No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAMIAN THOMAS
Petitioner

v.

STATE OF DELAWARE
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

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Dated: December 28, 2022

QUESTION PRESENTED

Was petitioner's Fourteenth Amendment right to due process of law violated when his conviction was obtained through the use of perjured testimony and as a result of prosecutorial misconduct?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner, Damian Thomas, by and through his counsel, Megan E. Venerick-Giffin and Christopher S. Koyste, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Delaware Supreme Court filed on January 25, 2022, cited as *Thomas v. State*, No. 392, 2021 (Del. Sept. 29, 2022) and appearing at A1-4.

OPINION BELOW

The Supreme Court of Delaware issued an opinion on September 29, 2022 affirming the Delaware Superior Court's denial of petitioner's motion for postconviction relief, finding that petitioner's claims that his conviction was tainted through the use of perjured testimony and that the State committed prosecutorial misconduct and violated its obligations under *Brady v. Maryland* were procedurally barred and that Mr. Thomas had not demonstrated cause for the procedural default or prejudice from the State's use of perjured testimony. The Delaware Supreme Court's opinion appears at A1-4 and is reported as *Thomas v. State*, No. 392, 2021 (Del. Sept. 29, 2022).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the Supreme Court of Delaware for which petitioner seeks review was issued on September 29, 2022. This petition is filed within 90 days of the Delaware Supreme Court's decision in compliance with United States Supreme Court Rule 13.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 14 provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const. amend. XIV).

STATEMENT OF THE CASE

Petitioner Damian Thomas (hereinafter referred to as "Mr. Thomas" or "petitioner") received a sentence of life imprisonment for Murder First Degree and related counts, stemming from the shooting death of Deshannon Reid. The State's case against Mr. Thomas consisted of three alleged eye witnesses, a prison informant and a blurry surveillance video. The testimony of one alleged eye witness—Monique Pruden—is central to the present action, as it revealed disturbing issues of perjured testimony, provided by the witness for still unknown reasons, and prosecutorial misconduct, which the prosecution egregiously and for still unknown reasons doubled down on. Yet the glaring perjury and prosecutorial misconduct that occurred in this case during trial was not fully understood until the postconviction review stage of proceedings, because rather than being fully developed and properly resolved during trial, it was swept under the rug by the parties and trial court.

On April 14, 2015, Deshannon Reid was shot near his home and later succumbed to his injuries. (A62). Mr. Thomas was immediately developed as a suspect and a warrant issued for his arrest; however, Mr. Thomas had left the state following the homicide. (A62, 72). On July 6, 2016, Mr. Thomas was stopped by law enforcement in Cherry Hill, New Jersey on an unrelated matter, and the outstanding warrant from Delaware was discovered. (A72, 75). Thereafter, Mr. Thomas was extradited to Delaware and on July 18, 2016, was transported to the Wilmington Police Department for questioning. (A72). Mr. Thomas declined to waive his *Miranda* rights. (A72, 75).

At trial, the State presented three alleged eye witnesses—Etta Reid, Leantaye Cassidy, and Monique Pruden—a prison informant, and surveillance video. Ms. Reid testified that she and her son were sitting on the front porch of their home at around 9:00 p.m. when Mr. Thomas joined them.

(A80-81). Mr. Reid was not interested in speaking with Mr. Thomas at that time, so Mr. Thomas left but returned to Ms. Reid's porch approximately five minutes later. (A82).

Ms. Reid testified that at that point, Mr. Reid and Mr. Thomas spoke briefly, with Mr. Reid eventually exclaiming "Man, I told you I don't have anything for you." (A83). Both men left the porch and while arguing, walked up the street, stopping two houses from the corner. (A83-84). Ms. Reid believed them to be arguing over drugs, admitting her son had been a drug dealer for many years. (A84-85). She testified that she saw her son walk across the street, heard shouting and gun fire, and saw her son fall down in the middle of the street. (A84). According to Ms. Reid, Mr. Thomas then stood over Mr. Reid and shot him two more times before running through the parking lot of Pete's Pizza. (A84). However, Ms. Reid also testified that she never saw a gun. (A85, 88). Ms. Reid testified that her son got up and staggered over to the side of the street before collapsing. (A85).

Ms. Cassidy testified that at the time of the shooting, she was living in an apartment across the street from Ms. Reid's home. (A97). Ms. Cassidy testified that on the night of the shooting, she was home with a migraine and staying in a bedroom at the front of the home, enabling her to look out onto the street when she heard arguing. (A98-99). Ms. Cassidy reported seeing Mr. Thomas shoot Mr. Reid twice and testified that Mr. Reid crawled from the middle of the street to the side of the street. (A101). Ms. Cassidy was adamant that the shooting occurred on the side of the street opposite from where Ms. Reid testified it occurred and was likewise adamant that Mr. Reid never stood up again after being shot but rather crawled until he came to rest in front of a house. (A108-109). Significantly, Ms. Cassidy did not speak with police about what she allegedly saw until two years after the shooting. (A103-105).

Prison informant Brandon Lacurts testified that he and Mr. Thomas were cellmates following Mr. Thomas' arrest for the instant offenses. (A123). Mr. Lacurts testified that Mr. Thomas told him he shot Mr. Reid. (A123). Although Mr. Lacurts did not enter into a cooperation agreement with the State to assist in the prosecution of Mr. Thomas, it was revealed that he has a history of entering into such agreements in other cases. (A125-128). Furthermore, Mr. Lacurts acknowledged during cross-examination that he had the ability to see materials about the case that were sent to Mr. Thomas by his attorney. (A131-132).

The State presented surveillance video from nearby Crestview Apartments, where Mr. Thomas' girlfriend lived, purportedly showing Mr. Thomas entering and leaving the apartment building shortly after 9:30pm. (A145-147). The State also presented surveillance videos from Pete's Pizza that showed individuals walking on 27th Street and Market Street around the time of the shooting; however, none of these individuals were easily identifiable. (A143-144, 147-148). Contrary to the alleged eye witness testimony, the videos did not depict anyone running from the crime scene. (A149).

On June 16, 2015, the Chief Investigating Officer, Detective Curley, spoke with Monique Pruden. She stated, in relevant part, that "Shannon was the weed man" and "Mutt" would buy weed off of Shannon and that on the day of the shooting "Mutt owed him a couple dollars and then he started disrespecting Mutt or whatever. . . .". (A54). When Detective Curley asked Ms. Pruden where exactly she was when shots were fired, she responded that she was on "27th Street across from Pete's shop" and that "Mutt . . . came right through the lot and ran right past us", adding "[b]ut he didn't have no gun or nothing in his hand. (A55). Ms. Pruden further stated that while she did not

see the actual shooting, she heard the shots, and that afterward, "everybody was saying that it was Mutt." (A56).

On September 15, 2017, Deputy Attorney General Annemarie Puit ("DAG Puit") sent an email to trial counsel in which she noted that they had interviewed Ms. Pruden that day and that "w[hen re-interviewing Ms. Pruden she indicated she saw the shooting and that 'Mutt shot Shannon'." (A159). This was a significant departure from Ms. Pruden's previous statement that she heard the shooting but did not see it.

The following day, DAG Puit emailed trial counsel the recorded September 16, 2017 statement of Ms. Pruden. (A160-167). During this interview, Ms. Pruden stated, in relevant part, that she actually did witness the shooting. (A165). Ms. Pruden stated that she was on 27th Street near Mr. Reid's house when he was shot. (A160). She reported that Mr. Reid and Mutt were arguing about marijuana when Mr. Reid spit on Mutt, and Mutt responded by saying that he would be back and then taking off. (A160-161). According to Ms. Pruden, Mutt then walked towards Market Street and when he returned about five minutes later, he and Mr. Reid started arguing again until Mr. Reid turned around and started walking away. (A161). Ms. Pruden stated that she then heard shots, and Mutt ran past her through the parking lot of Pete's Pizza. (A161). Later in the interview, Ms. Pruden stated that she actually saw Mutt pull out a gun. (A163).

On September 18, 2017, Deputy Attorney General Eric Zubrow ("DAG Zubrow") called Ms. Pruden to testify during its case-in-chief. In relevant part, Ms. Pruden testified that she was "present on the block the night that Deshannon Reid was killed." (A176). She admitted that her 2015 statement to Detective Curley would be inconsistent with her soon-to-be-given in-court testimony, explaining, "at the time I just was afraid, and I didn't want anything to do with it." (A176-177). In

explaining what she allegedly saw, Ms. Pruden testified, "I was on 27th Street. I was standing there by the church, and I heard Shannon and Mutt. They were arguing. They were on the sidewalk in front of Shannon's house - -." (A177). Ms. Pruden identified Mr. Thomas as "Mutt" by pointing him out the jury. (A177). Thereafter, Ms. Pruden testified that "Deshannon spit on Mutt", who said "I'll be back". (A178).

According to Ms. Pruden, "Mutt walked right by her in the direction of Market Street" and was gone for "about five minutes" before he returned. (A178-179). Ms. Pruden further testified that Mr. Reid and Mr. Thomas resumed arguing, that Mr. Reid was "waving his hands around" and that Mr. Thomas had a gun and "[w]hen Deshannon turned around, he [the defendant] pulled it out and he started shooting." (A179). She stated that she saw the gun come out, heard the shots, and saw "Mutt's" hand extended. (A180). Ms. Pruden testified that "after he shot Deshannon Reid", Mutt "ran through Pete's parking lot." (A180). She further asserted that she was testifying from what she saw that night. (A181).

On cross-examination, trial counsel asked Ms. Pruden, "It is your testimony today that you saw everything?". (A184). Ms. Pruden responded "Yes.". (A184). Trial counsel then inquired, "It's your testimony today that you were on 27th & Market on October the - - on April the 14th, 2015, correct?". (A184). Ms. Pruden responded "Yes.". (A184). She specified that she "was standing on 27th by the church, not exactly in front of the church, but closer to Deshannon's home, on the same side that Shannon lives on." (A184). Ms. Pruden testified that she did not see Deshannon's mother, Ms. Reid, outside that day. (A187). Thereafter, the following exchange occurred between trial counsel and Ms. Pruden:

Q. And you said earlier you told the police you only heard the shooting, but this time you're saying that you saw the shooting, correct?

A. I saw it the first time. I didn't want anything to do with it.

Q. Okay, and the testimony that you're giving, you're giving this under oath, right?

A. Yes

Q. And this is the hundred percent the truth, the whole truth and nothing but the truth?

A. Yes.

Q. And how sure are you of that?

A. Cause I was there.

Q. You were there. Is there anything that I could say to make you think that you weren't there?

A. I guess you will; won't you?

Q. No, I'm just asking you.

A. No, you cannot. (A190-191).

Trial counsel then asked Ms. Pruden if she was in WCI on April 7, 2015, to which Ms. Pruden responded yes. (A191). Trial counsel requested a recess, at which point trial counsel stated:

Your Honor, here's where we are in this matter. Miss Pruden has testified that she was present on April the 14th, 2015 at - - on Market Street and 27th. We have evidence to show that on April the 24th, 2015, she was sentenced by Judge Streett to 3 months at Level V. Her release date would have, and it is, 4/27/15 - - 4/29/15, Your Honor.

I've shown the State a copy of the inmate locator. There's an inmate locator that is sent that shows every person that is incarcerated on a certain day in the State of Delaware. I've pulled the date to show that on April the 13th, 2015, Miss Pruden was in the custody of the Department of Corrections in the Hazel Plant Correctional Center at WCI on Baylor on February 13, 2015.

> I pulled the date to show that Miss Pruden was also in custody at the Department of Corrections on April the 15th, 2015. I show - - I also pulled the date that says that she was in custody on April the 29th, 2015, and I pulled the records to show that she was no longer in custody on May 1st, 2015.
>
> I have the Sentencing Order, Your Honor. I have the Court's commitment paper, and I also have the violation report that was filed on 6/9/2015 that also says that she was released from custody on May 1st, 2015 and was violated for failure to report to Level III probation, that is currently pending, cause she was out on capias since that time. (A192-194).

Astonishingly, DAG Zubrow advised that the prosecution had never seen those records before and needed time to review them. (A195). DAG Puit also agreed to provide trial counsel with the DELJIS records that would show Ms. Pruden's actual release date from custody. (A195). Upon returning from recess, DAG Zubrow stated "I believe everyone is on the same page now, that she was at Hazel D. Plant Center. Mr. Armstrong will cross-examine her about that facility and what inmates can or can't do, and the State will redirect." (A196).

During trial counsel's resumed cross-examination of Ms. Pruden, she adamantly denied that she was in the custody of the Department of Corrections ("DOC") on the day of the shooting; instead, she insisted that she was working at Deal$ in April 2015 from 12:00 pm - 5:00 pm and was living at 303 West 29th Street. (A197-200). Ms. Pruden further argued that she had been sentenced to probation, despite the sentence order showing that she received Level V time, and that trial counsel was wrong in stating she was released from custody on April 29, 2015. (A201). When trial counsel asked Ms. Pruden whether, factoring in good time, she was released from custody on April 29, 2015, Ms. Pruden insisted he was incorrect, stating "It wasn't April 29th. You're trying to say I was in jail when this went down, but I was not." (A203-204).

When trial counsel questioned Ms. Pruden on her violation paperwork, which stated she had been released from custody on May 1, 2015 and that she did not live at the address she had provided, Ms. Pruden became increasingly hostile in her responses. (A204-2). When trial counsel specifically questioned, "I want to know if you were incarcerated on April the 14th, 2015", Ms. Pruden responded "No". (A28). Trial counsel then asked,"Even though the documents say that you were?". Ms. Pruden responded "Yes." (A219).

Regarding Hazel D. Plant's rules related to curfew and work release, Ms. Pruden conceded that there is a 10:00 curfew but stated she was not in by that time. (A219). Trial counsel inquired about work release, and Ms. Pruden responded that "I went home, because I had maxed up. So, I didn't have to end up making any phases." (A220). Trial counsel questioned whether April 29, 2015 was the date she maxed out, and Ms. Pruden replied "No, it's not." (A220). On redirect examination, DAG Zubrow essentially read a description of Hazel Plant which noted that the facility has "work release as a component", with the implication being that Ms. Pruden was or had the potential to be on work release at the time of the shooting. (A221-222).

During that day's lunch recess, DAG Puit advised the trial court that they were "also going to be looking for some information from the records that we just got from Mr. Armstrong during break", presumably meaning the records regarding Ms. Pruden's custody status on the date of the homicide. (A228-229). Subsequently, trial counsel advised the court that he may call someone from the DOC as a defense witness. (A232).

Reconvening after the lunch recess, DAG Puit advised the court that in regard to their last witness:

> We are scrambling to try and get some information, and as Your Honor can probably guess, it was lunchtime when we were trying to get in touch with people. I anticipate

> that we might need to ask to recess early today, and tomorrow morning, either call our last witness or rest, and I apologize for the delay. We've done everything in our power to try and make it happen today. (A235).

Trial counsel responded:

> They actually have, Your Honor. They called the Plummer Center and Hazel Plant. The reason I know is because we called as well, and they told us that they were getting phone calls. Apparently, the Deputy Warden who is in charge is not in today, or we don't know if we can get it or whatever. We do not oppose continuing today, starting up tomorrow. We kind of know how it's going to figure out, so we don't care. (A235).

The following day, September 19, 2017, trial counsel advised the court that the defense had no witnesses to call. (A240). There was no discussion from either party about calling someone from the DOC as a witness, and there was no further discussion of Ms. Pruden or her whereabouts on April 14, 2015. (A240). Nevertheless, during closing arguments, DAG Puit stated:

> Now, ladies and gentlemen, the State anticipates Mr. Armstrong is going to discuss the inconsistencies in Etta, Taye and Monique's statements, talk about the inconsistencies in the distance of how far they were and where exactly they were in the street.
>
> He's going to talk to you about Monique. Monique was emphatic that she was out there. You heard Mr. Armstrong question her about her time at Hazel D. Plant Center.
>
> You are going to be instructed that you will be the sole judges of credibility in this case . . . . (A243).

Taking it a step further, during rebuttal argument, the DAG Puit stated:

> Mr. Armstrong says to you that it is without a doubt that Monique Pruden was in jail. I think he writes jail up there five or six times. She's emphatic. She sits up there. She's there. The State submits to you, the records says she's at Hazel D. Plant, not jail, Hazel D. Plant. (A248).

Trial counsel immediately objected, arguing:

At this point, the State is trying to insinuate that Hazel D. Plant is not a jail. It actually is a jail housed at WCI. That is a total misrepresentation of the facts. (A248).

Thereafter, the following exchange occurred:

THE COURT: Is the State suggesting, because it should know, that she was out on work release or was at liberty or not in a custodial section?

MS. PUIT: I think the answer is no one knows. I think we can argue they put into evidence it's a work release facility.

THE COURT: I know defense put that into evidence, but does the State believe that she was at liberty in some fashion on April 14, 2015?

MS. PUIT: I do not know.

THE COURT: Well, I think it's the State's - - the State is in control of the Department of Corrections. I don't think the State should be permitted to suggest, just because this document was put into evidence, it was partially a work release facility, which probably is --

MS. PUIT: Your Honor, sorry to interrupt.

THE COURT: Go ahead.

MS. PUIT: On cross-examination said she has a job at Deals on Miller Road in April of 2015.

THE COURT: What has the State found out from the Department of Correction as to where she was on April 14?

MS. PUIT: I do not have an answer. All I know is that she was at Hazel D. Plant, and I don't have a definitive answer. That's what we were trying to get, and I can't get it.

MR. ARMSTRONG: That is a Level V facility, Your Honor. The State is now saying that it's not. It's a prison.

THE COURT: I think just because that document was put into evidence that suggests that it can be a work release referral, it is incumbent on the State, maybe just because personnel at the Department of Correction weren't there in the last couple of days, when this 24 hours almost when this came to light, I don't think the State should be

> able to suggest that she might have been able to leave without affirmative proof, given the seriousness of this that the defendant - - I think it's stated another way, I think the State is bound by the weight of the facts developing this case, that she was in prison on April 14, and I'm just going to preclude the State from arguing to the contrary.
>
> The State is the one on this important issue that should be able to tell the Court whether or not she was in prison. If you say you can't tell that one way or the other, I'm not going to allow an argument to the contrary. (A248-249).

DAG Puit stated that the State disagreed but would move on. (A249). However, trial counsel requested that the record be corrected, noting "She has said that she was not in jail; she was at Hazel D. Plant, which leads the jury to believe she is not in jail. That needs to be corrected, Your Honor." (A249). DAG Puit disagreed. (A249). However, the court concluded a correction was warranted, noting:

> Well, then I think the State should have put on some evidence that she was in the work release program or had the ability to leave, other than this document. I have to find the question because the State never argued until right now in rebuttal, there was a theoretical opportunity of her to not have been at Hazel D. Plant.
>
> I'm going to instruct the jury that Hazel D. Plant is a secure facility because I think it was incumbent on the State, having called her as a witness, found out the fact it did, to have shown one way or the other that she was in the custodial situation at Hazel D. Plant or not.
>
> So I'm going to instruct the jury that for the background facts, Hazel D. Plant is a, in fact, a jail. (A249).

Thereafter, the court stated: "Members of the jury, I instruct you that Hazel D. Plant facility is a jail." (A249).

In light of the aforementioned, Rule 61 Counsel employed a private investigator to speak with Ms. Pruden. On March 19, 2020, Investigator Michael Wiant conducted a recorded interview[1] with

[1] A transcript of this interview is attached at A255-259.

Ms. Pruden, at which time Ms. Pruden unequivocally stated: "I wasn't there." (A255). Ms. Pruden explained that she was in DOC custody at Hazel Plant at the time of the shooting and that she was not working at the time. (A256). When Investigator Wiant asked Ms. Pruden "you're positive that you were not at the scene when this happened", Ms. Pruden responded "I'm positive." (A256). When asked how she was positive about that, Ms. Pruden responded "[b]ecause I was in jail." (A256).

Investigator Wiant then inquired "Why, why would you tell them that you were there when you weren't there? Where you trying to - -", to which Ms. Pruden responded:

> No. It - - I don't really want to explain it. But it was just at the time, it was something going on, and they was just like no. You know, how people wanted you to - - I don't know. I just - - I shouldn't have did what I did . . . . I really shouldn't. And you know, I - - I wish I didn't. (A256).

Thereafter Investigator Wiant inquired "[s]o was - - were you - - were you in trouble at the time? Or had you been in any kind of uh, situation with, with police or anything like that?" (A256). Significantly, Ms. Pruden responded "[s]omething. Yeah, something like that. Pretty much, yeah." (A256). When asked whether she was working at Deal$ at that time, as she testified she was, Ms. Pruden responded that she did work at Deal$ but not at the time that she was in DOC custody. (A256-257). When Investigator Wiant asked how Ms. Pruden had information to give the police if she was not there, she responded "[b]ecause the person that was there that I know." (A257). However, Ms. Pruden refused to give the name of this person. (A257). Ms. Pruden further advised that she gave information to Officer McKenzie about Mr. Reid's homicide when she was at the police station being questioned in another case once the officers asked about Mr. Reid's homicide case. (A257-258). Ms. Pruden did not believe that this conversation was recorded and did not recall when

it occurred. (A258). Surprisingly, Ms. Pruden further reported that no one from the Attorney General's Office spoke with her prior to trial. (A258).

In concluding the interview, Investigator Wiant explained that it was important that Ms. Pruden be completely honest with him, and Ms. Pruden reaffirmed that she was not at the scene of the shooting and regretted testifying that she was, noting that by the time she had second thoughts about testifying, it was too late. (A259). Ms. Pruden confirmed that no one spoke with her afterwards about this. (A259).

Investigator Wiant was unable to make contact with Ms. Pruden for a follow-up interview. However, Rule 61 Counsel obtained documentation from the DOC through subpoena that corroborates Ms. Pruden's statements to Investigator Wiant. (A260-263). The DOC turned over to Rule 61 Counsel on March 27, 2020 three pages of records pertaining to Ms. Pruden's time in DOC custody around the time of the offense. (A261-263). These three pages include one page of a "Booking Search", which shows that Ms. Pruden was admitted to custody on March 25, 2015 and was released from custody on April 29, 2015. (A261). The DOC records also include two pages of "Contact Notes" that show on April 7, 2015, Ms. Pruden was given a pass to leave the facility and on April 28, 2015 was given a pass to leave the facility to interview at Mother Mary of Hope. (A262-263).

Rule 61 Counsel and a member of Counsel's staff thereafter conducted two interviews with Darren Carter,[2] a former Deputy Warden of Delaware's Department of Corrections for the Baylor Women's Correctional Institution, who confirmed that the listing of dates showing when Ms. Pruden

[2] Affidavit from Daniel C. Breslin, Esquire regarding interviews with Former Deputy Warden Darren Carter is attached at A264-266.

was given a pass to leave the facility, combined with the lack of a listing showing that Ms. Pruden was given a pass to leave the facility on April 14, 2015, establishes that Ms. Pruden did not leave the facility on April 14, 2015. (A265-266). As Mr. Carter explained, an inmate must check in and out with a correctional officer stationed at the exit of the facility whenever an inmate leaves a Level IV facility. (A264-265). Each entry into and exit from the facility is then recorded in a "log book." (A264-265). Consistent with this practice, Ms. Pruden's DOC contact notes indicate that she was given a pass to leave the facility on April 28, 2015. (A265). Thus, Mr. Carter was able to conclude that absent any records indicating Ms. Pruden was given a pass to leave the facility on April 14, 2015, Ms. Pruden did not, in fact, leave Hazel D. Plant. (A265-266). Furthermore, Mr. Carter noted that many DOC employees through the database should have been able to rather easily verify in September 2017 that Ms. Pruden was confined to the facility on April 14, 2015. (A266). Rule 61 Counsel additionally obtained documentation from Dollar Tree Stores, Inc. through subpoena that confirmed Ms. Pruden was not employed at Deal$ during the time of the homicide. (A339-340).

Based upon the aforementioned, Mr. Thomas sought postconviction relief and filed an Amended Motion for Postconviction Relief alleging that: 1) Mr. Thomas' right to due process of law under the Fourteenth Amendment to the United States Constitution and Article 1, § 7 of the Delaware Constitution was violated when his convicted was tainted by the use of perjured testimony; 2) the State committed prosecutorial misconduct by injecting perjured testimony into the trial, by failing to correct the perjured testimony and by arguing the false testimony to the jury during closing and rebuttal arguments; 3) the State violated *Brady v. Maryland* by failing to search for and disclose crucial impeachment information demonstrating the falsity of Ms. Pruden's testimony; and 4) and evidentiary hearing was needed pursuant to the Fourteenth Amendment to the United States

Constitution and Article 1, § 7 of the Delaware Constitution to determine whether the State suppressed impeachment material in relation to Ms. Pruden's June 16, 2015 statement to Detective Curley. (A267-332).

Following an affidavit from trial counsel, a response from the State, and a reply from Mr. Thomas, the Superior Court denied all of petitioner's postconviction claims. (A5-39). Mr. Thomas timely appealed to the Delaware Supreme Court. Following briefing from the parties, the Delaware Supreme Court issued an opinion on September 29, 2022, denying petitioner's appeal and affirming the judgment of the Superior Court. (A1-4).

The Delaware Supreme Court concluded that the Superior Court correctly determined that: 1) Mr. Thomas' claims were procedurally barred for failure to raise in the proceedings leading to the judgment of conviction; 2) Mr. Thomas could not show cause for the procedural default or that he suffered prejudice from the State's use of Ms. Pruden's testimony; and 3) the State did not violate *Brady* because the information not disclosed—Ms. Pruden's custodial status—was known to Mr. Thomas during trial and direct appeal. (A2-4).

The constitutional question at issue was preserved in the Delaware Supreme Court, as petitioner asserted that he was deprived of his Fourteenth Amendment right to due process of law when the perjured testimony of Monique Pruden was used by the State in securing petitioner's convictions and that the State's erroneous actions in relation to the perjured testimony constituted prosecutorial misconduct, as well as a violation of *Brady v. Maryland*, that deprived petitioner of his right to due process pursuant to the Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10(c) provides that a writ of certiorari may be granted where "a state court of last resort . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." In finding that petitioner failed to demonstrate prejudice from the State's use of the perjured testimony, because, as the court concluded, there was ample proof of petitioner's guilt independent of the perjured testimony, the Delaware Supreme Court's decision contravenes this Court's precedent that knowingly presenting or failing to correct false testimony in a criminal proceeding is so egregious that the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. As such, the Delaware Supreme Court's decision allows the State of Delaware to obtain a conviction, for which the defendant is serving a life sentence, through illicit means that amount to prosecutorial misconduct and contravenes clearly established precedent of this Court in order to do so.

I. The Delaware Supreme Court's Conclusion That Petitioner's Postconviction Claims Asserting That His Right to Due Process of Law Was Violated When His Conviction Was Obtained Through the Use of Perjured Testimony and Stemming From Prosecutorial Misconduct Is Procedurally Barred Contravenes Precedent of This Court.

In response to petitioner's postconviction claims his Fourteenth Amendment right to due process of law was violated when his conviction was obtained through the use of perjured testimony, and when the State committed prosecutorial misconduct and violated its obligations under *Brady v. Maryland*, the Delaware Supreme Court erroneously concluded that petitioner's claims were properly denied by the Superior Court as procedurally barred. (A2-4). However, the Delaware Supreme Court's decision contravenes controlling precedent of this Court.

This Court has long held that a State violates the Fourteenth Amendment right to due process when it knowingly presents or fails to correct false testimony in a criminal proceeding,[3] and if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury", the conviction must be set aside.[4] In finding that Mr. Thomas failed to demonstrate prejudice from the use of the perjured testimony, the Delaware Supreme Court concluded that there was "ample proof" of his guilt independent of the perjured testimony, leading the court to conclude that "it is not substantially likely that the outcome of Thomas' trial would have been different had the jury not been exposed to Pruden's testimony." (A3). This is quite clearly the wrong test to use in assessing such a claim, as laid out in this Court's precedent.

As an initial matter it should be noted that the Delaware Supreme Court also concluded that in addition to failing to demonstrate prejudice from the use of the perjured testimony, Mr. Thomas also failed to demonstrate "cause" for failing to raise this issue in the proceedings leading to conviction. (A2). The court's finding is unequivocally erroneous for numerous reasons.

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[3] *United States v. Agurs*, 427 U.S. 97, 106 (1976) (citing *Pyle v. Kansas*, 317 U.S. 213 (1942)); *see also Giglio v. United States*, 405 U.S. 150, 154–55 (1972) ("A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .'") (citing *Napue v. Illinois*, 360 U.S. 264, 271 (1959)); *Napue*, 360 U.S. 264 at 269); *Alcorta v. Texas*, 355 U.S. 28 (1957); *United States v. Williams,* 974 F.3d 320, 355 (3d Cir. 2020); *Haskell v. Superintendent Greene SCI*, 866 F.3d 139, 146-147 (3d Cir. 2017); *Lambert v. Blackwell*, 387 F.3d 210, 242 (3d Cir. 2004); *Weber v. State*, 457 A.2d 674 (Del. 1982) (. . . "[I]t is now axiomatic that a conviction may be invalid under the fourteenth amendment if a prosecutor has knowingly elicited false testimony relating to a witness' credibility or if the prosecutor has knowingly allowed the witness to testify falsely.").

[4] *Agurs*, 427 U.S. at 103, holding modified by *United States v. Bagley*, 473 U.S. 667 (1985); *Haskell*, 866 F.3d at 145, 147 (holding that when the State has knowingly presented or failed to corrected perjured testimony, "a petitioner carries his burden when he makes the reasonable likelihood showing required by Giglio and Napue" as opposed to the "actual prejudice" showing required by Brecht) (citing *Giglio*, 405 U.S. at 154 (citing *Napue*, 360 U.S. at 271); *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993)); *Jenkins v. State*, 305 A.2d 610, 616 (Del. 1973) (noting that Napue applies to the knowing use of false or perjured testimony).

The Delaware Supreme Court makes multiple factual and legal assertions that are plainly wrong. First, in concluding that "Thomas does not offer a persuasive excuse—or 'cause'—for this default", the Delaware Supreme Court erroneously stated that "[d]uring cross-examination, defense counsel thoroughly discredited Pruden's testimony by showing that—despite her protestations to the contrary—she was incarcerated in a Department of Correction facility on the day of the shooting." (A2). This factual assertion is false.

It is clear that while trial counsel did his best to dispute Ms. Pruden's testimony with the evidence available to him at the time, he could not have obtained the documentation needed to conclusively show that Ms. Pruden was in custody at Hazel D. Plant on April 14, 2015 without the ability to leave the facility on work release. As Mr. Thomas explained to the state courts, Rule 61 Counsel spoke with trial counsel who advised that he attempted to find out from the DOC mid-trial whether Ms. Pruden was in the facility at the time of the murder, but the DOC advised that they would be corresponding with only the State on this issue and as such, trial counsel would need to go through the State to get the answer as to Ms. Pruden's whereabouts. Although trial counsel possessed inmate locator sheets and Ms. Pruden's docket sheet, sentence order and violation paperwork, all of which raised strong *suspicion* that Ms. Pruden was in custody at Hazel Plant on April 14, 2015, the State suggested to the jury that Ms. Pruden had the ability to leave the facility for work release, and trial counsel did not have in his possession, either before or after trial, any evidence that would have conclusively refuted that.

In fact, Rule 61 Counsel, in the course of the investigation, even thought it was unclear that Ms. Pruden was being untruthful when she testified that she saw the murder. As such, taking the appropriate steps that postconviction counsel should do, Rule 61 Counsel had a private investigator

interview her, and this investigator, who happened to be a former law enforcement officer, agreed with Rule 61 Counsel's conclusion that it was unclear whether she had provided false testimony. It was after interviewing Ms. Pruden that it was finally discovered, and she readily admitted, that she had lied on the stand. It was only then that clear evidence was gathered by postconviction counsel to support the postconviction claim that Ms. Pruden testified falsely and the State committed prosecutorial misconduct in arguing the false testimony to the jury; although as explained to the state courts, this information should have, and could have, been gathered by the prosecutor prior to or even during trial. As such, in concluding that " Thomas cannot show cause for his default because he knew, during trial and his direct appeal, that Pruden's testimony was—to put it charitably—suspect" and that Mr. Thomas' *Brady* claim fails because, "Thomas was aware during his trial and direct appeal" of the information the State failed to disclose–"Pruden's custodial status", the Delaware Supreme Court erroneously dismisses the evidence of Ms. Pruden's custodial status that was revealed from postconviction counsel's investigation and its ability to ameliorate the prejudice caused by Ms. Pruden's perjured testimony had it been available to defense counsel during trial. (A2-4).

It should also be noted that what the state courts failed to consider is how strong Ms. Pruden's testimony actually was. Although trial counsel raised suspicions about her testimony, Ms. Pruden adamantly defended her testimony before the jury and failed to waver in her recounting of events. While the state courts may have believed that it was "obvious" she was lying, what was in fact obvious is that the jury had reason to believe her testimony was truthful–it was painfully apparent that Ms. Pruden's testimony would be followed up on after trial, particularly as she had an outstanding warrant for her arrest, and that she would easily be discovered if she was lying, so the

jury would reasonably have questioned why she would double down on her testimony if she was lying.

Moreover, Ms. Pruden painted a compelling story of these two individuals having an argument over drugs and how it escalated with Mr. Reid spitting on Mr. Thomas. (A177-183). Her testimony corroborated the testimony of Ms. Reid, with both explaining how the two men had an argument, with Mr. Thomas leaving and returning approximately five minutes later, followed by the resumption of the argument and eventually, the shooting. (A177-183).

When presented with evidence of her lies by trial counsel, Ms. Pruden became increasingly hostile and argumentative, repeatedly refusing to acknowledge that she was in custody on April 14, 2015. (A191-192, 197-220). The State then used Ms. Pruden's combative attitude during closing and rebuttal arguments to imply that Pruden must have been truthful in her testimony because she was so "emphatic" that she was there and saw what she said that she saw. (A243). Any progress trial counsel made in convincing the jury that Ms. Pruden's testimony was false was undermined by the actions of the State. The State insinuated that Ms. Pruden was at liberty on work release on April 14, 2015 when DAG Zubrow read a description of Hazel Plant on re-direct examination which noted the facility has a work release component. (A221-222). DAG Puit further undermined trial counsel's attempts to correct Ms. Pruden's false testimony by arguing to the jury on rebuttal: "Mr. Armstrong says to you that it is without a doubt that Monique Pruden was in jail. I think he writes jail up there five or six times. She's emphatic. She sits up there. She's there. The State submits to you, the records says she's at Hazel D. Plant, not jail, Hazel D. Plant." (A248). Although the court corrected the record that Hazel D. Plant is in fact a jail, the court's correction did nothing to ameliorate the

damage caused by the State's insinuations that there is, in fact, doubt as to whether Ms. Pruden was in custody on April 14, 2015. (A249).

Moreover, DAG Puit further undermined trial counsel's cross-examination of Ms. Pruden and implied the truthfulness of her testimony by arguing to the jury "Monique was emphatic that she was out there. You heard Mr. Armstrong question her about her time at Hazel D. Plant Center. You are going to be instructed that you will be the sole judges of credibility in this case. . . .". (A243). By her statements, DAG Puit suggested that despite the evidence trial counsel presented on cross-examination, he must be wrong because Ms. Pruden was so emphatic in her testimony that she witnessed the shooting and that the jury could and should so find. Thus, it is apparent that regardless of how "suspect" trial counsel argued Ms. Pruden's testimony was, the State was nevertheless banking on the jury believing her testimony because she was so emphatic that she was there and saw what she said she saw that it made no sense for her to be lying. Based on Ms. Pruden's demeanor and the State's arguments, it would have been more believable to the jury that the paperwork was erroneous or that trial counsel was misreading or misunderstanding the paperwork than to believe that Ms. Pruden injected herself into an investigation that did not involve her and committed perjury for no apparent reason.

This also raised the question of how and why Ms. Pruden became involved in the investigation at all; Mr. Thomas requested an evidentiary hearing to further develop the record on this issue but was denied by the state courts. It further raised the question of whether Ms. Pruden was promised anything, by either law enforcement or the prosecutor, in exchange for her testimony. It is suspect that on the date of Ms. Pruden's mid-trial interview with Detective Curley, September 15, 2017, there was an active warrant for her arrest but yet she was not arrested until after her untruthful testimony

was given. (A217, 225). Moreover, a transcript of Ms. Pruden's violation of probation hearing held after Mr. Thomas' trial but prior to his sentencing, showed an off-record discussion held at sidebar, followed by the court's dismissal of Ms. Pruden's violation, as, suspiciously, no officer showed up in court. (A253-254). Without further development of the record, the dismissal of Ms. Pruden's violation appears to be a reward for her untruthful trial testimony, as it seems unreasonable that Ms. Pruden's active arrest warrant would have been somehow overlooked until after she provided untruthful testimony, and then despite that untruthful testimony that had the potential to damage the State's case against Mr. Thomas, the State offered no resistance to Ms. Pruden's violation of probation, which should have resulted in her return to DOC custody, being dismissed.

Yet despite all the suspicious issues raised in this case, the state courts continue to sweep Mr. Thomas' claims of prosecutorial misconduct and deprivation of his constitutional right to a fair trial under the rug on the basis of patently erroneous factual assertions and legal conclusions based on the wrong standard. The state courts made conclusions and reached decisions, such as it being obvious that Ms. Pruden was lying and Mr. Thomas having all of the information he needed during trial and direct appeal to raise his claim, that are not only false but which would be unreasonable to conclude. What occurred in this case was a clear example of prosecutorial misconduct found during postconviction review and yet the state courts are unreasonably allowing it to occur with the excuse of it being understood to everyone, including the jury, that Ms. Pruden was lying, which is simply untrue. Moreover, the state courts also excuse the prosecutorial misconduct by finding that overwhelming evidence makes Ms. Pruden's perjured testimony non-prejudicial, which is not only incorrect, as this was not a case of overwhelming evidence, but also analyzes the claim under the wrong standard.

This was not a case of overwhelming evidence. There was minimal to no physical evidence connecting Mr. Thomas to the shooting. The strongest physical evidence that the State presented was the surveillance video and sign-in sheets at Crestview Apartments that arguably showed Mr. Thomas in the vicinity of the scene of the shooting around the time the shooting occurred. (A145-147). The Pete's Pizza surveillance videos showed an individual *not clearly identifiable* as Mr. Thomas in the general vicinity of the shooting around the time it occurred. (A143-144, 147-148). The store's surveillance videos did not, however, show anyone running through the parking lot, as the witnesses testified. (A149).

Thus, the State's evidence against Mr. Thomas consisted predominantly of witness testimony-three eye witnesses, including Ms. Pruden, and a prison informant. Ms. Reid testified that she witnessed the shooting; however, there were inconsistencies between the testimony of Ms. Reid and Ms. Cassidy, who also testified that she witnessed the shooting. (A83-85, 101, 108-109). Significantly, Ms. Cassidy did not come forward to report what she allegedly saw until two years after the shooting. (A103-105). Mr. Lacurts testified that Ms. Thomas admitted to him that he shot Mr. Reid. (A123). Yet, Mr. Lacurts, who has a history of making deals with the State to help himself out in other cases, acknowledged that he had the ability to access discovery sent to Mr. Thomas by his attorneys and that many people were discussing the shooting. (A125-128, 131-132). The fact that one witness waited two years to even report allegedly witnessing the shooting, another was arguably biased in that the victim was her son, and another was arguably biased in that he has a history of testifying in cases on behalf of the State in exchange for some benefit, all contributes to the importance of Ms. Pruden's testimony to the State. In the eyes of the jury, not only did Ms. Pruden appear to have no bias toward the victim or against Mr. Thomas, but she had no motivation to testify

against Mr. Thomas and in fact, had motivation to pretend she was not even a witness, as she feared for her safety. Notably, if Ms. Pruden's testimony was as immaterial to the State's case as the state courts suggest, then the prosecutors would not have gone to the trouble of attempting to rehabilitate her on re-cross examination or during closing and rebuttal arguments.

Moreover, as noted above, the Delaware Supreme Court failed to use the correct test for assessing Mr. Thomas' claims and in so doing, issued an opinion that contravenes clearly established precedent of this Court. The Delaware Supreme Court opined, "nor can Thomas show that he suffered prejudice as a result of the prosecution's use of Pruden's testimony", as "there was ample proof of Thomas's guilt independent of Pruden's problematic testimony" and because "it is not substantially likely that the outcome of Thomas' trial would have been different had the jury not been exposed to Pruden's testimony." (A3). Yet clearly established federal law holds that the appropriate standard is whether there is a "reasonable", not "substantial", likelihood that the false testimony could have affected the judgment of the jury.

As this Court has held, a witness commits perjury if he or she "gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory."[5] At this point, it is beyond dispute that Ms. Pruden committed perjury. When the State argued to the jury, without evidence, that Ms. Pruden may have been on work release at the time of the homicide and therefore had the ability to witness the shooting,

[5] *United States v. Dunnigan*, 507 U.S. 87, 94 (1993); *see also United States v. Hoffecker*, 530 F.3d 137, 183 (3d Cir. 2008); *United States v. Williams,* 974 F.3d 320, 355 (3d Cir. 2020).

the State indisputably "knowingly present[ed] or fail[ed] to correct false testimony in a criminal proceeding," a violation of Mr. Thomas' Fourteenth Amendment right to due process.[6]

Because this Court has held that if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury", the conviction must be set aside,[7] it is clear that Mr. Thomas needed only demonstrate to the state courts that there was *any* reasonable likelihood that Ms. Pruden's false testimony *could have* affected the judgment of the jury. Thus, the Delaware Supreme Court plainly used the wrong standard when it denied Mr. Thomas' claim on the basis that "it is not *substantially* likely that the outcome of Thomas' trial would have been different had the jury not been exposed to Pruden's testimony." (A3 *emphasis added*). Moreover, this Court has further held that even if the false testimony goes only to a witness's credibility and not to the defendant's guilt, the conviction must still be set aside.[8] In light of the aforementioned, it is clear that Mr. Thomas was only required to show a reasonable likelihood that the perjured testimony could have affected the jury's judgment, and he did just that.

In this case, not only did the false testimony, which the State failed to correct and continued to knowingly present and argue even after being made aware of its falseness, go to Ms. Pruden's credibility, but it also went to the heart of the issue–Mr. Thomas' guilt or innocence. Ms. Pruden told

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[6] *Haskell*, 866 F.3d at 146-147; *see also Lambert*, 387 F.3d at 242; *Williams,* 974 F.3d at 355; *Weber*, 457 A.2d 674 (citing *Agurs*, 427 U.S. at 103; *Giglio*, 405 U.S. 150; *Napue*, 360 U.S. 264; *Alcorta*, 355 U.S. 28).

[7] *Agurs*, 427 U.S. at 103, holding modified by *Bagley*, 473 U.S. 667; *see also Brecht*, 507 U.S. at 637–38); *Haskell*, 866 F.3d at 145, 147 (holding that when the State has knowingly presented or failed to corrected perjured testimony, "a petitioner carries his burden when he makes the reasonable likelihood showing required by Giglio and Napue" as opposed to the "actual prejudice" showing required by *Brecht*) (citing *Giglio*, 405 U.S. at 154 (citing *Napue*, 360 U.S. at 271); *Jenkins*, 305 A.2d at 616 (Del. 1973).

[8] *Napue*, 360 U.S. at 270.

the jury a believable story of how events unfolded, with her testimony corroborating the testimony of another witness, Ms. Reid. (A177-183). As noted above, when presented with evidence of her apparent lies by trial counsel, Ms. Pruden became increasingly hostile and argumentative, repeatedly refusing to acknowledge that she was in custody on April 14, 2015. (A191-192, 197-220). The State then used Ms. Pruden's combative attitude during closing and rebuttal arguments to imply that Ms. Pruden must have been truthful in her testimony because she was so "emphatic" that she was there and saw what she said that she saw. (A243, 248). Thus, trial counsel's attempts to convince the jury that Ms. Pruden's testimony was false was undermined by the State's actions.

Moreover, the prosecutor argued to the jury, in relation to trial counsel's attempts to discredit Ms. Pruden, that they "will be the sole judges of credibility in this case. . . .". (A243). Through the prosecutors' actions, the State not only undermined trial counsel's attempts to correct the false testimony but also undermined trial counsel's credibility with the jury. Given the lack of physical evidence in this case, the inconsistencies in the testimonies of the other witnesses, and the strength of Ms. Pruden's testimony, even in the face of trial counsel's cross-examination, the record shows, at a minimum, a reasonable likelihood that the perjured testimony had an affect on the judgment of the jury.

Because there is a reasonable likelihood that Ms. Pruden's false testimony, and the fact that it was left uncorrected and actually argued by the State, could have affected the judgment of the jury, Mr. Thomas' Fourteenth Amendment right to due process was plainly violated, as his convictions were tainted by perjured testimony stemming from the State's prosecutorial misconduct. Thus,

pursuant to this Court's precedent, Mr. Thomas' convictions must be set aside[9] and a new trial ordered. Certiorari should be granted on this issue, not only because petitioner was deprived of his right to the due process of law under the Fourteenth Amendment to the United States Constitution, but because the Delaware Supreme Court's failure to adhere to this Court's precedent on the use of perjured testimony will inevitably result in similar deprivation of due process in future similarly situated cases and implicitly condones the State's use of perjured testimony to obtain convictions while engaging in prosecutorial misconduct.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

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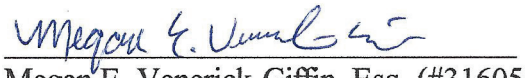
Respectfully submitted,



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[9] *Agurs*, 427 U.S. at 103, holding modified by *Bagley*, 473 U.S. 667; *Napue*, 360 U.S. at 270.