plate with an off-white chunky substance, a razor blade, two Ziploc bags containing a green

plant-like substance, a grinder, Top smoking papers, $150.00, a black digital scale, baking soda, a glass jar containing an off-white chunky substance, and a clear plastic bag containing a white powder substance. (A51). After the evidence was collected, Detective Leary ascertained a preliminary weight of 29.0 grams for the white powder substance and 1.0 gram for the green plant-like substance. (A13, 14). The clear plastic bag containing a white powder substance and the two Ziploc bags containing a green plant-like substance were turned over to the OCME for testing.

Medical Examiner's Report.

On March 4, 2013, Detective Vincent Disabatino of the Wilmington Police Department submitted to the OCME two items of evidence recovered from the administrative search of Mr. Burton's residence: a plastic bag containing white powder and two small ziplock bags containing plant material. (A15). This suspected drug evidence was weighed and tested by chemist Irshad Bajwa. Mr. Bajwa's report revealed that the white powder tested positive for cocaine and weighed 28.45 grams, while the plant material tested positive for Cannabis and weighed 0.93 grams. (A15, 51). Mr. Bajwa's report, which is dated May 15, 2013, reveals that the suspected drug evidence was tested by the OCME on May 8, 2013. (A15, 20, 21).

Suppression Motion and Hearing.

On June 3, 2013, trial counsel filed a motion to suppress all evidence seized as a result of the administrative search of Mr. Burton's residence. A hearing on the motion began on August 16, 2013 and concluded on August 21, 2013. Trial counsel argued that Supervisor Watson had failed to independently assess and determine whether the confidential informant was past, proven and reliable and instead, had simply relied upon the word of Detective Leary, which was insufficient in light of prior Court decisions. (A36). Furthermore, trial counsel argued that there had been no corroboration

of concealed criminal activity, which was required prior to lawfully conducting an administrative search. (A37).

The Court denied the defense's motion to suppress on September 9, 2013, finding that reasonable grounds had existed to conduct the administrative search of Mr. Burton's residence. (A43). The Court based its decision upon the quality of the information provided by the informant, the fact that the informant was known to Detective Leary, was past-proven and reliable, and that the informant had expressly identified criminality, rather than offering only a speculative hunch. (*Id.*).

Stipulated Trial.

On September 24, 2013, Mr. Burton waived his right to a jury trial. (A49, 50). Trial counsel informed the Court that it was their belief that the suppression issue was the most important issue in the case, and a "pretty thorough record" had been made before Judge Medinilla that they were willing to rely upon for the suppression issue. (A49). Trial counsel noted that the defense was willing to rely upon that record, in addition to the record the State "will make with respect to where the drugs were found and what they were and how much was found" for purposes of the trial. (*Id.*).

The State called only one witness during the non-jury trial–Detective Leary. The detective testified that the items found in Mr. Burton's bedroom were consistent with a process known as "popcorning," which is commonly used in the production and sale of cocaine. (A51, 52). Trial counsel called no witnesses but did ask a few questions during cross-examination of Detective Leary regarding "popcorning." (A52).

The Court found Mr. Burton guilty of one count each of Drug Dealing, Aggravated Possession, Possession of Marijuana and Possession of Drug Paraphernalia. (A53). The two separate counts of Possession of Marijuana as listed in the indictment were consolidated. (A52).

Sentencing.

Trial counsel acknowledged he had no good faith basis to oppose the State's motion to declare Mr. Burton an habitual offender, and the State's motion was granted. (A55). Trial counsel offered no presentation at sentencing, as the Court had no discretion in imposing a life sentence, but acknowledged that "[t]his was a search and seizure case where a stipulated trial resulted in a conviction," which Mr. Burton was going to appeal. (A57).

Mr. Burton received a life sentence for Drug Dealing, ten years at Level V suspended after two years for eighteen months at Level III for Aggravated Possession, six months at Level III for Possession of Drug Paraphernalia, and three months at Level III for Possession of Marijuana. (*Id.*, A60, 61).

Direct Appeal and Motion for a New Trial/Re-Testing of Evidence.

Mr. Burton filed a notice of appeal with the Delaware Supreme Court on December 30, 2013. (DE24, A68). On June 4, 2014, trial counsel, who was also handling the appeal of Mr. Burton's case, filed a motion with the Supreme Court to stay the appeal and remand the case to the Superior Court, in order to further develop the record in light of the recently revealed misconduct that had occurred at the OCME. (A66). On June 9, 2014, the Supreme Court granted trial counsel's motion and remanded the case to the Superior Court while retaining jurisdiction. (*Id.*).

As a result of the OCME investigation, on January 30, 2015, trial counsel filed a motion in the Superior Court requesting a new trial. (DE39). In a July 8, 2015 supplement to the motion for a new trial, trial counsel requested, in the alternative, re-testing of the suspected drug evidence in Mr. Burton's case. (DE48; A135). On November 30, 2015, the Superior Court denied the defense's request for a new trial and for re-testing of the evidence, concluding that Mr. Burton had not shown

the necessity for a new trial and that he had failed the bright line test created in *State v. Irwin* which required establishing either evidence of tampering or the existence of a discrepancy in weight, volume or contents. (DE49; A139-141). Moreover, the Court reasoned that because Mr. Burton had agreed to stipulated facts at trial regarding the drug evidence, and the drugs and medical examiner's report had been entered into evidence at trial without objection from the defense, he had waived the right to challenge the chain of custody regarding that evidence. (A143).

The case was returned to the Delaware Supreme Court on January 4, 2016. (A65). Mr. Burton's opening brief was filed on February 3, 2016, raising two claims: first, that the Superior Court erred in denying the defense's motion to suppress evidence seized during the administrative search of Mr. Burton's residence and second, that the Superior Court erred in denying the defense's motion for a new trial and for re-testing of evidence. (A64, 153). The State filed its answering brief on March 7, 2016, to which Mr. Burton filed a reply on March 22, 2016. (A64). On June 8, 2016, the Delaware Supreme Court affirmed the September 9, 2013 and November 30, 2015 judgments of the Superior Court. (*Id.*).

Issues involving the reliability of OCME witnesses and their work product.

On January 14, 2014, during the trial in *State v. Walker*,[27] it was revealed that suspected drugs, which had been sealed in an evidence envelope and stored at the OCME, were missing and had potentially been replaced with blood pressure pills.[28] An investigation commenced, and in February 2014, the Delaware Department of Justice ("DOJ") disclosed that from 2010 to early 2014, employees at the OCME were stealing and/or tampering with alleged drug evidence while evidence

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[27] *State v. Walker*, ID No. 1202002406 (Del. Super. Ct.).
[28] A187; *see generally Walker*, ID No. 1202002406.

was being stored there. (A185, 186). A preliminary findings report was issued on June 19, 2014, revealing that:

> 1. Systemic operational failings of the OCME resulted in an environment in which drug evidence could be lost, stolen or altered, thereby negatively impacting the integrity of many prosecutions. These systemic failings include:
>
> a. Lack of management;
> b. Lack of oversight;
> c. Lack of security;
> d. Lack of effective policies and procedures.
>
> 2. As a result of the systemic failures, evidence in several cases has been lost or stolen.
> 3. The loss of this evidence is not always traceable to any one individual. (*Id.*).

Numerous problems at the OCME were documented in the report, including the fact that, each week, the video footage from the camera located inside the drug vault was overwritten. (A195, 196). Employees at the OCME were not screened for drug use upon hiring or subjected to random drug screenings while employed. (A200). An employee hired as a front desk receptionist was tasked with completing work on controlled substances. (A202). Established OCME policies were not always followed, and changes in policy were not properly updated or communicated to employees. (A204). When the drug vault was secured for the audit, OCME records indicated that approximately 8,568 pieces of evidence were stored in the vault; however, the audit revealed there to actually be 9,273 pieces of evidence. (A206). OCME staff would remove evidence from the drug vault without properly logging it out. (A207). There were also issues with drugs seized in death cases, as well as failing to timely destroy evidence. (A209).

Additional problems in the lab included the fact that the alarm to the OCME building was turned off at times, giving individuals free access to the building. (A197). Furthermore, the software

used to track door entry in the OCME was compromised after the year 2000, as it failed to record the correct date that an individual used a door, creating much uncertainty as to who had access to what materials. (A198). Additionally, staff members have stated that over the years, the drug vault was propped open, providing unfettered access to its contents. (A199). Problems also existed with identifying who accessed the materials, as the wrong office or wrong agency was incorrectly logged into the system, and lab managers would remove evidence from the vault without properly logging it out. (A206, 207).

As a direct result of the scandal, three OCME employees were suspended and ultimately fired. (A214). The Chief Medical Examiner, Dr. Richard Callery, pleaded no contest to two counts of official misconduct for his mishandling of the OCME lab and was sentenced to approximately one year in prison. (A344, 347, 348). CSU laboratory manager Farnam Daneshgar was originally charged with drug possession and accused of "dry labbing;"[29] however, most of those charges were eventually dropped. (A214, 324). Forensic Evidence Specialist James Woodson pleaded guilty to unlawful dissemination of criminal history and pleaded no contest to official misconduct. (A326, 336-339).

As of the writing of the Preliminary Report, the audit revealed 51 pieces of potentially compromised evidence stemming from 46 cases in which evidence was once held in the OCME drug vault. (A212, 215). The missing evidence included prescription pills, marijuana and cocaine. (A215-219).

Since the Preliminary Report, additional allegations against OCME employees have

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[29] Dry labbing occurs when a forensic chemist provides fictional test results without conducting any actual testing.

continued to grow. Forensic Chemist Patricia Phillips was suspended after she reported a missing bag of heroin, which was later found in her lab coat.[30] (A258-262). In *State v. Zakuon Binaird*, Ms. Phillips, while working in the Division of Forensic Science, tested suspected heroin evidence contained in 2,834 plastic bags. (A258, 262). At some point, one bag went missing, and a search of the area was conducted. (A258). The missing bag was eventually found in the pocket of Ms. Phillip's lab coat. (A259). After debating whether to tell anyone, she ultimately informed Wilmington Police that she had found the missing bag. *Id.* A corrective action report was created to document the event. (A258-261). In the evaluation section, Ms. Phillips' rating for "[c]ontinues to demonstrate the required job skills and knowledge" and "uses resources available in an effective manner" was scored at a "1," denoting unsatisfactory. (A260).

Forensic Chemist Irshad Bajwa was suspended after the drugs he certified as cocaine were retested and came back negative for any illegal substances.[31] In *State v. Jermaine Dollard*,[32] Mr. Bajwa authored a report that stated two tightly wrapped bricks weighing 2 kilograms were in fact cocaine. (A263-265). Mr. Bajwa testified consistently with his report at trial and noted that there were no signs of tampering. (A264). Dollard was found guilty of aggravated possession of cocaine and other related charges. (*Id.*). While his case was pending on appeal, the OCME scandal broke, and it was revealed that James Woodson handled the substance in Dollard's case. (*Id.*). The case was remanded to the Superior Court, at which time the substance was retested by an independent lab. (A265). The lab determined that the substance contained no illicit drugs, at which point the Superior

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[30] *See also Brown v. State*, 117 A.3d 568, 575-76 (Del. 2015).

[31] *See* January 15, 2015 letter to Judge Carpenter from Nicole Walker, Esq. (exhibits attached as A267-323).

[32] *State v. Jermaine Dollard*, ID No.1206010837A (Del. Super. Ct.).

Court granted the State's motion to *nolle prosequi* the charges. (A265). Additionally, Forensic Chemist Bipin Mody resigned after it was revealed that he failed to abide by OCME policies and procedures while failing to timely test alleged drug evidence.[33]

A three day hearing was held on the OCME scandal and how it could affect cases scheduled for trial. At the August 20, 2014 OCME hearing, Lieutenant John Laird testified that during the OCME investigation, he was informed that blue evidence tape used by police was seen laying around the OCME office. (A241). Additionally, Sergeant Scott McCarthy testified that during the audit of the OCME drug vault, a box of evidence tape was found. (A243). Sgt. McCarthy also testified that there was "white tape, every type of tape. There was a variety of tapes in the box." (A245). Laura Nichols, who was employed at the OCME, testified that she saw blue police evidence tape in the receiving area of the OCME. (A255, 256). Ms. Nichols further testified that "we had all kinds of colors; we had blue, we had red, we had white, you know." (A256).

On February 17, 2016, Rule 61 Counsel and his law clerk, Daniel Breslin, interviewed Farnman Daneshgar, former forensic chemist and employee of the OCME, who provided insight into the problems that the OCME lab had faced over the years.[34] (A371-373). After the drug swapping incident in *State v. Walker*, Mr. Daneshgar informed Mr. Breslin that the OCME was a "mess," as the employees realized that staff members were not paying attention to the chain of custody, were leaving the drug locker open, and that other lab issues were starting to become a major issue. (A371, 372). Mr. Daneshgar indicated that "everyone" had access to the drug vault and that there were

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[33] *See* April 6, 2016 letter from Judge Bradley in *State v. Randolph Clayton* ID No. 1506019597 (A444-446); Bipin Mody Personnel File (A447-521).

[34] *See* February 26, 2016 Affidavit of Daniel C. Breslin Regarding Attempted Interviews of Former Office of the Chief Medical Examiner Employee and/or Active Employees of Delaware's Division of Forensic Science. (A371-374).

times when both the vault and the intake office were left open and unattended. (A372). Mr. Daneshgar further indicated that there were no cameras in the testing lab areas. *Id.* Additionally, Mr. Daneshgar reported a prior incident that occurred in the drug vault in which a forensic evidence specialist located an open envelope containing 90 oxycodone pills. *Id.* Mr. Daneshgar further described how the OCME would contact law enforcement when the weight of the drugs submitted by law enforcement differed from the actual weight, and law enforcement informed the OCME to proceed with the testing. *Id.* Mr. Daneshgar also indicated that chemists would at times leave evidence unattended at their desks or take it with them into the bathroom. *Id.* Following this interview, Mr. Daneshgar did not wish to make any additional voluntary statements due to the pending civil action involving Jermaine Dollard. (A373).

In February of 2016, Mr. Breslin spoke to a former Forensic Evidence Specialist employed by the OCME between 2006 and 2010 who provided a wealth of information about problems and issues with the office.[35] (A352). CS1 provided email correspondence that occurred between CS1 and the Forensic Quality Assurance Manager in which the manager noted a large amount of drug evidence missing from the vault. (A356, 357). CS1 also explained that all of the supplies needed to properly package evidence was located in OCME intake office. (A353). This included red evidence tape that had Office of the Chief Medical Examiner written on it, white tape and blank blue tape that was to be used by Delaware State police only. *Id.* CS1 further explained that evidence which was not packaged properly would be re-packaged by the submitting officer in front of CS1 and that the re-packaging would be inconspicuously noted on the evidence envelope. (A355). CS1 also indicated that there were instances when CS1 would need to return evidence to law enforcement

[35] This individual wished to remain anonymous and will be referred to as CS1.

due to discrepancies between the weight or quantity of a controlled substance as reported by law enforcement and the weight or quantity actually contained in the envelope submitted to the OCME. (A356). CS1 indicated that the EDU officer for the respective agency would be contacted. *Id.* CS1 also indicated that the camera in the vault pointed towards the door only and thus, would only capture who entered the vault and not the evidence that was being accessed. (A353). Additionally, the vault door would be propped open and the silent alarm would be disabled during the work day. *Id.*

CS1 also indicated that at one point, Farnam Daneshgar improperly weighed a marijuana plant that had rotted due to the improper storage of the plant. *Id.* Sometime later, Unit Supervisor Caroline Honse informed CS1 of the problem and resubmitted the plant for re-testing, while noting that the weight reported in Mr. Daneshgar's original report was a mistake due to degradation of the sample. *Id.*

OCME Guidelines and federal grant money.

The OCME evidentiary guidelines[36] demonstrate the law enforcement nature of the crime lab, as all evidence submitted for forensic examination "must be in connection with investigations that take place in Delaware or are in some way connected to the state of Delaware." (A182). The guidelines also describe how law enforcement should drop off drugs for testing and how each agency is assigned two lock boxes for the transfer of evidence. (A184). Additional guidelines describe how the OCME staff members should be contacted if they are needed to testify at trial. (A183).

In order to obtain federal grant funding, then Chief Medical Examiner Callery and then

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[36] It should be noted that CS1 indicated that although the OCME guidelines have a 2008 copyright, revisions were still being made in December of 2009. (A352).

Attorney General Biden were required to jointly sign the March 20, 2007 Memorandum of Understanding which certified that the Delaware DOJ would investigate "allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results . . . ." (A178).

Forensic Science Consultant Joseph Bono's February 26, 2016 and March 13, 2016 Reports.

On February 26, 2016, Joseph Bono, a Forensic Science Consultant and former laboratory director of a DEA lab, authored a report concerning the problems at the OCME.[37] (A388). Within the report, Mr. Bono references specific problems in the OCME and renders opinions as to how each problem affected the reliability of the chain of custody and the integrity of the evidence tested by the OCME, as well as how the problems violated specific forensic standards. (A389-397). Mr. Bono also opined that the reliability of the lab and any certificates it produces are challengeable and, until those problems are resolved, unreliable. (A393).

On March 13, 2016, Mr. Bono authored an additional report concerning the issues at the OCME lab.[38] In the report, Mr. Bono opined that "the vault which supposedly secured the drugs seized by law enforcement agencies and then analyzed by the laboratory chemists was severely compromised." (A410). In relation to accreditation, Mr. Bono found no evidence that the OCME drug lab self-reported non-conformances to the accrediting body. (A409, 410). Mr. Bono opined that, "had the accrediting body been aware of the severity of the evidence handling violations within the OCME drug analysis laboratory, their laboratory's accreditation could have been sanctioned on a number of levels." (A410, 415). Additionally, the OCME was required to notify the accrediting body and appropriate legal counsel "when these evidence integrity issues were discovered because

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[37] Mr. Bono's Bio and CV are attached as A398-405.
[38] The report and exhibits are attached as A406-443.

the admissibility of evidence was impacted." (A415).

In relation to who should be contacted in the chain of command regarding corrective action requests[39] ("CAR"), Mr. Bono opined that every lab he was a part of had a legal counsel assigned to represent the lab's interest, and the CARs would be taken to that counsel to determine whether it required disclosure to the accrediting body and the prosecutor's office. (A414). Mr. Bono found no evidence of any policy for notifying legal counsel of problems or issues occurring in the OCME system. *Id.* Mr. Bono also indicated that it was still the responsibility of lab management to take the concerns relating to violations of lab protocols up the chain of command. (A415). Mr. Bono further noted that the Attorney General's Office would have an interest in ensuring all protocols were followed and that the lab was in compliance with all accreditation requirements. (A411).

Mr. Bono found that the OCME failed to comply with accreditation and testing standards. After reviewing relevant documents and testimony, Mr. Bono further opined that many of the OCME evidence handling protocols were violated and compromised the evidence inventories and audits. (A412). The OCME also failed to conduct annual audits as required for proper accreditation, as the Delaware Police audit revealed that there were 705 unaccounted for exhibits in the OCME drug vault. (A413). The OCME failed to conduct root cause analysis, which allows the integrity and reliability of the evidence stored in the OCME lab to be challenged until it is complete. (A416, 417). Additionally, access to the OCME computerized data entry system was not limited to laboratory personnel, as required by the OCME's own lab protocols. (A417). This allowed individuals outside of the lab to change the data in the system, which challenges the reliability of what exactly is supposed to be contained in the vault. (A418). Lastly, access to the evidence vault was not limited

[39] An investigation to determine the root cause(s) of the problem. (A416).

to specified times and personnel, which permitted unauthorized personal access to the vault, and consequently, challenges the security and reliability of the stored evidence. (A418, 419).

In sum, Mr. Bono opined that "the OCME drug laboratory does not meet the requirement for reliability and integrity required by accrediting bodies and that serious violations challenging the laboratory's own accreditation. Therefore, any conclusions derived from an examination of the evidence in this case raise serious questions concerning the results reported by the forensic chemist." (A419).

Motions for Postconviction Relief.

On April 30, 2014, the Public Defender's Office filed a Motion for Postconviction Relief to Vacate Title 16 Conviction Related to Drug Evidence. (DE33, A69-A82). This was a standard boilerplate type pleading filed in hundreds of cases related to the revelation of misconduct at the OCME. This motion was filed while Mr. Burton's case was pending appeal with the Delaware Supreme Court and was not filed by his counsel of record. The State never filed a response to this postconviction motion, and the motion went unaddressed until three years later on September 27, 2016.

On August 11, 2016, Mr. Burton filed a *pro se* Motion for Postconviction Relief, alleging that the drug evidence had been contaminated and that there had been a break in the chain of custody. (A172, 175). Mr. Burton also alleged that trial counsel was ineffective for failing to apprise the Court at the time of the suppression hearing that there had been probable evidence contamination due to the broken chain of custody, as well as ineffective for failing to cross-examine witnesses during trial. (A175).

After Mr. Burton filed his own *pro se* motion for postconviction relief, the Public Defender's

April 30, 2014 motion for postconviction relief, which had never moved forward procedurally, was acknowledged by the Court. In a September 27, 2016 letter/order, the Court stated that it had "significant concerns about the appropriateness of the Rule 61 previously filed while the appeal of this matter was continuing. (A177). It was not filed by counsel of record, and it appears simply to be a standard pleading filed in these types of cases." (*Id.*).

The Court then denied the previous postconviction filing, "to ensure Mr. Burton may proceed appropriately and to put this case in proper procedural context." (*Id.*). The Court noted that this denial of the previous postconviction motion would allow Mr. Burton "to proceed with the Rule 61 he has now filed." (*Id.*).

CLAIM I. THE STATE VIOLATED *BRADY* BY FAILING TO TIMELY DISCLOSE CRUCIAL IMPEACHMENT INFORMATION AFFECTING THE ADMISSIBILITY OF THE PURPORTED DRUG EVIDENCE, WHETHER THE SUBSTANCE THAT WAS TESTED BY THE OCME WAS ACTUALLY THE SUBSTANCE GATHERED, AND THE POTENTIAL WEIGHT THAT COULD BE ASSIGNED BY THE TRIER OF FACT TO THE STATE'S PURPORTED DRUG EVIDENCE, IN VIOLATION OF MR. BURTON'S RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND UNDER ARTICLE 1, § 7 OF THE DELAWARE CONSTITUTION.

Superior Court Judge William C. Carpenter has noted that "[c]learly, by any reasonable forensic standards relating to the management and operation of a lab testing controlled substances, this facility has failed," and the "reliability and confidence in the State's ability to perform this critical function has been severely damaged."[40] The problems in the OCME lab, including its security, record keeping, testing, and employee misconduct, were not timely disclosed to Mr. Burton, and thus, resulted in a violation of his constitutional rights under both the United States[41] and Delaware Constitutions.[42] The State's failure to fulfill its *Brady* obligation compels this Court to overturn Mr. Burton's conviction and grant a new trial, in addition to ordering the State to disclose all *Brady* related materials concerning the OCME.

A. This claim is not barred.

This claim is not procedurally barred under Rule 61, as the State's failure to disclose critical *Brady* information until after Mr. Burton's trial rendered Mr. Burton unable to raise this claim in prior proceedings.[43] As demonstrated below, Mr. Burton was prejudiced by this error, as it is clear

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[40] *State v. Irwin*, 2014 WL 6734821, at *9 (Del. Super. November 17, 2014) (attached as Exhibit A).

[41] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[42] Article I, § 7 of the Delaware Constitution states in relevant part,"nor shall he or she be deprived of life, liberty or property, unless by the judgment of his or her peers or by the law of the land."

[43] Pursuant to Del. Super. Ct. Crim. R. 61(i)(3), "[a]ny ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this

that trial counsel would not have agreed to a stipulated record had the information been disclosed to the defense in a timely manner. Accordingly, Mr. Burton would not have been prevented from challenging the chain of custody in seeking a new trial and/or the re-testing of the suspected drug evidence. As Mr. Burton was prejudiced by the State's *Brady* violation, this claim is not procedurally defaulted under Rule 61(i)(3).

Furthermore, although a *Brady* claim was raised on direct appeal following the Superior Court's decision on remand, this claim is not barred as a former adjudication under Rule 61(i)(4),[44] as additional information has since come to light that impacts the Court's decision. The Delaware Supreme Court has determined that Rule 61(i)(4)'s bar on former adjudications is based upon the law of the case doctrine.[45] The law of the case applies "when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation."[46] However, this doctrine "is not an absolute restriction, and it allows the Superior Court and [the Supreme Court] to reexamine issues that are 'clearly wrong, produce[ ] an injustice or should be revisited because of changed circumstances.'"[47] The Court has also stated that "new evidence or changed circumstances" can "form[ ] the basis of an exception to the law of the case doctrine" and "previously unavailable evidence [can] transform[ ] the factual basis of the prior legal determinations.[48] The Court has held that "the doctrine does not apply when the previous ruling was

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court, is thereafter barred, unless the movant shows: (A) [c]ause for relief from the procedural default and (B) [p]rejudice from violation of the movant's rights."

[44] Pursuant to Del. Super. Ct. Crim. R. 61(i)(4), "[a]ny ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred."

[45] *Weedon v. State*, 750 A.2d 521, 527 (Del. 2000).

[46] *State v. Wright*, 131 A.3d 310, 321 (Del. 2016).

[47] *Wright*, 131 A.3d at 321-22; *Hoskins v. State*, 102 A.3d 724, 729 (Del. 2014).

[48] *Wright*, 131 A.3d at 323, 324.

clearly in error or there has been an important change in circumstances, in particular, the factual basis for issues previously posed."[49]

The Delaware Supreme Court affirmed the denial of the motion for a new trial on the basis of the Superior Court's written decision on remand. (A170). The Superior Court concluded that "the interests of justice [did] not require a new trial in this case" for two reasons: 1) "Burton has offered no evidence of a discrepancy in weight, volume, or content of the drug evidence in his case that would call into question the evidence seized and tested by the OCME;" and 2) "[i]n this case, the Court finds that Burton waived his right to test the chain of custody of the drug evidence when he knowingly, intelligently, and voluntarily agreed to a stipulated bench trial instead of a jury trial." (A143, 144).

When the Superior Court denied Mr. Burton's request for a new trial, it was not known that Irshad Bajwa, the forensic chemist who tested the suspected drugs in this case, had been accused of drylabbing and was placed on administrative leave for an unknown reason. On direct appeal, while it was then known that Mr. Bajwa had been accused of drylabbing, the issue of his suspension was still not disclosed. (A157, 158). Appellate counsel also acknowledged on direct appeal, but not in the motion for a new trial, that there was some difference between the weight recorded by law enforcement and the weight reported by the OCME but failed to indicate how much of a

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[49] *Weedon*, 750 A.2d at 527-28 (citing *Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990) (quotation omitted) and *Brittingham v. State*, 705 A.2d 577, 579 (Del. 1998)); *Pringle v. State*, 2013 WL 1087633, *3 (Del. March 13, 2013) (noting "[i]n *Weedon v. State*, we stated that the 61(i)(4) bar does not apply when the previous ruling was 'clearly in error' or when 'there has been an important change in circumstances, in particular, the factual basis for the issue previously posed') (attached as Exhibit B); *State v. Washington*, 2016 WL 5239644, *4 (Del. Super. Sept. 21, 2016) (quoting *Pringle*, 2013 WL 1087633 at *3) (attached as Exhibit C).

discrepancy.[50] (A167). Moreover, as previously described, additional revelations concerning the OCME misconduct have continued to be uncovered.[51] As the circumstances of the factual basis underlying the Court's ruling have changed, Mr. Burton's claim is not procedurally barred under Rule 61 as a former adjudication.

Furthermore, one of the bases for denying the motion for a new trial was the Court's conclusion that Mr. Burton knowingly, intelligently and voluntarily agreed to stipulated facts regarding the drug evidence, thereby waiving his right to challenge the chain of custody at a later date. (A143, 144). However, this finding does not accurately reflect the record or account for the impact the State's suppression of the OCME misconduct had on trial counsel's decision to stipulate to certain facts. Mr. Burton signed a "Stipulation of Waiver of Jury" on September 24, 2013, and the Court conducted a colloquy with Mr. Burton prior to the start of trial on September 24, 2013 to confirm that the waiver of his right to a jury trial was knowing, intelligent and voluntary. (A47, 49, 50).

Neither the stipulation nor the colloquy with the Court mention that Mr. Burton was agreeing to a stipulated trial nor was there a finding by the Court that Mr. Burton was knowingly, intelligently and voluntarily agreeing to a stipulation of facts. Rather, Mr. Burton was simply waiving his right to a trial by jury and trial counsel, in performing his duty as defense counsel, chose to stipulate to

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[50] The weights of the substances as reported by Detective Leary on January 31, 2013 were 29.0 grams of suspected cocaine and 1.0 gram of suspected marijuana. (A13, 14). Irshad Bajwa reported the weights in his May 15, 2013 forensic report as 28.45 grams of purported cocaine and 0.93 grams of purported marijuana. (A15).

[51] Ms. Patricia Phillips resigned after losing a bag of heroin in her lab coat and violating lab protocols and Mr. Bipin Mody resigned after being informed that the would be terminated for disregarding OCME policies and procedures and failing to timely test alleged drug evidence. (A258-262, 444-521); *see supra* pages 18-20.

the State's record concerning the purported drugs. It is indisputable that had trial counsel been aware of the misconduct occurring at the OCME when the substances in this case were stored and tested there, he would not have stipulated to the State's facts concerning the alleged drugs. Thus, it is the State's suppression of *Brady* material, and trial counsel's reliance on the State's assurance that it was unaware of any *Brady* material,[52] that directly lead to the action which the Court concluded barred Mr. Burton from challenging the chain of custody on remand. Moreover, the Court's determination that Mr. Burton had "knowingly, intelligently, and voluntarily agreed to a stipulated bench trial instead of a jury trial" is inconsistent with the record, which shows only that Mr. Burton consented to a bench trial.[53]

B. Law applicable to a *Brady* violation.

The United States Supreme Court held in *Brady v. Maryland* that "suppression by the prosecution of evidence favorable to an accused violates due process when the evidence is material to either guilt or punishment, irrespective of good faith or bad faith of the prosecutor."[54] *Brady* requires that the prosecutor disclose all materially exculpatory and impeachment evidence.[55] The prosecution, under *Brady*, has an affirmative duty to disclose any evidence that would reach the "reasonable probability" standard, meaning that failure to disclose would undermine confidence in the outcome of a trial.[56] Recognizing that it is sometimes difficult to assess the materiality of

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[52] A22-27.

[53] *See Florida v. Nixon*, 543 U.S. 175, 187 (2004) (quoting *Taylor v. Illinois*, 484 U.S. 400, 417-418 (1988)) (noting that counsel is not required "to obtain the defendant's consent to 'every tactical decision'" and that "an attorney has authority to manage most aspects of the defense without obtaining his client's approval").

[54] *Brady*, 373 U.S. at 87.

[55] *Id*; *United States. v. Bagley*, 473 U.S. 667, 676 (1985); *see Giglio v. United States*, 405 U.S. 150, 154 (1972).

[56] *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995).

evidence prior to trial, prosecutors must generally take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence.[57] The timing of disclosure must be made in order for defense counsel to be able to use the material effectively.[58]

As an extension of the duty to provide the defendant with a fair trial, the prosecution is required to disclose any and all favorable evidence known to the "prosecution team."[59] Furthermore, the prosecutor has a duty to seek out and to learn of any favorable evidence known to parties acting on behalf of the government, including the police.[60] If the police fail to provide the prosecutor with any *Brady* material, the prosecutor has an affirmative duty to follow up with the investigating officers to see if they possess any such materials.[61]

To determine if a *Brady* violation has occurred, the Court performs a three prong analysis.[62] A *Brady* violation requires showing that: 1) exculpatory or impeaching evidence exists that is favorable to Defendant; 2) "that evidence is suppressed by the State;" and 3) Defendant is prejudiced by the suppression. If each of these prongs is met, a *Brady* violation has occurred, and the verdict must be vacated.[63]

C. The information was favorable.

Evidence that is favorable to a defendant must be disclosed to him if it is material either to

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[57] *Id.* at 439.

[58] *See White v. State*, 816 A.2d 776, 778 (Del. 2003) ("When a defendant is confronted with delayed disclosure of *Brady* material, reversal will be granted only if the defendant was denied the opportunity to use the material effectively.") (quoting *Rose v. State*, 542 A.2d 1196, 1199 (Del. 1988)).

[59] *Kyles*, 514 U.S. at 437-38.

[60] *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006).

[61] *Id.*

[62] *Starling v. State*, 882 A.2d 747, 756 (Del. 2005) (citing *Strickler v. Greene,* 527 U.S. 263, 281-82 (1999)).

[63] *Id.*

guilt or punishment.[64] Impeachment evidence is part of an effective cross-examination, which is essential to the defendant's right to confront the witnesses against him.[65] Evidence of government misconduct at the State's crime lab and, more specifically, misconduct by Forensic Chemist Irshad Bajwa, is impeachment evidence favorable to Mr. Burton, which would have affected the outcome of his trial had the State timely disclosed that information.[66]

This assertion is consistent with federal courts that have held that information concerning the Massachusetts drug lab scandal is clearly impeachment evidence to a defendant.[67] Furthermore, when the San Francisco drug lab scandal broke, a California Superior Court held that "Madden's criminal record, her suspension from employment at SFPD, and the information described above relevant to the work of the Crime lab is both favorable to the defense and material."[68] Madden was a chemist accused of lab misconduct that included violations of lab security and theft.[69] The California Superior Court held that this information should have been disclosed to the defense, including information that was in the possession of the SFPD but unknown to the District Attorney's Office.[70] The Superior Court noted that the District Attorney's Office had no policies and procedures

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[64] *Brady*, 373 U.S. at 87.

[65] *Jackson v. State*, 770 A2d 506, 515 (Del. 2001); U.S. Const. amend. XIV; Del. Const. art. I, § 7.

[66] *See Martin v. State*, 60 A.3d 1100, 1009 (Del. 2013) ("[T]he defendant must be able to confront the certifying analyst when her report is submitted into evidence.") (citing *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011)).

[67] *See United States v. Hampton*, 109 F. Supp. 3d 431, 437 n.7 (D. Mass. 2015) (noting that "[t]he favorablility of the evidence [relating to the chemist who was accused of drylabbing] requires no explanation"); *United States v. Chin*, 54 F. Supp. 3d 87, 93 (D. Mass. 2014) (noting that "[i]t is easy to imagine how defendant could have used the OIG report to score points while cross-examining chemists from the Hinton Drug Lab at trial").

[68] *People v. Bibao*, Cali. Supr. Ct., No. 2442362, Massullo, J., at 12 (May 17, 2010) (attached as Exhibit D).

[69] *Id.* at 3-5.

[70] *Id.*

in place designed to discover and produce exculpatory information and that both the District Attorney's Office and law enforcement had failed to produce exculpatory information in their possession regarding Madden and the Crime Lab.[71] The Superior Court further found that the SFPD knew that there were material issues regarding Madden and the Crime Lab beginning as early as Fall 2009, and the Attorney General's Office possessed knowledge by November 19, 2009.[72] The Court ultimately denied the defendants' motion to dismiss without prejudice, so as to allow each defendant the opportunity to file the motion based upon the facts of his or her own case.[73]

1. The OCME scandal.

When there are serious problems with the integrity and security of evidence at a government run forensic drug lab, the United States Supreme Court and other courts have ruled that evidence of misconduct involving lab employees is impeachment and exculpatory evidence under *Brady*. The findings of the Preliminary Report indicate that there were massive problems with the OCME from 2010 to 2014, ranging from chain of custody and storage deficiencies to the theft of drugs. (A185, 186). The findings reveal that impeachment and *Brady* related information was known to the OCME staff as far back as 2010:

> 1. Systemic operational failings of the OCME resulted in an environment in which drug evidence could be lost, stolen or altered, thereby negatively impacting the integrity of many prosecutions. These systemic failings include:
>
> a. Lack of management;
> b. Lack of oversight;
> c. Lack of security;
> d. Lack of effective policies and procedures.
>
> 2. As a result of the systemic failures, evidence in several cases has been lost or stolen.
> 3. The loss of this evidence is not always traceable to any one individual. (*Id.*).

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[71] *Id.* at 12-13.
[72] *Id.* at 16.
[73] *Id.* at 17.

As a direct result of the scandal, three OCME employees were suspended and later fired.[74] (A214). All of this information would have been used by trial counsel to challenge the chain of custody and the findings of Mr. Bajwa's as provided in his forensic report, which was admitted into evidence at trial, by pointing out the glaring security flaws of the facility, particularly the drug vault, as well as the massive amount of missing evidence and other misconduct that occurred during the relevant time period.[75]

The information from the scandal is clearly impeachment in nature as it could have been used to attack the chain of custody, to challenge Mr. Bajwa's report identifying the substances Mr. Burton allegedly possessed as cocaine and marijuana, and to compel Mr. Bajwa to testify. Significantly, the State would have been forced to present additional witnesses and evidence affirming the veracity of its claims regarding the purported drug evidence, as there would have been no rational reason for

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[74] The Chief Medical Examiner, Dr. Richard Callery, pleaded no contest to two counts of official misconduct for his mishandling of the OCME lab and was sentenced to approximately one year in prison. (A347, 348). CSU laboratory manager Farnam Daneshgar was originally charged with drug possession and faced accusations of "dry labbing;" however, most of the charges were eventually dropped. (A324). Forensic Evidence Specialist James Woodson pleaded guilty to unlawful dissemination of criminal history, in addition to pleading no contest to official misconduct. (A326).

[75] *See* 10 *Del C.* § 4330, stating in relevant part, "a report signed by the forensic toxicologist or forensic chemist who performed the test or tests as to its nature is prima facie evidence that the material delivered was properly tested under procedures approved by the Division of Forensic Science, that those procedures are legally reliable, that the material was delivered by the officer or person stated in the report and that the material was or contained the substance therein stated, without the necessity of the forensic toxicologist or forensic chemist personally appearing in court, provided the report identifies the forensic toxicologist or forensic chemist as an individual certified by the Division of Forensic Science, the Delaware State Police or any county or municipal police department employing analysts of controlled substances, as qualified under standards approved by the Division of Forensic Science to analyze those substances, states that the forensic toxicologist or forensic chemist made an analysis of the material under the procedures approved by the Division of Forensic Science and also states that the substance, in the forensic toxicologist's or forensic chemist's opinion, is or contains the particular controlled substance specified."

trial counsel to stipulate to any of the State's facts once the OCME information had been disclosed. Problems with the lab that would have been revealed in the cross-examination of the State's witnesses would have included the important fact that the alarm to the OCME building was at times turned off, giving individuals free access to the building and statements from OCME staff that over the years, the drug vault was propped open, providing unfettered access to its contents.[76] (A197, 199, 200).

Additionally, it would have been brought out on cross-examination that significant uncertainty existed as to who had access to what materials, as the software used to track admission through each door in the OCME lab was compromised beginning in 2000, after which point it failed to provide the correct date of entry. (A198). Problems also existed with identifying who accessed the materials, as the wrong office or wrong agency was incorrectly logged into the system with the submitted drugs, and lab managers would remove evidence from the drug vault without properly logging it out. (A206, 207).

As of the writing of the Preliminary Report, the audit revealed 51 pieces of potentially compromised evidence stemming from 46 cases in which evidence had been held in the OCME drug vault. (A215). That 46 other cases contained compromised evidence is favorable information to Mr. Burton, as it shows that the OCME drug lab was not capable of properly storing and securing evidence. An essential qualification to this number, however, is the fact that the Preliminary Report has only documented compromised evidence that was then stored in the OCME lab and has made no findings on evidence that was currently being stored in an evidence vault in a courthouse.

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[76] This was confirmed by Mr. Daneshgar, as he indicated that "everyone" had access to the drug vault and that there were times when both the vault and the intake office were left open and unattended. (A372).

(A212).

Additionally, the placement of Forensic Chemist Irshad Bajwa on administrative leave after drugs that he certified as cocaine were retested and came back negative for illegal substances[77] is indisputably favorable evidence to Mr. Burton, as it relates to improper testing conducted close in time to the date on which Mr. Burton's alleged drugs were tested.[78] In *State v. Jermaine Dollard*,[79] Mr. Bajwa authored a report stating that two tightly wrapped bricks weighing 2 kilograms were cocaine. (A263-265). Bajwa testified consistently with his report at trial, noting that there were no signs of tampering. (A264). Dollard was found guilty of aggravated possession of cocaine and other related charges. (*Id.*). While his case was pending on appeal, the OCME scandal broke, and it was revealed that James Woodson handled the substance in Dollard's case. (*Id.*). The case was remanded to the Superior Court, at which time the substance was retested by an independent lab. (A265). The lab determined that the substance contained no illicit drugs, at which point the Superior Court granted the State's motion to *nolle prosequi* the charges. (*Id.*). Mr. Bajwa's forensic testing in Dollard was conducted on September 10, 2012, only eight months before the testing was performed in Mr. Burton's case. As these facts are impeachment in nature and occurred prior to Mr. Burton's trial, the prosecutor had a duty under *Brady* to disclose to Mr. Burton information relating to Mr. Bajwa's improper conduct in enough time for the defense to make use of it.

There is also significant impeachment value in the fact that James Woodson handled the

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[77] *See* October 9, 2015 letter to Judge Carpenter from Deputy Attorney General Joseph Grubb, Esq. (attached as A342-343).).

[78] The substance in *Dollard* was tested on September 10, 2012. (A264). Mr. Burton's substance was tested on May 8, 2013. (A15, 20, 21).

[79] *Dollard*, ID No. 1206010837A.

purported drugs in this case[80] and is alleged to have stolen drugs from the secure locker at the OCME. (A214, 215). Furthermore, Aretha Baily was another OCME employee who handled the substances tested at the OCME in this case when she removed them from the secure locker. (A20, 21). Although Ms. Bailey was hired as an OCME administrative assistant, she was granted access to the drug locker, given the building's alarm code, and assigned duties properly reserved for a Forensic Evidence Specialist. (A156, 157, 224-226, 229, 234, 235, 249, 250). It was later confirmed that Ms. Bailey left her former employer after being confronted with allegations of theft. (A156, 157, 201, 253, 254, 257). Laura Nichols, who was employed by the OCME, testified to curious activities of Ms. Bailey, such as keeping her own box in the evidence vault and instructing others not to touch it and Ms. Bailey's ability to quickly find "missing evidence." (A156, 157, 253, 254, 257). As both of these individuals handled the substances in this case, these facts, which occurred prior to Mr. Burton's trial, clearly held impeachment value.

The impeachment value of the non-disclosed materials is made more evident by Joseph Bono,[81] a Forensic Science Consultant, who has reviewed documents, testimony, and other relevant materials relating to the OCME scandal.[82] Mr. Bono has opined that the various OCME problems resulted in violations of multiple forensic quality standards ("FQS") and casts doubt on both the chain of custody and the reliability of test results provided by the OCME. (A388-397). As noted in his report, Mr. Bono has opined that the lack of security—specifically, the failure to record and maintain documentation of who enters the OCME drug vault and accesses secured doors, OCME

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[80] Mr. Woodson is the OCME employee who received and handled the substances in this case according to the chain of custody report. (A20, 21).

[81] Mr. Bono's Bio and CV are attached as A398-405.

[82] Mr. Bono's August 21, 2014 Report and February 26, 2016 Report are attached as A375-387 and A388-397 respectively.