No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM BURTON,
Petitioner

v.

WARDEN JAMES T. VAUGHN CORRECTIONAL CENTER,
Respondent

and

ATTORNEY GENERAL DELAWARE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX VOLUME I (A1-115)

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William Burton

Dated: May 7, 2024

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-3256

WILLIAM D. BURTON III,
Appellant

v.

WARDEN JAMES T. VAUGHN CORRECTIONAL CENTER;
ATTORNEY GENERAL DELAWARE

On Appeal from the District Court
for the District of Delaware
(D.C. No. 1:19-cv-01475)
District Judge: Honorable Maryellen Noreika

Submitted Under Third Circuit L.A.R. 34.1(a)
on February 1, 2024

Before: KRAUSE, PORTER, and CHUNG, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of Delaware and was submitted under Third Circuit L.A.R. 34.1(a) on February 1, 2024.

On consideration whereof, it is now hereby **ORDERED** and **ADJUDGED** by this Court that the order of the District Court entered on October 27, 2022, be and the same is hereby **AFFIRMED**. Costs shall be taxed against Appellant.

All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: February 7, 2024

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-3256

WILLIAM D. BURTON III,
Appellant

v.

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(Filed: February 7, 2024)

OPINION*

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* This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

KRAUSE, *Circuit Judge*.

William Burton appeals the District Court's order denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Discerning no basis for habeas relief, we will affirm.

I. DISCUSSION[1]

Under AEDPA, we may not grant habeas relief on "any claim that was adjudicated on the merits in State court proceedings" unless the state court's decision was either "contrary to, or involved an unreasonable application of," clearly established Supreme Court precedent or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Conversely, if the state courts did not adjudicate a claim on the merits, we review the claim de novo, *Lewis v. Horn*, 581 F.3d 92, 100 (3d Cir. 2009), which requires us to "exercise [our] independent judgment when deciding both questions of constitutional law and mixed constitutional questions," *Williams v. Taylor*, 529 U.S. 362, 400 (2000) (O'Connor, J., concurring).

Burton was convicted of various drug offenses after a search of his residence uncovered evidence that he was dealing cocaine and marijuana. His habeas petition

[1] The District Court had jurisdiction under 28 U.S.C. § 2254, and we have jurisdiction under 28 U.S.C. §§ 1291 and 2253. Because the District Court ruled on Burton's petition without an evidentiary hearing, "we review the state courts' determinations under the same standard that the District Court was required to apply." *Thomas v. Horn*, 570 F.3d 105, 113 (3d Cir. 2009).

claims that he is entitled to relief because the Delaware Supreme Court's rejection of his ineffective assistance of counsel claim (A) was based on an unreasonable factual determination that Burton knowingly consented to stipulate to certain pieces of evidence; (B) erroneously failed to apply the Supreme Court's holding in *McCoy v. Louisiana*, 584 U.S. 414 (2018); and (C) was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). None of these contentions is persuasive.

A. The State Court's Factual Determinations

The Delaware Supreme Court's conclusion that Burton "knowingly, intelligently, and voluntarily agreed to stipulate to the State's drug evidence" was not based on an unreasonable factual determination. *Burton v. State*, No. 287, 2018 WL 6824636, at *2 (Del. Dec. 26, 2018). A state court decision is based on "an unreasonable determination of the facts," 28 US.C. § 2254(d)(2), only when the court's factual findings are "objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (citing 28 U.S.C. § 2254(d)(2)). The state court's factual findings are "presumed correct," and a habeas petitioner bears the burden of rebutting this presumption by "clear and convincing evidence to the contrary." *Id.*

Burton has not carried that heavy burden. On the contrary, the record amply supports the state court's finding that Burton consented to his counsel's stipulation. For example, before Burton's trial started, his counsel represented to the trial court that he "met with [Burton] on two occasions and discussed with him the nature of a stipulated trial." App. 99. Burton did not object or contradict this representation in any way. And

although Burton now asserts that his counsel never discussed the stipulation with him prior to trial, his counsel advised the court in a sworn affidavit that it was his regular practice to do so with his clients. The state court was entitled to credit counsel's recollection, as well as his contemporaneous statement at trial, over Burton's unsubstantiated assertion years after the fact. *See, e.g.*, *Campbell v. Vaughn*, 209 F.3d 280, 291 (3d Cir. 2000) (concluding that the state court did not make an unreasonable determination of facts because "[a] reasonable fact-finder could discount [Petitioner's] testimony and credit his trial counsel's").

B. Structural Error under *McCoy*

The Delaware Supreme Court did not address Burton's argument that his ineffective assistance of counsel claim should be assessed under *McCoy*, rather than *Strickland*. Accordingly, we review the claim de novo. *See Lewis*, 581 F.3d at 100. Burton's contention that the state court's decision was contrary to *McCoy* rests on a shaky foundation to begin with. Because *McCoy* was decided after Burton's conviction became final in 2016, it can only be applied retroactively on collateral review if *McCoy* established a "[n]ew substantive rule[]" of constitutional law or announced a new "watershed rule[] of criminal procedure." *Schriro v. Summerlin*, 542 U.S. 348, 351–52 (2004) (cleaned up).

Moreover, the Supreme Court has observed not only that the "watershed rule[] of criminal procedure" exception is "extremely narrow," *id.* at 352 (internal citations and quotation marks omitted), but that "no new rules of criminal procedure can satisfy the watershed exception," *Edwards v. Vannoy*, 141 S. Ct. 1547, 1559 (2021). For that

reason, two Courts of Appeals have recently concluded that *McCoy* did not establish a watershed rule. *See Smith v. Stein*, 982 F.3d 229, 234–35 (4th Cir. 2020); *Christian v. Thomas*, 982 F.3d 1215, 1223–25 (9th Cir. 2020). We have not yet addressed that issue, but we need not do so here because *McCoy* would not afford Burton relief even if it could be applied retroactively to his case.

Burton argues that "the District Court unreasonably, and in contradiction of clearly established federal law, assessed Mr. Burton's claim [as] a standard ineffective assistance of counsel claim under *Strickland* rather than as a violation of autonomy claim under *McCoy*." Opening Br. 25 (internal quotation marks omitted). But this contention glosses over the narrow holding in *McCoy*, which established there was structural error where counsel admitted his client's guilt to the jury over the client's vociferous objections and insistence that he was innocent. 584 U.S. at 423–24, 426–28. In view of that structural error, the Supreme Court concluded that the petitioner did not need to demonstrate prejudice under the traditional *Strickland* standard. *Id.* at 426–28.

The circumstances of Burton's case are materially different in two respects. First, Burton's counsel stipulated to certain incriminating evidence; he did not make a whole-sale admission of guilt. *See United States v. Wilson*, 960 F.3d 136, 143 (3d Cir. 2020) (noting that the *McCoy* Court did not clearly establish what kinds of concessions count as "conceding guilt"). Second, there is no evidence that Burton ever objected to the stipulation, even when his counsel represented to the trial court that the two had discussed the strategy and agreed to stipulate to the State's evidence. Importantly for our purposes, in the absence of such an objection, counsel's stipulation could not constitute a

structural error, and thus did not foreclose the need for Burton to establish prejudice from his counsel's alleged ineffective assistance. *See Florida v. Nixon*, 543 U.S. 175, 192 (2004).

In view of the material differences between *McCoy* and the claims presented here, the Delaware Supreme Court did not err in applying *Strickland*, rather than *McCoy*, to Burton's ineffective assistance of counsel claim.

C. Ineffective Assistance of Counsel under *Strickland*

Finally, the Delaware Supreme Court did not unreasonably apply *Strickland* in denying Burton's ineffective assistance of counsel claim. A state court decision is "an unreasonable application of" clearly established federal law if the court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams*, 529 U.S. at 407–08.

To prevail on his *Strickland* claim before the Delaware Supreme Court, Burton had to show (1) that his counsel's performance at trial or on appeal fell below "an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, and (2) that he was prejudiced by counsel's inadequate performance, meaning that there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Because Burton's claim comes to us on collateral review, our analysis of that claim is "doubly deferential." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (internal citation and quotation marks omitted). We must presume both that counsel's conduct fell "within the 'wide range' of reasonable professional assistance," and that the state court reasonably determined that counsel was not

ineffective. *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689).

Burton has not overcome this presumption. As the Delaware Supreme Court explained, he cannot show prejudice because, even putting the stipulation aside, the State introduced "overwhelming" admissible evidence of Burton's guilt. *Burton*, 2018 WL 6824636, at *2. That evidence included 28.45 grams of cocaine and .93 grams of marijuana, various drug paraphernalia discovered in Burton's room, and a medical examiner's report confirming that the substances recovered from Burton's residence were marijuana and cocaine. Based on this evidence, a reasonable factfinder could have inferred that Burton was distributing the cocaine. *See United States v. Rodriguez*, 961 F.2d 1089, 1092 (3d Cir. 1992) (explaining that "[w]hen a defendant is found in possession of a sufficiently large quantity of drugs, an intent to distribute may logically be inferred from the quantity of drugs alone").

II. CONCLUSION

For the foregoing reasons, we will affirm the District Court's denial of Burton's habeas petition.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WILLIAM BURTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	C.A. No. 19-1475 (MN)
	)	
ROBERT MAY, Warden, and ATTORNEY GENERAL OF THE STATE OF DELAWARE,	)	
	)	
Defendant.	)	

ORDER

At Wilmington, this 27th day of October 2022, for the reasons set forth in the Memorandum Opinion issued on this date;

IT IS HEREBY ORDERED that:

1. Petitioner William Burton's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (D.I. 2; D.I. 8) is **DISMISSED** and the relief requested therein is **DENIED**.

2. The Court declines to issue a certificate of appealability because Petitioner has failed to satisfy the standards set forth in 28 U.S.C. § 2253(c)(2).

Maryellen Noreika

The Honorable Maryellen Noreika
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WILLIAM BURTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	C.A. No. 19-1475 (MN)
	)	
ROBERT MAY, Warden, and ATTORNEY GENERAL OF THE STATE OF DELAWARE,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Christopher S. Koyste, Esquire – Attorney for Petitioner.

Kathryn J. Garrison, Deputy Attorney General, Delaware Department of Justice, Wilmington, DE – Attorney for Respondents.

October 27, 2022
Wilmington, Delaware

NOREIKA, U.S. DISTRICT JUDGE

Pending before the Court is a Petition and Amended Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 ("Petition") filed by Petitioner William Burton ("Petitioner"). (D.I. 2; D.I. 8). The State filed an Answer in opposition, to which Petitioner filed a Reply. (D.I. 25; D.I. 26). For the reasons discussed, the Court will deny the Petition.

I. BACKGROUND

> On January 31, 2013 following up on a tip from a past-proven reliable informant an administrative search was conducted in the residence of [Petitioner] 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 [Petitioner'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 [Petitioner'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.

State v. Burton, 2018 WL 2077325, at *1 (Del. Super. Ct. Apr. 30, 2018).

On March 18, 2013, a New Castle County grand jury indicted Petitioner for drug dealing, aggravated possession of cocaine, two counts of illegal possession of marijuana, and possession of drug paraphernalia. (D.I. 17-5 at 7-9). On May 15, 2003, a forensic chemist with the Office of the Chief Medical Examiner ("OCME") issued a Controlled Substances Laboratory Report stating that the substances tested positive for cocaine (28.45 grams) and marijuana (.93 grams). (D.I. 22-2 at 33). In June 2013, Petitioner filed a motion to suppress the drug evidence (D.I. 17-5 at 11-17), which the Superior Court denied after a hearing. *See State v. Burton*, 2013 WL 4852342, at *4 (Del. Super. Ct. Sept. 9, 2013). Thereafter, Petitioner waived his right to a jury trial and a

stipulated bench trial was held on September 24, 2013. (D.I. 17-1 at 4, Entry Nos. 19-20; D.I. 17-12 at 59-62). At the trial, the State admitted into evidence, without objection, the OCME Lab Report confirming that the substances found in Petitioner's room were cocaine and marijuana. (D.I. 17-28 at 17, 53). The Superior Court found Petitioner guilty of all charges. (D.I. 17-1 at 4, Entry No. 20; D.I. 17-12 at 65). On December 13, 2013, the Superior Court sentenced Petitioner as a habitual offender to an aggregate life term plus two years. (D.I. 17-12 at 72-75). Petitioner appealed.

Meanwhile, in February 2014, the Delaware State Police and the Department of Justice ("DOJ") began an investigation into criminal misconduct occurring in the OCME which revealed, *inter alia*, that OCME employees had been stealing drug evidence. *See Brown v. State*, 108 A.3d 1201, 1204 (Del. 2015). Starting in the spring of 2014, the Office of Defense Services ("ODS") filed motions for post-conviction relief pursuant to Delaware Superior Court Criminal Rule 61 on behalf of more than 700 defendants, asserting identical claims for relief arising from issues relating to the evidence scandal in the OCME; namely, that the OCME misconduct constituted impeachment material under *Brady v. Maryland*, 373 U.S. 83 (1963).

On April 30, 2014, while his appeal was pending in the Delaware Supreme Court, the ODS filed a Rule 61 motion on Petitioner's behalf ("ODS Rule 61 motion") based upon the misconduct at the OCME. (D.I. 17-12 at 81-94). The Delaware Supreme Court granted Petitioner's request to stay his appeal and remanded the case to the Superior Court to provide Petitioner with an opportunity to file motions to supplement the record and a motion for a new trial. (D.I. 17-12 at 78). On January 30, 2015, Petitioner filed a Rule 33 motion for new trial in the Superior Court. (D.I. 17-1 at 7, Entry No. 39). The Superior Court denied the Rule 33 motion for new trial on December 1, 2015. (D.I. 17-13 at 138-147). Petitioner appealed. On June 8, 2016, the Delaware

Supreme Court affirmed Petitioner's convictions and the denial of his Rule 33 motion for a new trial. *See Burton v. State*, 142 A.3d 504 (Table), 2016 WL 3381847, at *1 (Del. Jun. 8, 2016).

On August 11, 2016, Petitioner filed in the Superior Court *a pro se* Rule 61 motion ("*pro se* Rule 61 motion"). (D.I. 17-1 at 9, Entry No. 53; D.I. 22-8 at 5-8). On September 27, 2016, the Superior Court denied Petitioner's ODS Rule 61 motion that was filed in April 2014. (D.I. 17-1 at 9-10, Entry No. 57; D.I. 22-8 at 9-10). On October 21, 2016, at Petitioner's request, the Superior Court appointed counsel to assist Petitioner with the *pro se* Rule 61 motion he had filed in August 2016. (D.I. 17-1 at 9-10, Entry Nos. 54, 58). Newly appointed Rule 61 counsel filed an amended Rule 61 motion ("Rule 61 motion") on August 17, 2017. (D.I. 17-1 at 11, Entry Nos. 63, 64; D.I. 22-8 at 11-94). The Superior Court denied Petitioner's Rule 61 motion on April 30, 2018. *See Burton*, 2018 WL 2077325, at *5. The Delaware Supreme Court affirmed that decision on December 16, 2018. *See Burton v. State*, 200 A.3d 1206 (Table), 2018 WL 1768652 (Del. Dec. 26, 2018).

II. GOVERNING LEGAL PRINCIPLES

A. The Antiterrorism and Effective Death Penalty Act of 1996

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "to reduce delays in the execution of state and federal criminal sentences . . . and to further the principles of comity, finality, and federalism." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). Pursuant to AEDPA, a federal court may consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). AEDPA imposes procedural requirements and standards for analyzing the merits of a habeas petition in order to "prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

B. Standard of Review

When a state's highest court has adjudicated a federal habeas claim on the merits,[1] the federal court must review the claim under the deferential standard contained in 28 U.S.C. § 2254(d). Pursuant to 28 U.S.C. § 2254(d), federal habeas relief may only be granted if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or the state court's decision was an unreasonable determination of the facts based on the evidence adduced in the state court proceeding. 28 U.S.C. § 2254(d)(1) & (2); *see Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). The deferential standard of § 2254(d) applies even when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied. *See Harrington v. Richter*, 562 U.S. 86, 98-101 (2011). As explained by the Supreme Court, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 99.

A state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 413. The mere failure to cite Supreme Court precedent does not require a finding that the decision is contrary to clearly established federal law. *See Early v. Packer*, 537 U.S. 3, 8 (2002). For instance, a decision may comport with clearly established federal law even if the decision does not demonstrate an awareness of relevant Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts

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1 A claim has been "adjudicated on the merits" for the purposes of 28 U.S.C. § 2254(d) if the state court decision finally resolves the claim on the basis of its substance, rather than on a procedural or some other ground. *See Thomas v. Horn*, 570 F.3d 105, 115 (3d Cir. 2009).

them." *Id.* In turn, an "unreasonable application" of clearly established federal law occurs when a state court "identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of a prisoner's case." *Williams*, 529 U.S. at 413; *see also White v. Woodall*, 572 U.S. 415, 426 (2014).

When performing an inquiry under § 2254(d), a federal court must presume that the state court's determinations of factual issues are correct. *See* 28 U.S.C. § 2254(e)(1); *Appel*, 250 F.3d at 210. This presumption of correctness applies to both explicit and implicit findings of fact, and is only rebutted by clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1); *Campbell v. Vaughn*, 209 F.3d 280, 286 (3d Cir. 2000); *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003) (stating that the clear and convincing standard in § 2254(e)(1) applies to factual issues, whereas the unreasonable application standard of § 2254(d)(2) applies to factual decisions). State court factual determinations are not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010).

Conversely, if the state's highest court did not adjudicate the merits of a properly presented claim, the claim is reviewed *de novo* instead of under § 2254(d)'s deferential standard. *See Breakiron v. Horn,* 642 F.3d 126, 131 (3d Cir. 2011); *Lewis v. Horn*, 581 F.3d 92, 100 (3d Cir. 2009). *De novo* review means that the Court "must exercise its independent judgment when deciding both questions of constitutional law and mixed constitutional questions." *Williams v. Taylor*, 529 U.S. 362, 400 (2000) (Justice O'Connor concurring). "Regardless of whether a state court reaches the merits of a claim, a federal habeas court must afford a state court's factual findings a presumption of correctness and . . . the presumption applies to factual determinations of state trial and appellate courts." *Lewis*, 581 F.3d at 100 (cleaned up).

III. DISCUSSION

Petitioner's timely filed Petition asserts the following three claims: (1) defense counsel violated Petitioner's due process right to a fair trial and provided ineffective assistance by stipulating to the State's evidence without Petitioner's consent (D.I. 8 at 19-27; D.I. 22 at 27-35); (2) the State violated *Brady v. Maryland* ("*Brady*") by failing to disclose evidence of the OCME misconduct prior to Petitioner's trial (D.I. 8 at 27-35; D.I. 22 at 36-50); and (3) the administrative search of Petitioner's residence violated the Fourth Amendment (D.I. 8 at 35-38; D.I. 22 at 51-54).

A. Claim One: Ineffective Assistance of Counsel

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Supreme Court has recognized various categories of claims concerning the right to the assistance of counsel, including: (1) the ineffective assistance of counsel ("ineffectiveness claims"), *see Strickland*, 466 U.S. at 688; (2) the violation of a defendant's autonomy to decide the objectives of his defense ("autonomy claims"), *see McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2008); and (3) the complete deprivation of the assistance of counsel ("deprivation claims"), *see United States v. Cronic*, 466 U.S. 648, 659 (1984). The main difference between these three categories is whether the petitioner must demonstrate prejudice in order to prevail.

As a general rule, ineffective assistance of counsel claims are reviewed pursuant to the two-pronged standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the first *Strickland* prong, the petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness," with reasonableness being judged under professional norms prevailing at the time counsel rendered assistance. *Strickland*, 466 U.S. at 688. The second *Strickland* prong requires the petitioner to demonstrate "there is a reasonable probability that, but for counsel's error the result would have been different." *Id.* at 687–96. A reasonable probability

is a "probability sufficient to undermine confidence in the outcome." *Id.* at 688. A petitioner must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal. *See Wells v. Petsock*, 941 F.2d 253, 259-60 (3d Cir. 1991); *Dooley v. Petsock*, 816 F.2d 885, 891-92 (3d Cir. 1987). A court can choose to address the prejudice prong before the deficient performance prong, and reject an ineffective assistance of counsel claim solely on the ground that the defendant was not prejudiced. *See Strickland,* 466 U.S. at 698. Although not insurmountable, the *Strickland* standard is highly demanding and leads to a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Finally, claims alleging ineffective assistance of appellate counsel are evaluated under the same *Strickland* standard applicable to trial counsel. *See Lewis v. Johnson*, 359 F.3d 646, 656 (3d Cir. 2004). An attorney's decision about which issues to raise on appeal are strategic,[2] and an attorney is not required to raise every possible non-frivolous issue on appeal. *See Jones v. Barnes*, 463 U.S. 745 (1983); *Smith v. Robbins*, 528 U.S. 259, 272 (2000).

In *McCoy v. Louisiana*, the Supreme Court held that defense counsel's concession of his client's guilt in order to avoid the death penalty violated the defendant's right to autonomy. *See McCoy*, 138 S.Ct. at 1503 (the "Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty."). Autonomy claims are premised on violations of a defendant's "right to make the fundamental choices about his own defense." *McCoy*, 138 S. Ct. at 1511. The "right to defend" granted to the defendant "personally" in the Sixth Amendment protects not only his right

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2 *See Albrecht v. Horn*, 485 F.3d 103, 138 (3d Cir. 2007); *Buehl v. Vaughn*, 166 F.3d 163, 174 (3d Cir. 1999) (counsel is afforded reasonable selectivity in deciding which claims to raise without the specter of being labeled ineffective).

to self-representation, *see Faretta v. California*, 422 U.S. 806, 834 (1975), but also ensures that if the defendant chooses to be represented by counsel he retains the "[a]utonomy to decide . . . the objective of the defense." *McCoy*, 138 S. Ct. at 1508. A represented defendant surrenders control to counsel over tactical decisions at trial while retaining the right to be the "master" of his own defense. *See id.; Faretta*, 422 U.S. at 820. Although counsel makes decisions concerning matters of trial management, such as "the objections to make, the witnesses to call, and the arguments to advance," *Gonzalez v. United States*, 553 U.S. 242, 249 (2008), the defendant has "the ultimate authority to make certain fundamental decisions regarding the case." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Fundamental decisions "are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are." *McCoy*, 138 S. Ct. at 1508. Autonomous decisions that are reserved exclusively for defendant include whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, take an appeal, and admit guilt of a charged crime. *See id.; Jones*, 463 U.S. at 751. The *McCoy* court further held that it is structural error for an attorney to proceed with that strategy over the defendant's objections entitling the defendant to a new trial without requiring a demonstration of prejudice. *Id.* at 1511. As explained by the Third Circuit:

> [I]n *McCoy v. Louisiana*, the Supreme Court clarified the line between tactical and fundamental decisions. On the one hand, **"strategic choices about how best to *achieve* a client's objectives"** are decisions for lawyers, so we review them for ineffectiveness. On the other hand, **"choices about what the client's objectives in fact *are*"** belong to defendants themselves, and violating defendant's right to make those choices is structural error.

United States v. Wilson, 960 F.3d 136, 143 (3d Cir. 2020) (emphasis in original).

Finally, in *United States v. Cronic*, the United States Supreme Court articulated a limited exception to *Strickland*'s requirement that a petitioner must demonstrate both deficient

performance and prejudice in order to prevail on an ineffective assistance of counsel claim, holding that there are three situations in which prejudice caused by an attorney's performance will be presumed: where the defendant is completely denied counsel at a critical stage; where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing;" or where the circumstances are such that there is an extremely small likelihood that even a competent attorney could provide effective assistance, such as when the opportunity for cross-examination has been eliminated. *See Cronic*, 466 U.S. at 659 & n.25. The *Cronic* presumption of prejudice only applies when counsel has completely failed to test the prosecution's case throughout the entire proceeding. *See Bell*, 535 U.S. at 697. This presumption of prejudice is sometimes referred to as "*per se*" ineffective assistance of counsel. *See Thomas*, 750 F.3d at 113 n.3.

In his Rule 61 motion, Petitioner presented Claim One as an ineffective assistance of counsel claim vaguely premised on the violation of his right to autonomy, and argued that prejudice should be presumed and defense counsel's actions constituted a structural error under *Cronic*. (D.I. 22-8 at 84-90). Petitioner also argued that defense counsel's actions amounted to ineffective assistance under *Strickland*. (D.I. 22-8 at 87-92). The Superior Court denied Claim One after applying the *Strickland* standard without any mention of Petitioner's *Cronic* argument. On post-conviction appeal, Petitioner presented Claim One as an ineffective assistance of counsel claim explicitly premised on the violation of his right to autonomy, and argued that prejudice should be presumed because defense counsel's actions constituted a structural error under *McCoy*. (D.I. 22-9 at 60-66). Petitioner also argued that defense counsel's actions amounted to ineffective assistance under *Strickland*. The Delaware Supreme Court affirmed the Superior Court's denial of Claim One after applying *Strickland*, without any mention of Petitioner's *McCoy* argument.

In Claim One of this proceeding, Petitioner contends that defense counsel provided ineffective assistance by stipulating to the State's evidence without his consent, "thereby conceding elements of the offenses and undermining [Petitioner's] due process right to a fair trial and to meaningfully oppose the prosecution's case." (D.I. 8 at 19; D.I. 22 at 27). He asserts that the Delaware state courts unreasonably determined the facts and unreasonably applied clearly established federal law by finding that Petitioner's voluntary waiver of a jury trial and his consent to a bench trial meant that he waived his right to contest the State's evidence and to meaningfully oppose the prosecution's case. (D.I. 8 at 20). In addition, Petitioner contends that the Delaware Supreme Court unreasonably failed to apply *McCoy* to his argument that defense counsel violated Petitioner's right to autonomy and, therefore, unreasonably failed to presume he was prejudiced by defense counsel's stipulation to the State's evidence. (D.I. 8 at 22-25).

As an initial matter, the Court must determine the appropriate standard of review for Claim One. Both the Superior Court and the Delaware Supreme Court adjudicated the merits of Petitioner's ineffective assistance of counsel argument, but the Delaware Supreme Court did not adjudicate the merits of Petitioner's *McCoy*/autonomy argument. In turn, Petitioner challenges both of the state courts' underlying factual determination that he consented to defense counsel's stipulation. Given these circumstances, the Court must: (1) determine whether the Delaware state courts' factual determination that Petitioner knowing, intelligently, and voluntarily agreed to stipulate to the State's drug evidence is presumptively correct (*i.e.*, has Petitioner provided clear and convincing evidence to rebut that presumption); (2) review Petitioner's *McCoy* argument *de novo*; and (3) review his *Strickland* argument under the deferential standard of § 2254(d).

The starting point for the Court's analysis is the Delaware Supreme Court's reason for denying Claim One:

> Here, [Petitioner] 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 errors. As the Superior Court held, it is unlikely trial counsel would have achieved anything by contesting the drug evidence. [Petitioner] knowingly, intelligently, and voluntarily agreed to stipulate to the State's drug evidence. The evidence of [Petitioner's] guilt was also overwhelming. [Petitioner] confessed to flushing cocaine down the toilet, and the drugs were seized from his room while he was present. Thus, [Petitioner's] *Strickland* claim fails.

Burton, 2018 WL 6824636, at *2.

1. Voluntary, knowing, and intelligent consent to stipulate

Petitioner contends that the Delaware Supreme Court unreasonably determined the facts by concluding that he voluntarily, knowingly, and intelligently agreed to stipulate to the State's drug evidence because: (1) defense counsel did not obtain Petitioner's consent before stipulating to the evidence from the suppression hearing; and (2) the transcript of the bench trial reveals that the trial judge did not "mention [] a stipulated bench trial in which the prosecution's evidence would not be contested." (D.I. 8 at 19-20). The Court acknowledges that the issue concerning the voluntariness of Petitioner's waiver of his right to challenge the evidence is independent of the *McCoy* and *Strickland* issues concerning defense counsel's actions. *See Eichinger v. Wetzel*, 2019 WL 248977, at *11 (E.D. Pa. Jan. 16, 2019). Nevertheless, because the Delaware Supreme Court premised part of its absence-of-*Strickland*-prejudice conclusion on its determination that Petitioner voluntarily and knowingly consented to the stipulation, the Court finds it necessary to address the Delaware Supreme Court's factual determination of voluntariness.

The record reveals the following facts. On the day scheduled for trial, defense counsel advised the Superior Court that Petitioner had elected to waive his right to a jury trial and had executed a waiver of jury trial form. (D.I. 17-12 at 59, 61). Defense counsel explained that Petitioner made this decision after two meetings during which defense counsel discussed the nature

of a stipulated bench trial. (D.I. 17-12 at 61). Defense counsel then entered the following stipulation in front of the Superior Court, Petitioner, and the State:

> [I]n this case it's our belief that the suppression issue is really the most important issue [. . .] and that there was a pretty thorough record made before Judge Rapposelli that we're willing to rely upon for the 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.

(D.I. 22-3 at 112). Immediately following defense counsel's statement, the trial judge engaged Petitioner in a colloquy concerning his waiver of a jury trial and his decision to proceed with a bench trial. (D.I. 22-3 at 23-24). Petitioner stated that he had consulted with defense counsel regarding his decision and did not wish to discuss it any further with counsel. (D.I. 22-3 at 24). The trial judge concluded that Petitioner's waiver of a jury trial was knowing and voluntary. (*Id.*). The trial judge did not specifically mention the stipulation during this colloquy. (*Id.*).

The bench trial proceeded, and the State admitted into evidence, without objection, the OCME's lab report, which confirmed that the substances found in Petitioner's room were cocaine and marijuana. (*Id.* at 25). The State presented Detective Leary as a witness, who described where the drugs and paraphernalia were found and explained the basis for his opinion that Petitioner had those items for drug dealing. (*Id.* at 25-26). Defense counsel cross-examined Detective Leary about the "elements necessary to popcorn some crack cocaine." (*Id.* at 26). After the State rested its case, the trial judge asked if there was anything else, to which the State replied, "The State has no argument since it's a stipulated trial." (*Id.*).

In his Rule 61 proceeding, Petitioner "acknowledge[d] that" he and defense counsel discussed "the importance of the suppression issue and the possibility of choosing a bench trial," but "denie[d] ever discussing any possible stipulation to the State's record." (D.I. 22-8 at 82). In

his responsive Rule 61 affidavit, defense counsel denied that he stipulated to the State's evidence without Petitioner's knowledge or consent, explaining:

> The [Public Defender's] database reflects that I went to the prison on September 23, 2013, and "discussed plea offer and prospects for appeal for suppression issue". Based on that data entry, I can only assume that I explained to [Petitioner] that the most expeditious way to preserve an appellate issue was to conduct a bench trial and allow the Court to rely upon much of the record developed at the client's suppression hearing in August [2013]. It would have been my practice to explain to the client that, at such a stipulated bench trial, the allegations of the police officers would largely go unchallenged in cross-examination, because the controlled substance at issue was clearly found in the living space of the defendant (which he shared with no one else) and I had no good faith reason, based on the record as I understood it, to challenge the findings of the Medical Examiner's Office concerning the type and amount of controlled substance involved in the case. Keep in mind that the OCME scandal with respect to stealing drugs and dry-labbing tests had not been exposed. Prior to going into court, I had the defendant execute a waiver of his right to a jury trial and probably conducted some explanation as to how the trial would proceed before [the trial judge].

(D.I. 17-14 at 175-76). Based on this record, the Superior Court implicitly, and the Delaware Supreme Court explicitly, concluded that Petitioner "knowingly, intelligently, and voluntarily agreed to stipulate to the State's drug evidence." *Burton*, 2018 WL 6824636, at *2. *See also Burton*, 2018 WL 2077325, at *4.

After reviewing the record, the Court finds that the Delaware state courts[3] reasonably determined the facts in light of the evidence presented when concluding that Petitioner knowingly,

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[3] The Delaware Supreme Court relied on the Superior Court's reasoning when denying Petitioner's ineffective assistance of counsel argument. Therefore, although the Court will primarily refer to the Delaware Supreme Court's decision when reviewing Claim, there are times the Court will refer to both decisions. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1193-94 (2018) (reiterating that when a higher court affirms a lower court's judgment without an opinion or other explanation, federal habeas law employs a "look through" presumption and assumes that the later unexplained order upholding a lower court's reasoned judgment rests upon the same grounds as the lower court judgment); *Ylst v. Nunnemaker*, 501 U.S.

intelligently, and voluntarily agreed to stipulate to the State's drug evidence. At the beginning of the bench trial, defense counsel specifically stated that the defense was stipulating to the State's evidence from the suppression hearing. During the colloquy that ensued between the trial judge and Petitioner, Petitioner did not indicate that he did not understand the stipulation, that counsel had misinformed him, or that counsel had misstated his decision. Rather, Petitioner explicitly acknowledged that the final decision to proceed via a bench trial belonged to him. Additionally, Petitioner did not challenge the voluntariness of his stipulation to the State's evidence in his motion for new trial or on direct appeal.

Moreover, when reviewing Petitioner's allegation that he did not consent to the stipulation and defense counsel's response to that allegation, it was reasonable for the Delaware state courts to find defense counsel's Rule 61 response to be more credible than Petitioner's unsubstantiated assertion that there was no discussion of stipulating to the State's record. Thus, Petitioner's unsupported assertion – presented in hindsight – that he did not consent to entering the stipulation does not rebut the presumption of correctness applied to the Delaware state courts' factual findings. *Cf. Campbell*, 209 F.3d at 291 (finding that because a reasonable fact-finder could discount petitioner's testimony and credit trial counsel's, the state court did not make an unreasonable determination of the facts in light of the evidence presented when it implicitly reached that conclusion); *United States v. Williams*, 403 F. App'x 707, 708 (3d Cir. 2010) (noting there was no evidence in the record that the defendant dissented from his counsel's stipulation to the admissibility of the laboratory evidence before or during trial). *See Vickers v. Sup't Graterford*

797, 804 (1991) (under the "look through" doctrine, "where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.").

SCI, 858 F.3d 841, 850 n.9 (3d Cir. 2017) (noting credibility findings are presumed correct absent clear and convincing evidence to the contrary).

In turn, although not a factual issue, the Court also rejects Petitioner's related argument that the Delaware state courts unreasonably concluded he had consented to the stipulation because the trial judge did not "mention [] a stipulated bench trial in which the prosecution's evidence would not be contested" during the colloquy concerning Petitioner's waiver of a jury trial. (D.I. 8 at 19-20). Petitioner does not identify, and the Court has not found, any Supreme Court precedent requiring a colloquy before a defendant agrees to a stipulated bench trial. The United States Supreme Court has consistently held that "it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [it]." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). *See Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, . . . it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law."). Consequently, the trial judge's failure to specifically address the issue of the stipulation during the colloquy regarding Petitioner's waiver of a jury trial does not, on its own, demonstrate that Petitioner did not knowingly, intelligently, and voluntarily stipulate to the State's drug evidence.

In sum, the record reflects that Petitioner understood he was waiving his right to a jury trial and stipulating to the State's drug evidence, and that he only objected to defense counsel's strategy of stipulating to the State's evidence after the verdict. Given Petitioner's failure to provide clear and convincing evidence to the contrary, the Court defers to the Delawares state courts' factual finding that Petitioner consented to defense counsel's stipulation.

2. Violation of Petitioner's autonomy under *McCoy*

Citing *McCoy*, Petitioner contends that defense counsel's stipulation to the State's evidence conceded "all elements of the State's case but for possession and possession with intent to manufacture or distribute" and "undermin[ed] [his] due process right to a fair trial and to meaningfully oppos[e] the prosecution's case." (D.I 22 at 27-28). Petitioner asserts he "never wanted or expected Trial Counsel to relieve the State of its constitutional burden to prove each element of the offenses beyond a reasonable doubt, and Trial Counsel violated [Petitioner's] constitutional right by overriding the objectives of the defense as decided by [Petitioner]." (D.I. 22 at 29)

Assuming, *arguendo*, that the right of client autonomy acknowledged in *McCoy* is retroactively applicable to Petitioner's case, Petitioner's instant argument is unavailing because the facts of his case are distinguishable from those in *McCoy*. In *McCoy*, a capital case, defense counsel conceded McCoy's factual guilt with the hope of securing a life sentence despite McCoy's goal of obtaining an acquittal. McCoy objected and testified on his own behalf that he was innocent. *See McCoy*, 138 S.Ct. at 1506-07. In this non-capital case, Petitioner actually acknowledges that defense counsel never admitted that Petitioner was guilty of the charged offenses.[4] (D.I. 22 at 56). Also, during the bench trial, Petitioner never voiced any opposition to defense counsel's decision to stipulate to the State's evidence. *Cf. Wilson*, 960 F.3d at 144 (distinguishing *McCoy* because there was no evidence that the defendant either objected to the stipulation or demanded that counsel not concede the element of the crime). Petitioner's failure to

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[4] Instead, Petitioner contends that, "[b]ased upon the offenses with which he was charged and the statutory elements required to be proven beyond a reasonable doubt, [defense counsel's] decision to stipulate to the State's evidence conceded all elements of the State's case but for possession and possession with intent to manufacture or distribute." (D.I. 22 at 28-29).

contest the stipulation in his motion for new trial or on direct appeal – where he specifically challenged the drug evidence – provides further support for finding that Petitioner did not oppose the stipulation at the time it was entered.

As the Supreme Court explained in *Florida v. Nixon*:

> When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.

543 U.S. 175, 190-92 (2004). Significantly, the *McCoy* Court distinguished McCoy's case from the circumstances in *Nixon*, stating:

> In *Florida v. Nixon*, this Court considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial "when [the] defendant, informed by counsel, neither consents nor objects." In that case, defense counsel had several times explained to the defendant a proposed guilt-phase concession strategy, but the defendant was unresponsive. We held that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, "[no] blanket rule demand[s] the defendant's explicit consent" to implementation of that strategy.

McCoy, 138 S. Ct. at 1505. Thus, Petitioner's case is not one of structural error under *McCoy*, where defense counsel refuses to defer to his client's explicit assertion that he wishes to argue his innocence, but rather, a case where defense counsel's decision to stipulate to the State's evidence should be assessed under *Strickland*.

3. Ineffective assistance of counsel under *Strickland*

Acknowledging the possibility that the Court might reject his *McCoy* argument, Petitioner also contends that, pursuant to § 2254(d)(1), the Delaware state courts unreasonably applied the

Strickland standard to the facts of his case by concluding that he did not establish prejudice.[5] When performing the "reasonable application" portion of the § 2254(d)(1) inquiry, the Court must review the Delaware state court decisions with respect to Petitioner's ineffective assistance of counsel claim through a "doubly deferential" lens.[6] *See Richter*, 562 U.S. at 105. Notably, when § 2254(d)(1) applies, "the question is not whether counsel's actions were reasonable, [but rather], whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* When assessing prejudice under *Strickland*, the question is "whether it is reasonably likely the result would have been different" but for counsel's performance, and the "likelihood of a different result must be substantial, not just conceivable." *Id.* And finally, when viewing a state court's determination that a *Strickland* claim lacks merit through the lens of § 2254(d), federal habeas relief is precluded "so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* at 101.

Petitioner contends that "the state courts unreasonably applied *Strickland* to the facts of this case" by concluding that the "overwhelming evidence" of his guilt precluded him from establishing the prejudice. (D.I. 8 at 26; D.I. 26 at 10). He argues that the "overwhelming evidence" was only admissible because "defense counsel's stipulation included consent to rely

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5 Petitioner does not contend – and it is clearly not the case – that the Delaware state court decisions were contrary to *Strickland*. Therefore, the Court focuses on the "unreasonable application" portion of the § 2254(d)(1) inquiry.

6 As explained by the *Richter* Court,

> [t]he standards created by *Strickland* and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is doubly so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d).

Richter, 562 U.S. at 105 (internal citations omitted).

upon the lengthy record made at the suppression hearing for purposes of trial, numerous pages of factual testimony that would have been otherwise inadmissible at trial, such as the fact that [Petitioner] was on probation and that he was identified by a confidential informant alleging that [Petitioner] was selling crack cocaine out of his residence, were in fact admitted." (D.I. 8 at 26). Petitioner's argument, however, ignores the fact that the overwhelming evidence to which the Delaware Supreme Court referred was Petitioner's confession to flushing cocaine down the toilet and the fact that the drugs were seized from Petitioner's room while he was present. *See Burton*, 2018 WL 6824636, at *2. This evidence would have been admissible without the stipulation because the trial court denied Petitioner's motion to suppress.

Petitioner also argues that, "regardless of how allegedly overwhelming the evidence was against" him, Petitioner was prejudiced because "he was denied a new trial and/or re-testing of the alleged drug" after OCME misconduct was discovered "due to [defense counsel] stipulation to the drug evidence and the chain of custody." (D.I. 26 at 10). It is well-established that, when applying *Strickland*, the Court is required to evaluate defense counsel's performance in light of the facts and circumstances known/knowable to defense counsel at that time. *See Strickland*, 466 U.S. at 689 ("[E]very effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). Here, defense counsel entered the stipulation on September 24, 2013, and the misconduct at the OCME was not discovered until February 2014. As defense counsel was unaware of the OCME misconduct at the time of the stipulation, the fact that the Delaware state courts relied, in part, on the existence of the stipulated facts to deny Petitioner's motion for new trial, re-testing cannot be factored into the prejudice determination. In sum, Petitioner's

arguments fail to show a reasonable probability that, but for the stipulation, the outcome of his bench trial would have been different.

Based on the foregoing, the Court concludes that the Delaware state courts reasonably reviewed Claim One as a standard ineffective assistance of counsel claim under *Strickland* rather than as violation of autonomy claim under *McCoy*. In turn, the Delaware state courts reasonably applied *Strickland* in concluding that Petitioner was not prejudiced by defense counsel's stipulation and, therefore, defense counsel did not provide constitutionally ineffective assistance. Accordingly, the Court will deny Claim One.[7]

B. Claim Two: *Brady* Violation

In Claim Two, Petitioner contends that the Delaware state courts "erroneously concluded that the State's *Brady* violation did not entitle [Petitioner] to a new trial or postconviction relief." (D.I. 8 at 27). According to Petitioner, the State violated *Brady* by not disclosing the "exculpatory and impeachment information regarding the OCME employees and the reliability of the OCME's work product" before he entered his stipulated bench trial. (D.I. 8 at 28). The following history

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7 Additionally, although the Delaware Supreme Court did not address the performance prong of the *Strickland* standard, the Superior Court held that defense counsel's strategic 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" was "representative of rational professional judgment and thus reasonable." *Burton*, 2018 WL 2077325, at *4. Petitioner contends the Superior Court unreasonably applied *Strickland* in reaching this conclusion, because the stipulation was unnecessary to preserve the appellate issue and provided Petitioner with no benefit. The Court is not persuaded. "Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." *McCoy*, 138 S.Ct. at 1508 (cleaned up). *See United States v. Benoit*, 545 F. App'x 171, 174 (3d Cir. 2013) ("[D]efense counsel has the ultimate authority to decide issues concerning what evidence should be introduced [and] what stipulations should be made."). In turn, "[u]nder [the *Strickland*] standard, ineffectiveness will not be found based on a tactical decision which had a reasonable basis designed to serve the defendants in interests." *Werts v. Vaughn*, 228 F.3d 178, 190 (3d Cir. 2000). At the time defense counsel made the decision to stipulate in order to preserve the suppression issue on appeal, the decision was a reasonable strategy.

is relevant to the Court's analysis of the instant argument. In his Rule 33 motion, Petitioner argued he should be granted a new trial because the State violated *Brady* by failing to disclose the irregularities in the handling of drug evidence at the OCME before his trial. (D.I. 17-29 at 1-20). The Superior Court denied Petitioner's motion for new trial without explicitly addressing whether the State's failure to disclose the OCME misconduct amounted to a *Brady* violation. (D.I. 17-29 at 46-55). Instead, the Superior Court denied the motion for new trial because Petitioner could not satisfy the bright-line rule established in *State v. Irwin*, 2014 WL 6734821 (Del. 18, 2014) for determining what circumstances must exist in a case before allowing questioning regarding the OCME investigation in that case at trial.[8] (D.I. 17-29 at 49-54). Petitioner appealed. The Delaware Supreme Court affirmed the Superior Court's denial of the motion for new trial on the basis of several of the Superior Court's prior decisions in other cases which "addressed and rejected" the same argument for new trial. *See Burton*, 2016 WL 3381847, at *1 n.1. The cases cited by the Delaware Supreme Court also applied *Irwin*'s bright-line rule without addressing the substance of the defendants' *Brady* arguments.

In his Rule 61 motion, Petitioner argued that the State violated *Brady* by failing to turn over the information about the problems at the OCME. (D.I. 17-25 at 34-70). The argument was essentially the same as the one he raised in his Rule 33 motion for new trial, except he included evidence of additional violations that had come to light since the filing of his motion for new trial,

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[8] The Superior Court explained that,

> [i]n *Irwin*, the [Delaware Supreme] 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. In *Irwin*, the [Delaware Supreme] Court acknowledges that discrepancy in weight due to a multitude of factors is not uncommon.

Burton, 2018 WL 2077325, at *2.

along with the report of Joseph Bono, a Forensic Science Consultant he had retained. (D.I. 17-25 at 45-48). Petitioner also provided emails from 2007 and 2010, which, he asserted, proved that there were police officers who would have been aware of the problems at the OCME prior to 2014. (D.I. 17-25 at 52). The Superior Court found that the *Brady* claim was procedurally barred, but held that it met the criteria for the Rule 61(i)(5) exception to the procedural bar and denied it on the merits after explicitly applying *Brady*. *See Burton*, 2018 WL 2077325, at *2-3. On post-conviction appeal, the Delaware Supreme Court found that the Superior Court had applied the wrong version of Rule 61. *See Burton*, 2018 WL 6824636, at *1-2. The Delaware Supreme Court further concluded that the claim was procedurally barred as formerly adjudicated under Rule 61(i)(4), and that it did not meet the criteria for the Rule 61(i)(5) exception under the correct version of Rule 61. *See id.*

Although a formerly adjudicated claim barred by Rule 61(i)(4) is defaulted for Delaware state court purposes, for the purposes of federal habeas review, the fact that the Delaware Supreme Court found the instant Claim barred for being formerly adjudicated means that it was decided on the merits and should be reviewed under the deferential AEDPA standard contained in § 2244(d)(1). *See Trice v. Pierce*, 2016 WL 2771123, at*4 n.4 (D. Del. May 13, 2016). The "former adjudication" in this case is the Superior Court's denial of Petitioner's Rule 33 motion and the Delaware Supreme Court's affirmance of that decision. But, as previously explained, those decisions denied Petitioner's motion for new trial after applying the threshold test established in *Irwin*, which means that the Delaware state courts never addressed the merits of Petitioner's *Brady* argument. Given these circumstances, the Court concludes that it must review Claim Two *de novo*.

Pursuant to the due process clause of the Fourteenth Amendment, the government must disclose evidence favorable to an accused "where the evidence is material either to guilt or to

punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. "[T]he duty to disclose [*Brady*] evidence is applicable even though there has been no request by the accused . . . and . . . the duty encompasses impeachment evidence as well as exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Thus, the government's obligation under *Brady* to disclose exculpatory evidence includes evidence that the defense might use to impeach a government witness by showing bias or interest. *See United States v. Bagley*, 473 U.S. 667, 676 (1985); *accord Giglio v. United States*, 405 U.S. 150 (1972). In order to prevail on a *Brady* claim, a petitioner must establish that: (1) the evidence at issue was favorable to the accused, either because it was exculpatory or it had impeachment value; (2) the prosecution suppressed the evidence, "either willfully or inadvertently"; and (3) the evidence was material. *Strickler*, 527 U.S. at 281-82 (1999); *Lambert v. Blackwell*, 387 F.3d 210, 252 (3d Cir. 2004). A petitioner demonstrates materiality of the suppressed evidence by showing a "reasonable probability of a different result." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). In turn, "a reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Id.* Importantly, "[b]ecause the *Brady* factors are conjunctive, the failure to demonstrate that any of the factors applies to the case at hand will result in a finding that no *Brady* violation occurred." *Livingston v. Att'y Gen. New Jersey*, 797 F. App'x 719, 722 (3d Cir. 2020).

Here, Petitioner has failed to demonstrate that the evidence of the OCME misconduct was material. First, as recognized by the body of Delaware caselaw and this Court's caselaw concerning the OCME misconduct scandal, "[t]here 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 " *Brown v. State,*

117 A.3d 568, 581 (Del. 2015). *See also Rust v. DeMatteis*, 2021 WL 965582, at*12-13 (D. Del. Mar. 15, 2021); *Brown v. Metzger*, 2019 WL 12373829, at *8 (D. Del. Mar. 25, 2019). Second, although there is a .55 gram difference between the reported weights of the white powder and a 0.07 gram difference between the reported weights for the plant substance,[9] these minor discrepancies – on their own – are not the type "that would call into question the evidence seized and tested by the OCME in this case."[10] (D.I. 22-6 at 70; *see, e.g., Williams v. State,* 141 A.3d 1019, 1029 (Del. 2016) (explaining that "[d]iscrepancies in weight are common"); *State v. McNair*, 2016 WL 424999, at *1 (Del. Super. Ct. Feb. 1, 2016) (describing a .8 gram difference between the preliminary weight of cocaine and the weight listed in the OCME as "a minor deviation or discrepancy" which, given the lack of evidence "to suggest that drug evidence envelopes were opened or tampered," did not satisfy *Irwin*'s bright line rule and, therefore, did not justify a new trial); *Brown v. State*, 117 A.3d 568, 581 (Del. 2015) (explaining that, "the slight discrepancy among the measurements reported by the police (21.2 grams), OCME (23.23 grams), and NMS (22.05 grams) would not have changed the result, and there was thus no prejudice to Brown.")).

Third, the additional evidence of OCME misconduct that Petitioner provides in this case – namely, "the reports and opinions rendered by Joseph Bono, an independent Forensic Science

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9 The police report lists the preliminary weight of the marijuana at 1 gram and the preliminary weight of the cocaine at 29 grams. (D.I. 17-28 at 15-16). The OCME lab report lists the weight of the marijuana at .93 grams and the weight of the cocaine at 28.45 grams. (D.I. 17-28 at 17).

10 The Court acknowledges that a drug weight discrepancy is the focus of *Irwin*'s bright-line rule for determining the circumstances that must exist in a case before allowing questioning regarding the OCME investigation in a particular case. Nevertheless, the Court is not restricted by the parameters of *Irwin*'s test, because it is reviewing the merits of Petitioner's *Brady* claim.

Consultant who was retained by Petitioner's post-conviction counsel"[11] (D.I. 22 at 39), various emails between the OCME and the New Castle County Police Department, as well as misconduct involving Forensic Chemists Irshad Bajwa (the chemist in this case), Bipin Mody, and Patricia Phillips that resulted in their termination/resignation from the OCME – does not demonstrate or warrant an inference that any actual evidence tampering occurred in his own case. Mr. Bono's reports and the emails identified by Petitioner are mostly irrelevant to his case and none of them show that employees were planting drugs to falsify test results, or that law enforcement was aware of systemic and potentially criminal problems at the OCME before 2014. (D.I. 17-13 at 182-84, 188-89; D.I. 22-7 at 24-25). Moreover, the incidents involving Bajwa, Mody, and Phillips occurred after Petitioner's bench trial.[12] Thus, given the generic quality and tenuous connection between the aforementioned evidence of the OCME misconduct at issue here and Petitioner's case, the Court concludes that Petitioner has failed to demonstrate a reasonable probability that the outcome of his trial would have been different had Petitioner's evidence of OCME misconduct been disclosed to him prior to his trial.

The following substantial evidence of Petitioner's guilt creates an additional hurdle to demonstrating the materiality of the OCME misconduct: (1) Petitioner's statement to police upon

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11 In his reports, Mr. Bono opined that: (1) the "OCME practices violated forensic quality standards which in turn diminished the integrity of the chain of custody of evidence stored at the OCME and the testing of evidence by the OCME"; and (2) the OCME's failures "to comply with accreditation and testing standards [. . .] could have resulted in the OCME's accreditation being suspended or being placed on probation." (D.I. 22 at 39).

12 Mr. Bajwa was placed on administrative leave in October 2015 for reasons unrelated to Petitioner's case. (D.I. 17-13 at 4-6, 136). Mr. Mody was placed on administrative leave in January 2016 and, after reviewing his personnel file, the Superior Court noted in another case that the problems occurred mostly in 2015. (D.I. 17-14 at 3-5, 7-17). The events leading to Ms. Phillips' suspension and resignation began in October 2014. *See Anzara Brown*, 117 A.3d at 575.

his arrest that he had "flushed all his cocaine" prior to officers seeing him exit the bathroom in his residence (D.I. 17-7 at 19); (2) Detective Leary's testimony that, when he searched Petitioner's room, he recovered three plastic bags – one containing 28.45 grams of cocaine and two bags containing marijuana (D.I. 17-7 at 103); (3) the substances found in Petitioner's room field tested positive for cocaine and marijuana (D.I. 17-7 at 80); and (4) drug paraphernalia found in Petitioner's room is associated with the preparation of cocaine for later sale (D.I. 17-7at 103-04). After viewing the nature of the OCME misconduct in context with the additional evidence of Petitioner's guilt,[13] the Court concludes that Petitioner cannot demonstrate a reasonable probability that the result of his trial would have been different if the State had disclosed the OCME misconduct prior to his trial. In other words, no *Brady* violation occurred in this case. Accordingly, the Court will deny Claim Two as meritless.

C. Claim Three: Fourth Amendment Suppression Issue

In his final Claim, Petitioner contends that Probation and Parole violated his Fourth Amendment rights by conducting a warrantless administrative search of his residence. Pursuant to *Stone v. Powell*, 428 U.S. 465, 494 (1976), a federal habeas court cannot review a Fourth Amendment claim if the petitioner had a full and fair opportunity to litigate the claim in the state courts. *Id.*; *see also Wright v. West*, 505 U.S. 277, 293 (1992). A petitioner is considered to have had a full and fair opportunity to litigate such claims if the state has an available mechanism for suppressing evidence seized in or tainted by an illegal search or seizure, irrespective of whether

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13 Count One charged Petitioner with drug dealing "20 grams or more of cocaine", Count Two charged Petitioner with aggravated possession of "25 grams or more of cocaine", and Counts Three and Four charge Petitioner with possession of marijuana without any particular weight. (D.I. 17-5 at 7-8). The fact that the field tests and the OCME lab report both identified the drugs as cocaine and marijuana, and also listed the drug weight of the cocaine at a significantly greater weight than that which was charged in the indictment (29 grams in the field test and 28.45 grams in the OCME report) also helps to impede Petitioner's ability to satisfy the materiality prong of the *Brady* test.

the petitioner actually availed himself of that mechanism. *See U.S. ex rel. Hickey v. Jeffes*, 571 F.2d 762, 766 (3d Cir. 1980); *Boyd v. Mintz*, 631 F.2d 247, 250 (3d Cir. 1980). Conversely, a petitioner has not had a full and fair opportunity to litigate a Fourth Amendment claim, and therefore, avoids the *Stone* bar, if the state system contains a structural defect that prevented the state court from fully and fairly hearing that Fourth Amendment argument. *See Marshall v. Hendricks*, 307 F.3d 36, 82 (3d Cir. 2002). Significantly, "an erroneous or summary resolution by a state court of a Fourth Amendment claim does not overcome the [*Stone*] bar." *Id.*

In this case, Petitioner filed a motion to suppress the evidence seized from his residence pursuant to Rule 41 of the Delaware Superior Court Rules of Criminal Procedure during the pre-trial stages of his trial. The Superior Court denied that motion after conducting a hearing. *See State v. Burton*, 2013 WL 4852342, at *3 (Del. Super. Ct. Sept. 9, 2013). The Delaware Supreme Court affirmed that decision on direct appeal. *See Burton*, 2016 WL 3381847, at *1.

This record clearly demonstrates that Petitioner was afforded a full and fair opportunity to litigate his Fourth Amendment claim in the Delaware state courts. The fact that Petitioner disagrees with these decisions and/or the reasoning utilized therein is insufficient to overcome the *Stone* bar. Therefore, the Court will deny Petitioner's Fourth Amendment argument as barred by *Stone*.

D. Request for Evidentiary Hearing

Petitioner requested an evidentiary hearing in his Rule 61 proceeding, but the Superior Court denied the Rule 61 motion without holding a hearing after determining that no further expansion of the record was necessary. (D.I. 22 at 48). To support his request for an evidentiary hearing in this case, Petitioner asserts that the Delaware state courts denied him: (1) "any and all ability to further develop the factual record," including his request "to question members of the DOJ and former employees of the OCME about their knowledge of the problems at the OCME

and whether any communications took place during which the problems at the OCME were discussed"; and (2) "the ability to investigate and compel testimony in relation to the credibility issues of Mr. Bajwa, who was responsible for the analysis of the alleged drug evidence in this case." (*Id.*). Referencing due process, Petitioner requests an evidentiary hearing to allow him "to present witnesses and evidence concerning his *Brady* claim should this Court find that [Petitioner] has not already sufficiently demonstrated the State's *Brady* violation." (*Id.*).

A federal habeas petitioner is not entitled to an evidentiary hearing in most cases. The Supreme Court has explained that "[a]lthough state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011). Typically, requests for an evidentiary hearing in a federal habeas proceeding are evaluated under 28 U.S.C. § 2254(e)(2), which provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that
>
> (A) the claim relies on –
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

"In cases where an applicant for federal habeas relief is not barred from obtaining an evidentiary hearing by 28 U.S.C. § 2254(e)(2), the decision to grant such a hearing rests in the

discretion of the district court." *Schriro v. Landrigan*, 550 U.S.465, 468 (2007); *see also* Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254. When deciding whether to grant a hearing, the "court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations," taking into consideration the "deferential standards prescribed by 28 U.S.C. § 2254." *Schriro*, 550 U.S. at 474. An evidentiary hearing is not necessary if the issues can be resolved by reference to the record developed in the state courts. *Id.*

The Court has determined that Petitioner's claims are meritless under § 2254(d)(1) and (2), and Petitioner's assertions do not demonstrate how a hearing would advance his arguments. Therefore, the Court will deny Petitioner's request for an evidentiary hearing.

IV. CERTIFICATE OF APPEALABILITY

A district court issuing a final order denying a § 2254 petition must also decide whether to issue a certificate of appealability. *See* 3d Cir. L.A.R. 22.2 (2011); 28 U.S.C. § 2253(c)(2). A certificate of appealability is appropriate when a petitioner makes a "substantial showing of the denial of a constitutional right" by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 28 U.S.C. § 2253(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Court has concluded that the instant Petition does not warrant relief. Reasonable jurists would not find this conclusion to be debatable. Accordingly, the Court will not issue a certificate of appealability in this case.

V. CONCLUSION

For the reasons discussed, the Court will deny the instant Petition without holding an evidentiary hearing. The Court will enter an Order consistent with this Memorandum Opinion.

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

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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.*

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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.").

HA1146

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'").

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

BY THE COURT:

/s/ Collins J. Seitz, Jr.
Justice

HA 1148

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

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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

HA1024

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).

HA1025

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).

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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

HA1027

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).

HA1028

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

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

HA1029

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

[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).

HA1031

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.*

HA1032

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

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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.

HA1035

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

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

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.

Irshad Bajwa — 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.

CONFIDENTIAL REPORT

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Case No.:	FE2013-01768	**Report Date:**	May 15, 2013
		Complaint No	3013007212

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

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.

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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

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COPY

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August 16, 2013
Courtroom No. 4C
2:00 p.m.

PRESENT:

As noted.

- - - - -

THE COURT: Good afternoon, everyone.

MS. WRIGHT: Unfortunately, we have one defendant here, Mr. Burton, but not Mr. Guy.

THE DEFENDANT: He's on his way. He's downstairs.

MS. WRIGHT: I was just informed of that.

THE COURT: So I had hoped that we -- I understand that one of the -- who is not here? Mr. Guy is not here? So I understand he's older, so we were making some accommodations for him, but what I was told upstairs was that you had decided to move forward -- you had a plan to move forward?

MS. WRIGHT: Yes, Your Honor. In the event that Mr. Guy was not on his way up, instead, just to proceed with Mr. Burton at this time, but it sounds like Mr. Guy is on his way upstairs.

THE COURT: Is Mr. Guy in the courthouse?

THE DEFENDANT: Yes, ma'am.

THE COURT: He's here in the building?

THE DEFENDANT: Yes, he's downstairs. He had to park the truck. He went in that -- the garage down there.

THE COURT: What would you like to do, Ms. Wright?

MS. WRIGHT: I guess we will wait, Your Honor. Unfortunately, I guess we ...

THE COURT: All right. Well, my understanding is that there are flights that need to be --

MS. WRIGHT: I do, Your Honor. It's at -- I have a train at 3:51. I think we should be okay. If Mr. Guy can get up here within the next couple of minutes, we should be okay. And the officers are here, Your Honor. There's two witnesses for the State.

THE COURT: All right. So we should be all right then with the time frame?

MS. WRIGHT: Yes, Your Honor.

THE COURT: Do you want to give him a few minutes? All right.

MS. WRIGHT: Sorry to call you down, Your Honor. We were unaware that Mr. Guy was even in the building. We just presumed he wasn't here. We were going to go forward.

THE COURT: It's all right. We'll give him a few minutes.

MS. WRIGHT: Thank you, Your Honor.

(Recess taken.)

THE COURT: All right. Good afternoon, everyone.

MS. WRIGHT: Good afternoon again, Your Honor. The State is here and Defense is here on State versus William Burton and Bernard Guy. And the State is ready to proceed.

THE COURT: All right.

MS. WRIGHT: The State would like to call its first witness, Detective Joseph Leary.

THE COURT: All right. Detective Leary.

MR. O'CONNELL: Your Honor, while Mr. Leary -- or Detective Leary is coming in, I just would like to kind of outline some legal arguments I want to make in the motion and in the hearing. It won't stop us from moving forward, but as I outlined in the submission that I made yesterday, I think the record's kind of locked in. And so I'm asking the Court to consider simply what the administrative warrant approval officer considered, and I think we pretty much know what that is, and they can put that on the record. But I think anything outside of what the administrative warrant approval officer considered is not appropriate for the Court to consider in determining whether or not this was a reasonable search under the probation guidelines.

THE COURT: All right.

MS. WRIGHT: Your Honor, the State respectfully disagrees with Mr. O'Connell. The administrative warrant by Officer Collins just outlines the facts as they happened. It does not outline the detailed conversation -- office conference he had with Supervisor Craig Watson. And Supervisor Craig Watson will testify to all of the factors considered, including past-proven reliability of the informant, his experience with working with Detective Leary firsthand, and several

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other factors, not just the tip from the past-proven reliable informant.

So the State would submit that everything that Officer Craig Watson testifies to applies because all of those factors he took into consideration during the office conference.

Officer Collins, to be clear, all he said in his report was he relayed information to Officer Watson, and Officer Watson will testify as to the information he received from Officer Collins at the time of the case conference. And the State submits that that controls, Your Honor, and it's relevant to the hearing.

THE COURT: Mr. O'Connell, why are you limiting the scope to the administrative warrant?

MR. O'CONNELL: Because that's what we do in warrant situations, whether it's an arrest warrant, it's a search warrant, it's an administrative warrant for something other than a probation search. The law says when we have a warrant situation, we want people to be able to review it later, initially a neutral and detached magistrate or, in this case, an approval officer. And so we have a set of facts that they look at. We can't after that, after we get approval, then go

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boot-strap new facts into the situation.

For instance, if we found drugs and we want to put that in the warrant, you can't do that. You can't go back in time. It's kind of frozen. Once the administrative approval officer says, "Okay, I think we have enough to go in," then that's the measuring step, just like reasonable articulable suspicion for a stop. It stops right where, you know, we've stopped that person and seized them. Now we know exactly what the facts are and the constitutional analysis has to be.

With the warrant, it's the same. Once the administrative officer makes their determination what's appropriate, then what's been detailed in the warrant -- you know, for a search warrant, it's an affidavit of probable cause. For an arrest warrant, it's an affidavit of probable cause. And for this, it's their search warrant checklist, which looks like it was put together eight days after the search, but, still, they've outlined in a report exactly what they considered. And for them to come in here now and say, "Oh, I considered about 10 others things" --

MS. WRIGHT: That's not -- I apologize. Are you finished?

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MR. O'CONNELL: Yes.

THE COURT: Now let me make sure that I understand. Is the issue that there is potentially information that's going to be coming to the Court about facts that the -- that law enforcement considered subsequent to the warrant or are we talking about things prior to?

MS. WRIGHT: Only at the time of the case conference. And Officer Watson's going to testify about the defendant's criminal history, which is one of the factors on his checklist. Officer Watson's going to walk through each thing -- each item on his checklist and explain what he considered at the time that Officer Collins called him with that information on January 31st. That's all the State's going to elicit through Officer Watson, what he considered at the time of the case conference.

THE COURT: So --

MR. O'CONNELL: I understand. And I guess it comes down to what he documented is one set of facts, and if he's going to supplement it with a lot of new facts, that's one of the problems with the four corners analysis is we want them to document exactly what they

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considered; not come in courtrooms later and say, "Well, I considered a lot of other things. I just didn't write them down."

THE COURT: All right. So I just heard you say I thought that the issue was that there were subsequent other things that may have factored into -- beyond the search warrant that the Court will be hearing about. And your objection was that the Court should not consider subsequent factors that are not in that search warrant. As I understand Ms. Wright, it's not subsequent factors. It's other factors that were prior factors, prior information, that he may have had in conjunction with what was put on the warrant from the checklist that was -- is available.

MS. WRIGHT: And, Your Honor, to be clear, there's no search warrant in this case.

THE COURT: I'm sorry. The administrative warrant.

MS. WRIGHT: Yes, Your Honor. And I'm not sure if Mr. O'Connell's referring to Officer Collins' actual police report, but in terms of the actual checklist that the officers relied on, that's -- State's going to introduce that as an exhibit and Your Honor has that

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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.

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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.

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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

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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

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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

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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?

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A. He did the search, and he advised me that there is a William David Burton, 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

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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.

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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?

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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.

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A. Mr. Guy was already -- Bernard Guy was already

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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?

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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

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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?

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A. **I secured him in handcuffs and I conducted a frisk of his person.**

Q. Can you explain to us, when you say "a frisk of his person," what exactly you did step by step?

A. **I started to pat him down for weapons. During that pat down, I immediately felt an object which I knew from my training and experience to be a -- to be heroin which was on his person.**

Q. How would you know if you just patted him down from the outside whether it's heroin, cocaine, or any other type of drug?

A. **It's the way that it's packaged. Heroin is a very -- when they package it, it's in single, separate bags and there's another bag that's in it. It's a very flat product. It's not something like marijuana that's in a bag that bulges. It's not like crack cocaine which is a hard subject. It had -- it's like a rock or a pebble that you would feel which would be in a bag.**

And commonly with heroin they bundle it in what we call bundles, which is in packages of 13 which are in a rubber band. So it kind of has a square shape to it when you feel it. And when you're patting, you can feel that bulge and you immediately know when you're grabbing

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heroin at that point.

At this point I had 11 years as an investigator in the drug unit and had conducted hundreds, maybe thousands, of frisks on subjects who have had heroin and other drugs on their persons.

Q. And in those hundreds to thousands of pat downs, can you tell us whether or not the pat down you did with Mr. Guy was consistent or not?

A. **Yes, it was very consistent with him possessing heroin on his person.**

Q. And, Detective, finally, with regards to Officer Collins' statements to you, did Officer Collins tell you what, if anything, the defendant -- specific threats that the defendant made to Officer Collins and Officer Vettori? And you can refer to your report if you do not recall.

If I can refer you to the second paragraph, the second page of your report.

MS. WRIGHT: Your Honor, may I approach?

THE COURT: Yes.

BY MS. WRIGHT:

Q. Detective, I'm handing you what's been marked -- it's not been marked, but it's a police

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report. Do you recognize that?

A. **Yes.**

Q. What is it?

A. **It's my police report that's been approved by Master Sergeant Looney.**

Q. Now, if you can read the second paragraph, last sentence to yourself.

A. **He had threatened to use a dog, to sic his dog on SBO Collins.**

Q. And that was relayed to you specifically by Officer Collins?

A. **Yes.**

MS. WRIGHT: No further questions at this time, Your Honor.

THE COURT: Thank you.

MR. O'CONNELL: Couple of brief questions.

CROSS-EXAMINATION

BY MR. O'CONNELL:

Q. Good afternoon, Detective Leary. How are you today?

A. **Good, sir. How are you?**

Q. I'm well. Thanks for asking.

Just so I'm clear about the contact you had

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with SBO Collins.

A. **Yes.**

Q. You get a call from past-proven and reliable informant, correct?

A. **Yes, sir.**

Q. That person tells you that a black male subject known to that CI as David and who's on probation and who lives at 1232 Thatcher is selling crack cocaine, correct?

A. **Yes, sir.**

Q. And you hand that information off to SBO Collins? You weren't sitting with him, but you called him up and said -- or were you in the same office?

A. **We were in the same office.**

Q. Okay. In the same office. So you say to him, "Hey, I have a CI who's telling me" what I just said. And you ask him to look up in the DACS system, which you don't have access to?

A. **Their DACS system, yes.**

Q. Which -- whether or not there's a probationer living at 1232 Thatcher, correct?

A. **Yes.**

Q. And he verifies there's a probationer by the

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name of William David Burton who is living at 1232 Thatcher, correct?

A. Yes.

Q. And that he is on probation, Level II?

A. And a sex offender.

Q. Okay. So that part of it gets confirmed, correct?

A. Yes.

Q. And then I guess he summons a picture for you somehow?

A. I believe I took a -- well, I had to take a picture because --

Q. Okay. Like off of the computer terminal or something?

A. Yes.

Q. And you, like, texted that to your CI?

A. Yes, I sent him the picture.

Q. You didn't bring him in and have him look at a six-pack or anything like that, you just texted him a picture and said, "Is this your David?"

A. I just sent him the picture.

Q. All right. And he confirmed that that was David?

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A. Yes.

Q. All right. And that's it, that's all the contact basically you had with Collins before he goes to his superior to seek approval of the administrative warrant, correct?

I mean, that's what you testified to and that's pretty much in your report?

A. That pretty sums it up, yes.

Q. Okay. You didn't have like -- you didn't go to some conference with Collins and tell Officer Watson things that Collins hasn't documented? You just told him essentially what you testified to now, which you documented in your report essentially everything you told Collins, and presumably he relayed that to Officer Watson, correct?

A. That's correct.

Q. And then they got approval, correct?

A. Yes.

Q. And then you acted?

A. Yes.

Q. Okay.

MR. O'CONNELL: Nothing further. Thank you.

THE COURT: Thank you.

A-66

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Mr. Roop?

CROSS-EXAMINATION

BY MR. ROOP:

Q. Good afternoon, Detective Leary.

A. Good afternoon, sir.

Q. I think we covered this a little bit, but this search started because you heard from a confidential informant that someone named David or William Burton was on probation because he's a sex offender?

A. Well, it started after the informant contacted me and said that there was drugs being sold from that residence. And then he gave me the information linking me to the subject because this particular confidential informant knew that I worked with Safe Streets and that I was no longer doing -- controlling CIs doing direct buys unless it dealt with probationers.

Q. Okay. That information you received from that confidential informant didn't mention anything about guns or weapons, did it?

A. It did not.

Q. Okay. And you mentioned that Burton lives in a room directly at the top of the stairs. Did you know going into the search that this was an apartment-type

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building? I think it's a house that's converted to apartments.

A. We knew that it was broken down into rooms because of the DACS system itself.

Q. Okay. So it's a shared residence?

A. Yes.

Q. Okay. How many other people live there? Did you know?

A. I did not know until we got there that day.

Q. When you got there, how many people were in there?

A. There were three people that lived there that day.

Q. And you mentioned that five people from Safe Streets ended up inside the house?

A. I want -- yes, I want to say around five people were there.

Q. Okay. And then there's -- in the report it mentions that Mr. Guy allegedly comes to the door and asks who's there to SBO Collins, right?

A. I --

Q. Or I think it was the porch you said?

A. It was the porch.

HA95

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Q. Okay. Did SBO Collins ever indicate whether this individual identified himself? How did he know that it was Bernard Guy?

A. He didn't know until we got inside and made contact with him.

Q. Okay. But you said there were three other people inside, right?

A. Yes.

Q. Do you know who the other two individuals were?

A. I do. One was Defendant Burton, and the other subject ... I can't remember his name. It's in my file. I believe it started with an L.

Q. Okay.

A. Another older black gentleman, muscular build.

Q. Bigger guy?

A. Very big, yes.

Q. Just like Mr. Guy?

A. Well, no, he's bigger than Mr. Guy.

Q. Okay. And you say you get inside, and there was mention of a dog. When SBO Collins had approached, could you hear a dog barking?

A. When I approached, I did not hear a dog barking. When SBO Collins and SBO Vettori were

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initially made contact, we could not hear -- again, I couldn't hear the conversation between SBO Collins and Defendant Guy from the distance that I was at. I could just tell you that something was going on because of the way that SBO Collins was acting and then that he told us to come -- to move up to assist.

Q. Okay. How about when you went inside? Was there a dog in there?

A. There was a dog being taken out the back of the residence by the third person after I made contact with Mr. Guy. He was dragging him out through the kitchen.

Q. Okay. Now, you testified that Mr. Guy was being very hostile and aggressive towards you. Then you detained him, correct?

A. I placed him into handcuffs for officer safety, yes.

Q. Behind his back?

A. I believe it was behind his back.

Q. Okay. And then you immediately pat him down, right?

A. Immediately.

Q. Okay. You don't ask any more questions, you immediately go to pat him down?

A67

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A. I immediately pat him down. I didn't even ask him his name.

Q. So you didn't ask him his name or what his purpose for being there was or anything like that?

A. No.

Q. Okay.

A. When my sergeant came in, he knew who Mr. Guy was.

Q. Okay. From prior experiences?

A. Absolutely.

Q. But you had already detained him at that point?

A. Absolutely.

Q. You testified that Mr. Guy said that David wasn't home. Do you know if -- sorry -- if SBO Collins ever tried to clarify whether he meant he's actually not home, I don't know if he's here, I'm not sure, that type of thing?

A. Well, that was after he went back into the residence to check if he was there.

Q. Okay.

A. And he came back and said he wasn't home and then he opened the door.

Q. Okay. When he opened the door, were you there

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when he actually opened the door?

A. As they opened the door and those guys -- and SBO Collins and SBO Vettori entered, we were approaching up the sidewalk and followed them.

Q. Okay. And you mentioned that he wasn't using his cane when you opened the door up, but did he eventually use his cane when he was in there?

A. We -- I believe that we ended up taking his cane with us to the police department.

Q. Okay. And you mentioned that he had closed the door and he went back inside and checked the residence, but you don't really know if he went and checked the residence, you just know that he went back inside?

A. Well, I know he went back inside.

Q. Right. But you don't know if he walked up to that second floor bedroom where Mr. Burton is staying and actually verified whether he was there or not, correct?

A. I do not know if he did that or not.

Q. Burton was seen exiting the bathroom at the top of the stairs, right?

A. Yes, sir.

Q. Okay. Any idea how long he was in there for?

HA96

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A. None at all.
Q. Do you know if Burton was ever downstairs at any point?
A. I do not know. There's no way to see into the residence.
Q. Okay. And do you know where Mr. Guy's room is located?
A. I believe his room was at the top of the steps in the front of the residence.
Q. Okay. I want to ask about your pat down when you said you knew it was heroin. Heroin comes in baggies, right?
A. Yes. Well, it's --
Q. Sorry to interrupt you.
A. It's some type of plastic baggie, whether it's heat sealed or a clear Ziploc bag.
Q. Right. And cocaine is typically packaged that way, too, right?
A. Cocaine is packaged normally -- well, powder cocaine will be packaged in a Ziploc bag also, yes.
Q. Same type of bag?
A. Yes.
Q. Okay.

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A. The difference is that cocaine is packaged by itself in the Ziploc bag. It's not packaged with a glassine bag which is on the inside of heroin because heroin is placed in the glassine because it is very solvable to moisture which makes the heroin bad. So they place it in that so that the powder stays dry and doesn't get sticky and tacky, which makes it a different feel from when you pat someone down from cocaine and cocaine will settle at the bottom of those particular bags which gives you a different feel.
And heroin in itself, the way it's packaged because it's such a small amount, is done in a different manner than when you deal with people who are possessing cocaine for use. And you will get people that are possessing cocaine for use in smaller bags and different sized bags depending on how they are doing it, for sale or personal use.
Q. Okay. But he had 17 bags of what you thought was heroin was in there, right? You can tell the difference between 17 bags of cocaine in someone's pocket and 17 bags of heroin?
A. Absolutely.
MR. ROOP: Nothing further, Your Honor.

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THE COURT: In terms of size, what does 17 bags of heroin, not feel like, but in terms of the size of that -- what that would look like, is it the size of your thumb? Size of your hand? What does that feel like when you're patting it down?
THE WITNESS: When it's in the bundled form -- it was in two separate bundles, I believe -- the bundle is approximately maybe like three quarters of an inch thick, rubber-banded together, and depending on whether it's a heat-sealed bag or it's a clear Ziploc bag that they're sliding it in, it may be an inch to three quarters of an inch long. So you're looking at a stack of approximately that high, which is about three quarters of an inch around.
THE COURT: All right. So what you patted down was about three quarters of an inch long?
THE WITNESS: Yes, ma'am.
THE COURT: All right. And you testified that you -- as to Mr. Guy that you secured him and conducted a frisk of his person. And then on cross, I believe the words that you said is that he was detained and then you conducted a search -- I mean a frisk.
THE WITNESS: He said detained. I said he was

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placed into handcuffs for officer safety.
THE COURT: All right. So you -- when that term was used, it was used interchangeably?
In other words, he was handcuffed which you called secured and then you conducted the frisk. Is that correct?
THE WITNESS: Yes, ma'am.
THE COURT: All right. Thank you.
REDIRECT EXAMINATION
BY MS. WRIGHT:
Q. Detective, can you explain why, if you have somebody in handcuffs, why you need to do a frisk? If you can explain for the Court why you do that.
A. Just because they're in handcuffs doesn't mean that they can't still hurt you. Doesn't mean that they don't still have access to weapons that are on their person. Doesn't mean that they don't have things on them that they can attempt to discard.
I've seen officers get hurt. I'm also one of the defensive tactics instructors for our police department, and I've seen people get injured while using handcuffs. And I've seen people remove items from their person and attempt to hurt cops that way.

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Q. Thank you.

With regards to Defendant Burton, Mr. O'Connell on cross-examination asked you about the information that you gave to Collins. Can you explain -- and your answers were you told Officer Collins the defendant was on probation and he was selling cocaine out of 1232 Thatcher Street. Is that the only information you told Officer Collins? Can we just clarify for the record everything that you told Officer Collins with regards to what your informant told you?

A. Well, first of all, I told him that the information came from a past-proven, reliable confidential informant. Of the information that at 12 -- I told him who the name was, the name that the informant knew, which was David. That he knew that the subject was on probation. That he was selling crack cocaine from the residence. That he lived at -- his room, when you went into the residence, was at the top of the steps, continue, and his room, in fact, was at the very top of those steps of the residence when we went there. And that the subject was a sex offender.

MS. WRIGHT: Thank you, Detective. No further questions.

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THE COURT: Thank you. Does that prompt any re-cross?

MR. O'CONNELL: No, thank you, Your Honor.

MR. ROOP: No, Your Honor.

THE COURT: All right. Thank you.

THE WITNESS: Thank you, Your Honor.

THE COURT: Next witness?

MS. WRIGHT: Your Honor, the State calls Officer Craig Watson.

THE COURT: All right.

MS. WRIGHT: And, Your Honor, with Defense permission, I know Detective Leary is on -- is off, not working today, if he could be excused.

THE COURT: Yes, that's fine.

MS. WRIGHT: You can stay if you want.

THE COURT: Did you want him excused?

MS. WRIGHT: I wasn't sure if he wanted to stay or not, but he can if he wants.

THE COURT: Thank you.

MS. WRIGHT: I know he's just not working today, Your Honor.

THE COURT: And what is your time frame?

MS. WRIGHT: Your Honor, my train leaves at 10

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of 4, but I could -- there's another train right after that I could catch.

THE COURT: All right.

THE CLERK: State your name.

THE WITNESS: William Craig Watson.

WILLIAM CRAIG WATSON, 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: William, W-I-L-L-I-A-M, Craig, C-R-A-I-G, Watson, W-A-T-S-O-N.

DIRECT EXAMINATION

BY MS. WRIGHT:

Q. Good afternoon, Officer.

A. Afternoon.

Q. By whom are you employed?

A. Pardon me?

Q. For whom are you employed?

A. I have been employed with Department of Corrections, Delaware State Probation and Parole since March of 1996.

Q. And can you explain to us what your current duties are with Probation and Parole, specifically?

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A. My current duties with Probation and Parole, I am the operations administrator located at Cherry Lane Probation and Parole Office for the Safe Streets GTF, Governor's Task Force, Absconder Team and FBI task force supervisor.

Q. Can you just explain for the Court generally what your day-to-day responsibilities are as a supervisor?

A. My day-to-day responsibilities are most likely are definitely handling complaints. Safe Streets is a program in which Probation and Parole officers are teamed up with police officers, and we have them in New Castle County with Delaware State Police and Wilmington Police. On a daily basis I review arrest reports of arrests conducted by the members of my task force. I give administrative approvals for those arrests. I give administrative approvals for administrative searches.

I review that paperwork. I sign that paperwork. I submit that paperwork. I log that paperwork. I conduct interviews with individuals who have been arrested. As I said, I take complaints. I mediate complaints.

A-69 In addition to that, I am also responsible for

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the whole building at Cherry Lane Probation and Parole. So I have mechanical issues that come up during the day-to-day process on that. The list could go on.

Q. And if I could take you back to January 31st of this year, can you tell us, did there come a time when you had an office conference with Officer Daniel Collins?

A. I had a telephone conference with Officer Daniel Collins, who is a member of Wilmington Safe Streets, at 7:40 approximately on 1-31 of 2013.

Q. Can you explain to us generally when a probation officer calls you for a teleconference requesting permission for an administrative search generally what factors do you go over with your probation officers?

A. Okay. Well, we use the -- there's a document called a Pre-Arrest Pre-Search Checklist. We run through that. And on the pre-search conditions, those criteria that are discussed immediately are offender believed to be in possession of contraband, offender is in violation of his probation and parole, information from an informant is corroborated, approval from a supervisor, manager, or director, which would be me,

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proper planning for search completed, sufficient staff to search, individual responsibilities assigned, police called to provide search and security, search team members have been properly trained.

In addition to that, there are the circumstances surrounding the search. Who is the offender? What information do you have that fulfills this checklist? Is the probationer or parolee actively on supervision? Is it an address of record?

In the case of an informant I would ask, what information has the informant provided? Okay. What is the nature of that information? Okay. Is the informant past-proven and reliable or is it an anonymous tip or is it a tip crime stopper tip or something of that nature?

Are there -- what's the criminal history? Is there a history that involves prior drug offenses, prior weapons offenses? What is the nature of the item that you are going to be searching for? Are there other individuals in the residence that are on probation? Has that address been verified, meaning has the officer of record been out to that house and conducted a home visit at that house? Is that the address that the probationer has given Probation and Parole?

A-10

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Every case conference is different, but that is a generalization of things that would be discussed.

Q. And, Officer, can you tell us approximately, and I understand approximately because of your experience, how many times have you had conferences with your probation officers, approximately?

A. Over the course of a year?

Q. Yes.

A. In 2011 it was 425 times. In 2012 it was approximately 260 -- 460 times. And this year to date I do not have a number for you. That will be calculated in my end-of-year stats.

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

THE COURT: Yes.

BY MS. WRIGHT:

Q. Officer, I'm handing you what has been marked as State's Exhibit 1 without objection.

MS. WRIGHT: And, Your Honor, at this time, I apologize, the State would like to move this as State's Exhibit 1.

MR. O'CONNELL: Without objection, Your Honor, from Defendant Burton.

MR. ROOP: No objection, Your Honor.

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THE COURT: All right. So moved without objection.

THE WITNESS: Okay.

BY MS. WRIGHT:

Q. Officer, I just handed you what has been marked as State's Exhibit 1. Do you recognize that?

A. Yes, ma'am.

Q. What is it?

A. That is a Pre-Arrest Pre-Search Checklist.

Q. Can you tell us this pre-arrest checklist, who does it refer to?

A. This individual listed at the top which would be William D. Burton.

Q. Retrieve that exhibit.

Officer, during your listing of the different factors that you considered, were all of those factors that you listed for the Court in your testimony on the pre-arrest checklist?

A. It's covered in the case conference, but they did meet the criteria for that pre-arrest checklist.

Q. And, Officer, if I can ask you, the date of this report is February 5th, 2013. Can you tell us when exactly this conference was held?

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A. The telephone conference and the approval for this particular search and arrest occurred on 1-31 of 2013.

Q. Can you explain why the date is later on the actual arrest search checklist?

A. Yes, what you have in front of you is a digital record. The report -- once the approval is given and the arrest has taken place or the search has taken place, a report is generated. That report is then electronically submitted to me. That report is reviewed. That report is either sent back for corrections, if need be, or is stamped and time dated as approved at that time that you see on the pre-arrest checklist. That's why you would have on 2005 of 2013 that was the final draft that was written into -- entered into the digital recording, our DACS system.

Q. Now, with regards to this case, do you recall your office conference with -- your telephone conference with Officer Collins?

A. Yes, I do.

Q. Can you tell us, what information did Officer Collins tell you that you relied upon when determining whether to approve the administrative warrant?

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A. Okay. Officer Collins called me, and as you can see from the first paragraph, he stated that he had received information from Officer Leary that --

MR. O'CONNELL: I'm sorry, Your Honor. The Officer just said, "As you can see from the first paragraph." I don't know what he's referring to.

THE COURT: Can you identify it?

THE WITNESS: Yes, it is the Arrest Incident Report. It should have accompanied your pre-arrest checklist.

MR. O'CONNELL: That is this?

MS. WRIGHT: Yes.

THE COURT: What is the date of the Arrest Incident Report that you're referencing?

THE WITNESS: The date of the report is 2-3-2013. The incident time is 1-31-2013.

BY MS. WRIGHT:

Q. How about we do it this way, Officer? If you can tell us, what information did Officer Collins tell you that you recall?

A. Okay.

Q. That you relied upon for your checklist?

A. Okay. Officer Collins called and said that he had received --

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MR. O'CONNELL: Your Honor, this isn't so much an objection as it is I'm going to ask the witness to obey what the prosecutor just asked him to do. He's now reading us the report again.

THE COURT: Right.

MR. O'CONNELL: If he could just put the report aside and testify to what he recalls, and if he needs his recollection refreshed, he can do that.

THE WITNESS: Okay.

BY MS. WRIGHT:

Q. Just based on your recollection so far.

A. Officer Collins called and said he had information from Detective Joe Leary who had a reliable past-proven informant or confidential informant that an individual by the name -- going by the name of David, okay, who resided at 1232 Thatcher Street was in possession of illegal narcotics. I asked Officer Collins, "What is the nature of the information?"

He said -- "And how do we know that David refers to William David Burton?"

He said he did an automated DACS check which came back as reading -- Delaware -- Delaware Automated

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Systems For Corrections is DACS. It's our electronic storage unit.

He said he had conducted a DACS check. This individual, William D. Burton, came back through DACS as being on probation at 1232 Thatcher Street; that he is a Level II sex offender on with David Wishowsky.

I then asked him, "How do we know -- how do we know this? Has the officer of record been out to the address?"

He said it is the address of record, both in DACS and that P.O. Wishowsky had been to the address on three separate occasions and confirmed that that is the address for William Burton.

And I then asked him, "How was the individual identified by the CI, the confidential informant?"

He said that he was identified by photo. He was identified as a sex offender. He was identified as being on probation, and he was identified as David.

I asked him -- oh, and he was identified as residing at that address, at 1232 Thatcher Street.

Q. Any other specifics with regards to -- that Officer Collins told you with regards to where David resided?

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A. **Yes, he resided at 1232 Thatcher Street in a second floor bedroom.**

Q. So you had that information at the time of the office -- the telephone conference?

A. **Yes, I did.**

Q. Now, can you tell us when you -- why do you ask whether the informant is past-proven and reliable?

A. **That adds a distinctive amount of credibility to the information. Past-proven reliable means that that individual has in the past provided information that is credible and has led to the arrest, successful prosecution, and/or seizures of drugs. It's given a higher credence than an anonymous tip or something coming in from a tip line or something like that.**

Plus, that also goes with the officer has -- the officer who is getting this information has a relationship with this individual and the credibility of the officer is also coming into play, too.

Q. Can you explain that for a moment? Did you know the officer involved at the time of your teleconference with Officer Collins?

A. **Yes. I have known Detective Leary since 2000. I have worked with him while he was on the Wilmington**

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Vice Unit. I have worked with him in my capacity as a former FBI Fugitive Task Force member. And I have worked with him extensively as an Operation Safe Streets Wilmington police officer.

Q. Can you tell us what other information -- going through this checklist one by one, what are the factors -- again, referring to State's Exhibit 1, *Is offender believed to possess contraband?* Can you tell us what from your conference with Officer Collins allowed you to check off that box?

A. **Officer Collins said that the information from the informant was that he observed the offender or the Parolee William David Burton to be in possession of illegal narcotics.**

Q. What about information from the informant as corroborated, what factors did you consider?

A. **The information from the informant was that an individual known by David lives at 1232 Thatcher Street. That was confirmed. That he knows him to be a probationer. That was confirmed. That he knows him to be a sex offender. That was confirmed.**

Q. Let me stop you right there, Officer.

A. **Sure.**

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Q. This information -- if this information could be determined from a common citizen, how is that significant to you in this particular case?

A. **These are not things that a normal individual would relay to the common citizen. If you are on probation, and especially for a kidnap and rape and on parole for life, that is not a discussion that you would normally have with an everyday person on the street. There has to be some knowledge or familiarity with this individual beyond the normal acquaintance.**

Q. What about the sex offender status? Can anybody just plug in and look up a sex offender and where they live?

A. **Yes, they can.**

Q. So what about this case differentiated the quality of the informant's information?

A. **Well, not every sex offender's on probation. So this individual knew that this individual was a sex offender on probation.**

Q. And can you tell us what, if anything, do you know about other probationers in that building or area?

A. **There were no other probationers in that building at the time of this telephone call. Our DACS**

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automated system also reveals if there are other individuals on probation in that residence. You can run what they call a dynamic report, and it will give you a list of all the individuals on probation in a particular address.

Q. Can you tell us what other factors, and I stopped you at the address, sex offender status, and probation status, what other information from the informant was corroborated that you relied on?

A. **There was a photo I.D. that was presented that identified this individual that he knew as David to be William David Burton.**

Q. Any other information about the residence and David Burton that was corroborated by the informant that you were aware of?

A. **No.**

Q. Officer, you did -- when you listed the factors that you considered generally, you testified about the location of where Mr. Burton resided at 1232 Thatcher Street. Can you tell us the significance of where exactly he resided in 1232 Thatcher Street in terms of the information provided by the informant?

A. **His probation officer -- his probation officer**

HAIDI

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of record had been out to the house and confirmed that he resided on the second floor, in a bedroom on the second floor. The information from the informant that was relayed via Detective Leary to Dan Collins to me was that this individual resided on the second floor bedroom.

Q. And can you tell us with regards to the checklist what other areas you considered?

A. Well, may I refer to the checklist?

Q. Yes, you can. And to be clear, you're referring to State's Exhibit 1.

A. Thank you. We believe that the offender is in possession of contraband, which would be a direct violation of his parole. That is taken into fact that the informant has provided us with a visual confirmation of the person. That he has stated that he has seen him in possession of illegal narcotics. That they are at his residence, which his reported address of record which has been confirmed by not only our DACS automated system, but by physical visits at that residence. Officer Collins also stated that they saw Mr. Burton enter that residence after approval was given.

MR. O'CONNELL: That's the sort of thing that I

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object to, Your Honor. I hope the Court won't consider that.

MS. WRIGHT: I do apologize.

BY MS. WRIGHT:

Q. Just to clarify. Sorry to cut you off --

THE COURT: Your point is it's not on that list?

MR. O'CONNELL: It's the approval already has been given. And so after the fact they -- the State argued various things, like seeing him there and the behavior of Bernard Guy and things like that. And I don't think the Court should consider that.

THE COURT: All right.

MS. WRIGHT: And that's fair, Your Honor. If I can direct the witness?

THE COURT: That's fine.

MS. WRIGHT: And to be clear, Your Honor, when Mr. O'Connell made his concerns at the beginning, the State did not have an opportunity to inform Officer Watson to stay strictly with what you considered on January 31st, 2013.

BY MS. WRIGHT:

Q. So if we can stick with what you considered on

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January 31st, 2013, you already talked about the informant's corroboration. What other factors did you discuss with Officer Collins when you made that decision to approve the administrative warrant?

A. His criminal history was discussed. At that point I learned from Officer Collins, who had done a DELJIS check and a DACS check, that he had prior convictions in 1992 for Possession of Cocaine and Possession With Intent to Deliver a Narcotic Schedule 2 Controlled Substance which subsequently violated his probation. In 2005 he was again arrested for a violation of probation. At the time of his arrest he was patted down and found to be in possession of marijuana. There is a urine drug screen from 6-28 of 2010, which is our most recent drug screen that came back positive for marijuana. All these things are indicative of drug sales and drug use.

He has a -- we discussed a pattern of noncompliance with probation. We have issues of noncompliance with sex offender group. We had -- in 1992 we had issues of leaving the state without permission. We've had missed office visits. We've had missed curfews. All of these things compile to the

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totality of my decision to go ahead and approve that search.

Q. And with regards to the factors on the checklist regarding security, what did you discuss with the officers about their security concerns when you were contemplating approving the administrative search?

A. The security concerns are we go over what the offender's on probation for, obviously in case he's on probation for a weapon, the nature of the probation, what the original offense was, which in this case was kidnapping and rape, the fact that he's on parole for life. There's a heightened sense of urgency in that because if you are on parole for life, it could raise the tension level because if we're coming in there to arrest you and you know that you're on parole and there is no bail for parole, there is the distinct possibility that you are going to fight and/or flee. Does he have enough members of the team to effectively make the arrest and to secure the house? Which he confirmed.

Those are the factors that I would consider.

MS. WRIGHT: Thank you. No further questions --

BY MS. WRIGHT:

A-73

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Q. That you would consider or that you actually did consider?

A. I did consider.

Q. On January 31st?

A. Correct.

MS. WRIGHT: Thank you. No further questions.

THE COURT: All right. Thank you.

MR. O'CONNELL: Your Honor, just an administrate matter. I don't want to -- I know that Ms. Wright's -- it's not just the train that she has to get. She's getting a train to get a plane, and I don't want to -- I don't want to compromise my client's situation in the interest of doing that. And I almost think that considering -- I don't know if AJ has any questions of this officer, but I know my questioning is going to last at least 15 to 20 minutes.

THE COURT: All right. So we would probably do well here to -- what is it that you're asking for?

MR. O'CONNELL: Recess.

THE COURT: To take a recess?

MR. O'CONNELL: And reconvene at a --

THE COURT: All right. That's fine. I think that's fair. I don't want to rush the cross-examination

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for either defendant, and so that's what we're going to need to do. We'll go ahead and recess, and we'll get another date rescheduled.

MR. O'CONNELL: We do have a final case review I think it's September 3 and a trial date of something like September 10? Is that right?

MS. WRIGHT: Yes.

MR. O'CONNELL: So we have a little bit of time to work with and probably a lighter court schedule over the next couple of weeks.

THE COURT: That's fine. I think it's easy enough to accommodate, assuming that you'll be willing to come back in.

THE WITNESS: Yes, Your Honor.

THE COURT: To finish out. All right? All right. Thank you.

MS. WRIGHT: Thank you, Your Honor.

MR. ROOP: Thank you, Your Honor.

(Whereupon the proceedings concluded at 3:35 p.m.)

STATE OF DELAWARE:

NEW CASTLE COUNTY:

I, Patricia L. Gaeci, 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 1st day of MAY [illegible] 2019.

/s/ Patricia L. Gaeci, RMR, CRR

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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

COPY

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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
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for Defendant Burton

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

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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 --

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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

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Q. What does the first page look like?
A. **First page lists the offender, individuals involved, items that we are seized, time of the report, date of the report.**
Q. Okay.
This is probably more complete.
MR. O'CONNELL: May I approach?
THE COURT: Yes.
BY MR. O'CONNELL:
Q. Is that the complete report cover sheet narrative and --
A. **Correct.**
MR. O'CONNELL: Your Honor, I think without objection I ask this be marked as the first defense Exhibit.
THE COURT: All right. Without objection.
MS. WRIGHT: Without objection, Your Honor.
THE COURT: Have that marked Defendant's 1.
BY MR. O'CONNELL:
Q. Before you came in and testified, you reviewed that report, arrest incident report, is that like a narrative that was prepared by Officer Collins?
A. **Correct.**

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Q. And you reviewed the checklist?
A. **Correct.**
Q. Did you review anything else?
A. **No, sir.**
Q. You testified on Friday that in 2011 you handled 425 of these case conferences, in 2012 you had 460 of those case conferences, this year has it been unusually similar, you think you are going to come in at the end of year with around 450?
A. **That would be reasonable.**
Q. So this case conference with Officer Collins was over the phone on January 31st of this year, correct?
A. **Yes.**
Q. So more than six months has gone by since then, correct?
A. **Yes.**
Q. You are on par for what you normally do, you have handled over 200, maybe 225 case conferences since that conference with Officer Collins; is that correct?
A. **If we are on par. Yes. I can't give you a definitive answer to that.**
Q. Not asking you to. You have had a lot of case

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conferences since then, correct?
A. **Yes, sir.**
Q. You reviewed the report, we can agree that in the report first paragraph on page two, essentially addresses what officer Collins says was reviewed with you prior to you approving an administrative warrant?
A. **The first page reviews part of what we discussed, not all of what we discussed.**
Q. That paragraph basically said that Officer Leary of the Wilmington Police Department indicated to Officer Collins he received information from a past proven reliable informant, that a man named David, was selling crack cocaine from his residence at 1232 Thatcher Street, correct?
A. **Correct.**
Q. Further stated you knew that the individual was on probation, that he is a sex offender, correct?
A. **Correct.**
Q. Officer Collins checked the probation DACS system, and searched the address and a hit came back for a probationer named William David Burton with a DOB of 1956, correct?
A. **Correct.**

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Q. He was a Level II sex offender residing at that address, correct?
A. **Correct.**
Q. He says in his report; based on this information permission was granted by supervisor Watson to conduct an administrative search of the residence, correct?
A. **That is what the report says, correct.**
Q. But more than 200 case conferences ago, you recall that you also discussed his criminal history, which is a drug arrest back in 1992?
A. **Correct.**
Q. Positive drug screen for marijuana in 2010?
A. **Correct.**
Q. He was found in possession of marijuana in 2005?
A. **As part of his VOP, yes, that would be a normal discussion that we would have to review his criminal history so that I can make a more reasonable decision.**
Q. And he, according to your testimony, he had been somewhat non-compliant with his sex offender group therapy?

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A. **Yes, based on two violations of probation on 2002 and 2005.**

Q. They were more than eight years old, those non-compliance with sex offender group therapy, correct?

A. **Correct.**

Q. He missed an office visit. When did he miss the office visit?

A. **I don't have a specific date that he missed an office visit.**

Q. Did you ever talk to Officer David Wiechowski, who was his supervising officer prior to issuing the administrative warrant?

A. **No, I did not.**

Q. A number of those other circumstances that we described, ones that were not described in the first paragraph, none of those other circumstances had ever caused you or Officer Collins, or Officer Wiechowski, or anybody from Probation and Parole to want to seek an administrative warrant previously, correct?

A. **Correct.**

Q. Now, you indicated in your direct examination that you had a phone conversation for this case

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conference with Officer Collins, correct?

A. **Correct.**

Q. Where were you and where was he when this conference occurred; if you know?

A. **I can tell you where I was. I was in my living room.**

Q. At your house?

A. **Yes.**

Q. Do you know where Officer Collins was calling you from?

A. **My guess — I do not. I would assume it would be from his car.**

Q. Do you know where -- wasn't this a situation where he was generating information and actually looking at a computer and things like that, he would have to have probably have been in an office?

A. **He has a mobile system in his car.**

Q. Where is his office?

A. **His office, he has two offices; one is at Pine Street/Cherry Lane, the other is at Wilmington Police.**

Q. Where is the Pine Street/Cherry Lane office?

A. **314 Cherry Lane, New Castle, Delaware.**

Q. Down in New Castle?

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A. **It is right under the Memorial Bridge.**

Q. Where is the Wilmington office?

A. **It is in the Wilmington Police Department.**

Q. Is that in conjunction with Operation Safe Streets?

A. **Yes.**

Q. So if he had been dealing with Detective Leary, it would make sense he was with -- at his Wilmington office, perhaps, correct?

MS. WRIGHT: Objection, Your Honor, this is speculation at this point.

MR. O'CONNELL: I am asking him based on the facts and circumstances as they are, what would make the most sense to him. He is the person in the best position to testify.

THE COURT: He already testified that he is not going to guess where the officer was. This witness can testify, he has testified that he was in his living room, not sure -- he already said I am guessing at this point, not sure what it is that you are trying to seek. It's all speculation.

MR. O'CONNELL: I understand.

BY MR. O'CONNELL:

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Q. Since we don't have Officer Collins here, we have to piece it together as to where he was coming from. He had an office at the Wilmington Police station?

A. **He has an office at the Wilmington Police Department.**

Q. In this case, he was interacting with Detective Leary from Wilmington Police Department?

A. **Detective Leary.**

Q. And how far is that Wilmington Police Department from 1232 Thatcher Street?

A. **Located in the City. You are asking me mileage and destination --**

Q. You have any idea how far it is for a car drive, is it a five-minute drive, ten-minute drive?

A. **Once again, that would be speculation. I can tell you it is located in the City of Wilmington. For me to say it is five or ten minutes, is speculation on my part. I have never driven that distance.**

Q. You indicated that you had this conference at 7:40, correct?

A. **Approximately 7:40.**

Q. Could it have been later than that?

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A. It wasn't -- it was prior to the time dated on the second page of the arrest incident report. I believe that was 8:05. This conversation occurred before 8:05.

Q. You are not sure when?

A. It occurred before 8:05.

Q. Okay. I guess my point is you wrote down 7:40, you testified it happened at 7:40?

A. Approximately.

Q. That is your best estimate?

A. That would be my best guess.

THE COURT: I am not reading the report, a.m. or p.m.?

BY MR. O'CONNELL:

Q. Talking about p.m. correct?

A. P.m.

THE COURT: Thank you.

BY MR. O'CONNELL:

Q. So how long do you think this phone conversation between you and Officer Collins lasted?

A. Enough to cover the information and Officer Collins had his facts in line, and I only was needed to clarify a few points. However long that took to do

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that, clarify those points.

Q. You would agree with me the fact that Mr. Burton had a conviction back in 1992 that was drug related, his positive drug screen from 2010, his possession of marijuana 2005, his non-compliance with sex offender group back in 2002, 2005 missed office visit don't appear in anyone's report, correct?

A. No, they do not appear in a report, but they were discussed as part of that phone conversation.

Q. You would agree also that none of those circumstances had caused you or any other officer at Probation and Parole to seek an administrative warrant against Mr. Burton previously?

A. Not at that time. We just received information from a past proven reliable informant, and making my decision, all those factors, including his history have to be reviewed to try to put together the pieces of this, whether that is reasonable for us.

So if you take the fact that we discussed his criminal history, that in his criminal history in 2002, and in 2005, he was arrested for drug-related convictions, which according to the informant was crack cocaine; once again, his conviction was for cocaine in

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2002. We discussed violations of probation because that shows a pattern of non-compliance.

Q. 1992 you are talking about, not 2002?

A. I believe it is 2002.

Q. Criminal record shows he had a conviction in 1992 for possession with intent to deliver cocaine. You have anything in front of you?

A. If it is 1992, I have misspoken. I reviewed with Officer Collins on the phone, we have an individual who is on parole for life for kidnapping and rape. I have to take the totality of the circumstances that he is providing to me, and part of that totality of these circumstances would be past criminal history, compliance with probation, the arrest. Are the prior arrests consistent with what the informant is telling us, which it was. And that we have something more than just a name, David.

So we confirmed his ID via a photo. I have to look at the factors of his probation, the reason for positive urine in 2010, is that there have been none since then. So that is my most recent indicator of non-compliance.

Q. The fact that this individual is a sex

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offender is information that could have been obtained from anybody from the internet, correct?

A. Yes, if you are willing to do the research, you are correct.

Q. The fact that this person is living at 1232 Thatcher Street is obtainable by anybody who is a neighbor of his who would know he lives there, correct?

A. Correct, that is public enough information, also.

Q. The fact this individual is on probation is reasonably obtainable just seeing a home visit by Dave Wiechowski with Probation and Parole garb on is going to tell someone he is on probation?

A. That is a rooming house. So there could be other individuals. That does not specifically go to William David Burton.

Q. Could be anybody in that rooming house could see David Wiechowski going in the door of William David Burton could glean that this gentleman is on probation, correct?

A. Someone in that residence is on probation.

Q. All of that information is readily obtainable by the public, correct?

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A. **It would require some research, but yes, if you are willing to put the time in, you can find that.**
Q. There was no controlled buy in this case, was there?
A. **No.**
Q. Is that something that police officers often do to corroborate what an informant has told them about someone who is alleged to be selling drugs, or using drugs, or in possession of drugs?
A. **If you are going for probable cause, but this is based on reasonable suspicion on an admin warrant.**
Q. Have you ever encountered a situation where a confidential informant will actually call a target and have a conversation with them while a police officer monitors it about possession of drugs, or contraband, or things like that?
A. **Once again, you are asking me to try to, you know --**
Q. Simple question; have you ever encountered that situation before?
A. **Yes, I have encountered that in the past.**
Q. Neither of those things were done in this case, were they?

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A. **No.**
Q. There was no controlled buy, there was no monitoring of phone conversation between the CI and Mr. Burton, there was nothing really to confirm the allegations of concealed criminal activity on the part of Mr. Burton, was there?
A. **We have a past proven reliable. I understand that from Officer Collins and Officer Leary, that past proven reliable carries a huge amount of reliability. Both all three of us involved in that know the determining factors for a past proven reliable. That in and of itself is enough to garner reasonable suspicion. This is not a -- wasn't a search warrant, this was an administrative search. I am operating under a different set of rules and guidelines which I have to make an informed decision to allow probation to search William David Burton's room.**
Q. Back to the question I asked you. There was no corroboration of concealed criminal activity in this case, was there?
A. **No.**
MR. O'CONNELL: No further questions. Thank you.

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THE COURT: Mr. Roop.
MR. ROOP: One question, Your Honor.
CROSS EXAMINATION
BY MR. ROOP:
Q. Were you present at 1232 North Thatcher Street on the night of January 31, or were you in a supervisory capacity?
A. **I was in my living room.**
Q. You never interacted with Mr. Guy?
A. **No, I did not.**
MR. ROOP: No further questions.
THE COURT: Redirect.
REDIRECT EXAMINATION
BY MS. WRIGHT:
Q. Officer Watson, can you tell us -- Mr. O'Connell went through a laundry list of things that could be determined by the public. Can you tell us whether or not the fact that the defendant lives in room number two, is that readily accessible to the public?
A. **That a defendant lives on the second floor is not readily accessible to the public.**
Q. Probation and parole, where did they get that

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information from?
A. **That was from the informant.**
Q. What factor, how did the fact that the informant gave a specific type of drug that the defendant had play a role in your review of the case and approving the administrative warrant?
A. **If you go into his criminal history, which we could during that case conference, he had a prior conviction for possession of cocaine, possession to deliver a narcotic Schedule II controlled substance, both of which fit the description of what was being reported as being sold out of that particular room.**
Q. Officer, can you tell us whether or not you would deem that a corroboration of an informant?
A. **Yes.**
THE COURT: When you say this is corroboration; you are saying prior possession of cocaine and prior intent to deliver?
MS. WRIGHT: Yes, Your Honor.
BY MS. WRIGHT:
Q. With regards to that information about the particular room, what, if anything, did Officer Collins, yourself, what did you do to corroborate that

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information from the past proven reliable informant?

A. We showed a photo ID to make sure we were talking about the right person. It was reported to me he was identified through the photo, which narrows down the potential list of people in the house. Now we know exactly who we are dealing with. The CI had information that he was on the second floor. There were home visits that were conducted, they were positive home visits to that address of record. So we -- his probation officer, in conducting home visits, confirmed that he resided at that residence.

Q. What significance did the fact that the informant referred to the defendant as David play in your evaluating?

A. David is the middle name, and Mr. Burton has quite a history, both myself, and my prior supervisor Tom Skully were aware of Mr. Burton. In fact, Tom Skully, my supervisor back in 2005, was the original arresting officer for Mr. Burton. So during the course of my interaction as an officer with the State of Delaware, and not in the supervisor role, I have had conversations with supervisor Tom Skully back in 2005 when we were putting together a top 25 list.

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His name came up because of --

MR. O'CONNELL: Your Honor I am going to object, not sure the relevance about his conversations with an officer who arrested him back in 2005 and a top 25 list or anything like that. I don't know how if he didn't testify that that was -- had anything to do with granting of the administrative warrant to Officer Collins, which he has not testified to. Now to seemingly reopen the record, have him talk about a million other things why this gentleman is such a bad person is totally inappropriate.

THE COURT: I think if I am not mistaken, on cross examination the witness testified as to factors that were considered that would have been made to the public, made readily accessible to the public. The State is now trying to establish there was information that was not readily available by the public including that the defendant lived on the second floor, type of drug that was -- had been identified by the informant, how the name now plays into information that the informant has. I think what this witness is trying to establish is identification of the middle name.

Let's limit it, we do not need to go through a

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history how do you know the -- why is the middle name, how are you aware why this is important. I think he can probably condense it into --

MS. WRIGHT: We established that point. The State was going to move on.

THE COURT: All right.

BY MS. WRIGHT:

Q. Officer Watson, you also testified that on cross examination that the criminal history of the defendant, positive drug screen, his prior violations alone were not enough to approve an administrative warrant, correct?

A. No, they are determining factors.

Q. Those are not enough. Can you outline for us finally what the totality of circumstances, outline all factors that you considered?

A. I have information from a past proven reliable informant. I have three individuals who understand what that terminology, in and of itself, means. What the factors for that terminology mean. I have an individual who was identified as David, who is identified through a picture, to make sure that this is the exact same person they are talking about. I have

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an exact location. I have the exact type of drug listed. I have the common factors, as Mr. O'Connell was pointing out, that he is a probationer, that he lives at 1232 Thatcher Street. I have confirmed that through case notes that his supervising officer has been to the residence, has positively put him there.

I believe I testified on Friday at the time, through a dynamic report, we were able to tell he was the only person on probation living in that house at the time. I have a history of non-compliance with supervision. I have two violations of probation, one of which is for drugs. I have minor technical issues throughout the course of a probationer who is on parole for life for rape, and kidnapping, even though that span may be 10 years, 20 years, whatever, we are on parole for life for rape and kidnapping.

There is a history throughout that span of non-compliance, okay. Like I said, we have the exact type of drug. We have a location, and we have a urine screen provided by the defendant, which is positive for drugs.

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Q. Is that a reason as --

A. 2010, yes. In the totality of all these

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circumstances, and the fact it is a past proven and reliable, okay, the administrative search for his room was approved.

MS. WRIGHT: Thank you. No further questions.

RECROSS EXAMINATION

BY MR. O'CONNELL:

Q. I didn't understand you when you said that you corroborated what kind of drug it was. What did you mean by that?

A. I was informed it was crack cocaine. He had possession of cocaine, possession with intent to deliver a narcotic Schedule II. Crack is a derivative of cocaine. So we have a drug cocaine, whatever form.

Q. From 21 years previous to that?

A. Correct.

Q. How does that corroborate what the past proven reliable informant has said about him?

A. Shows a pattern of behavior. Shows a pattern that we have an individual who was dealing drugs, cocaine. Once again, whether it is 20 years, 30 years, or however many years we have an individual who we are responsible for supervising on parole for life, that has now relapsed into this pattern of behavior.

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MR. O'CONNELL: Thank you, Your Honor.

THE COURT: Thank you.

MR. ROOP: Nothing further, Your Honor.

THE COURT: Thank you. You may step down.

MS. WRIGHT: State would like to briefly call -- before I do may Officer Watson be excused?

THE COURT: Yes.

MS. WRIGHT: I believe he is going to remain in the courtroom, or not. State would like to briefly call Officer Vettori.

BRYAN VETTORI,

having been first called by the State was sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. WRIGHT:

Q. Good afternoon, Officer.

A. Good afternoon.

Q. Can you first tell us by whom are you employed?

A. I work for Probation and Parole, State of Delaware.

Q. How long have you been with Probation and Parole?

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A. Approximately nine years.

Q. What are your current duties with Probation and Parole?

A. I am assigned to Operation Safe Streets task force.

Q. Can you tell us, take you back to January 31st this year, were you working in your capacity on that date?

A. Yes.

Q. Can you tell us where you were at approximately 8 o'clock p.m. on that day?

A. Conducting surveillance on 1232 Thatcher Street.

Q. Stop you right there. When you say "we", who would are you referring to?

A. Operation Safe Streets task force.

Q. Can you tell us what, if anything, you observed when you were conducting surveillance?

A. Shortly after we began, we observed two males enter that residence, one of whom we believed to be William Burton, a probationer on Level II, who was a targets of an investigation at that time.

Q. Officer, can you tell us is Mr. Burton in the

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courtroom today?

A. He is.

Q. Can you point him out?

A. Seated at the table to my left in the white Department of Correction jumpsuit?

Q. Thank you.

Can you tell us when you observed who you believed to be the defendant, and another man walking into 1232, what did you do?

A. Myself and Probation Officer Daniel Collins went to the front door of the residence and knocked in an attempt make contact with Mr. Burton.

Q. Just you and Officer Collins at that time?

A. Yes.

Q. What happened when you approached the door to 1232?

A. Shortly after knocking another male came, it was not Mr. Burton, later we identified him as Bernard Guy. We advised him we were there to see Mr. Burton. He told us he would go inside to see if he was there. He went inside. Several minutes later he had not reappeared. We -- Officer Collins knocked again on the door. Mr. Guy then came out, advised that Mr. Burton

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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

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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?

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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?

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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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A. **Yes.**
Q. Were you in a Probation and Parole unmarked vehicle?
A. **I believe we were in a Wilmington Police Department vehicle, not sure — I know we were in the car, I don't recall who else was in the car with us.**
Q. Officer Collins was with you?
A. **Yes.**
Q. Where had you come from?
A. **As I recall, we came from our office at Wilmington Police station.**
Q. Just for a few minutes you conducted surveillance?
A. **Correct.**
Q. While you were in Officer Collins' presence, was he on the phone with his supervisor, Officer Watson?
A. **I don't recall being present when was on the phone with Officer Supervisor Watson.**
Q. During the time period that you were in the car with him from the Wilmington Police station to whenever you were at 1232 Thatcher Street, you don't recall him ever speaking with Officer Watson on the

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phone?
A. **No, I think before we left the station he had gotten approval, as I recall.**
Q. So do you know how long a drive it is from Wilmington Police station to 1232 Thatcher Street in terms of minutes; how long did it take you to get there?
A. **Maybe five to ten minutes, tops.**
Q. Then you got there, and you observe the individual you believed to be Mr. Burton, then you proceeded with the encounter with Mr. Guy?
A. **Correct.**
MR. O'CONNELL: No further questions. Thank you.
THE COURT: Thank you. Cross examination.
CROSS EXAMINATION
BY MR. ROOP:
Q. Thank you, Your Honor.
Good afternoon, Officer Vettori.
A. **Good afternoon.**
Q. You were at 1232 Thatcher for Mr. Burton, right?
A. **Correct.**

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Q. You didn't get any information about Bernard Guy?
A. **Correct.**
Q. How long were you sitting watching the house before you saw the two people go inside?
A. **Several minutes.**
Q. You said you saw someone walk up that you believed to be Mr. Burton?
A. **Correct.**
Q. You don't know for sure, right?
A. **At the time we had a picture of him and we thought it was him. That is why we went in the house.**
Q. How far away were you?
A. **Block or two at most.**
Q. From the house?
A. **I believe so.**
Q. It is 8 o'clock at night, right?
A. **Correct.**
Q. So it is dark, January?
A. **Yes. Correct.**
Q. You could a see couple blocks down?
A. **Um-hmm. We have a clear view of the front of the house.**

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Q. Went you come up to that house, you say that Mr. Guy comes to the door and said he is going to check to see if Mr. Burton is home?
A. **He said he would go inside and check.**
Q. Was he hostile at that point?
A. **Initially, no.**
Q. He goes back inside, and you don't hear from him for a couple minutes. You knock on the door again?
A. **Yes.**
Q. He comes back and says what?
A. **He comes back and says he is not here.**
Q. Could you see inside the residence when you were waiting there?
A. **I think the door to the house was open, but all we could see was the hallway.**
Q. So you couldn't see of Mr. Burton actually went upstairs look --
A. **Correct.**
Q. Mr. Guy went upstairs to see if Mr. Burton was there?
A. **We could not see if he went inside.**
Q. You found Mr. Burton at the top of the stairs, right?

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A. **Yes.**
Q. You also don't know if Mr. Guy called up to see if Mr. Burton was there or not?
A. **Correct.**
Q. You said that he was hostile with you. You called for backup. Eventually he does let you inside the house, right?
A. **He does, yes.**
Q. You said that he threatened you with a dog?
A. **Yes.**
Q. When you go inside, does someone take the dog outside of the house?
A. **I think the dog was put in the backyard, because it wasn't running around us, but I don't recall specifically what happened to the dog.**
Q. Besides threatening with the dog, did he threaten you with anything else?
A. **No.**
Q. He never said I have a gun, I'm going to shoot you, hit you?
A. **Other than him telling me he is going to have the dog attack me, he did not threaten me.**
Q. He didn't want you in his house right?

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A. **His manner, shouting, his posturing, he is close to over a foot taller than I am. It was very concerning, yes.**
Q. When he was inside the house standing there, was he using anything for support?
A. **Not that I recall.**
Q. When you were testifying on.
Direct you said that he was being hostile. You were kind of giving a calm demeanor in terms of telling him to comply and calm down. Is that how were you saying it to him that night?
A. **Sir, can you please calm down, relax. We are here for Mr. Burton. We need to make sure he is here. Can you just relax.**
Q. But did it stay like that the whole time, did it eventually escalate in terms of your forcefulness?
A. **When he was not responding, we had to escalate our commands.**
Q. How about when he initially did not come back, you knock again, he comes back. How was your tone then?
A. **We don't -- we asked him, you know, if Mr. Guy is home he never came back.**

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Q. You knocked again, when he comes back, what did you say to him then?
A. **Is Mr. Burton here?**
Q. Did you say it like that, or did you yell it?
A. **I don't recall yelling at him.**
MR. ROOP: One moment, Your Honor.
(Discussion held off the record.)
BY MR. ROOP:
Q. How many people were inside when you got inside?
A. **How many including officers?**
Q. How many law enforcement officers?
A. **I would say there is approximately seven to nine of us.**
Q. How many occupants of the residence, people that live there?
A. **There were three individuals inside, including Mr. Guy and Mr. Burton. There was a third individual, I don't remember his name.**
Q. How soon after you enter the apartment does Detective Leary handcuff Mr. Guy?
A. **It was essentially immediately upon all of us entering the door he was placed in custody for officer**

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safety.
MR. ROOP: No further questions, Your Honor.
THE COURT: When you went in, was it just you and Collins?
A. **Yes, when we went to open the door just Collins and myself.**
Q. Behavior from defendant Guy was witnessed by you and Collins, or you and these other seven to nine individuals?
A. **It was just me and Officer Collins at the door. That altercation between us and Mr. Guy was just Officer Collins and myself.**
THE COURT: Thank you.
REDIRECT EXAMINATION
BY MS. WRIGHT:
Q. Officer Vettori, follow-up to the Judge's question. With regards to knocking on the door, your altercation with Mr. Guy, why did you call the other officers to come up?
A. **I was concerned for our safety.**
MS. WRIGHT: No further questions, Your Honor.
THE COURT: Any recross?
MR. O'CONNELL: No, Your Honor.

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MR. ROOP: No, Your Honor.
THE COURT: You may step down.
MS. WRIGHT: This officer is working nights, make he be excused?
THE COURT: Yes.
MS. WRIGHT: Your Honor, State rests.
MR. O'CONNELL: Your Honor, Defendant Burton has no evidence, just argument.
THE COURT: All right.
MR. ROOP: Just argument for Mr. Guy.
THE COURT: I will hear argument.
MS. WRIGHT: The State will start with defendant Burton's Motion to Suppress. The State would first wants to start off reiterating standards for administrative searches; it is reasonable grounds not probable cause. The State, in our written response, we did cite cases for probable cause to give Your Honor a perspective as to what courts have looked at in determining when there is reasonable grounds up to probable cause.
In Culver, which the defendant cites, that is anonymous tip, no corroboration. That is not enough for reasonable suspicion. Moving up to anonymous tip

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with corroboration is enough for reasonable suspicion, State also cited cases for probable cause where past proven, reliable, and corroboration.
The State only did that to provide Your Honor with a sliding scale of different factors that the Court considers when determining whether Probation and Parole have reasonable grounds to approve an administrative search.
Having said that, the State will take some issue with defence's arguments that in the motion that because there was no controlled buys, no monitoring of an informant, that there is no reasonable grounds. Our Supreme Court has made it very clear, as recently as this year in Holden v. State, that that is not even required for probable cause. Here we are dealing with lesser standards.
Next, Your Honor, looking at the totality of the circumstances, as Officer Watson explained to the Court, he looked at all of the factors, not just the past proven reliable informant's information, which arguably the State will stand by it is, is the information we have in this case is somewhere in between reasonable grounds and probable cause, looking

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at the cases that the State outlined for the Court.
We not only rely on past proven reliable informant information, which is inherently reliable as our case law indicates because Officer Leary has worked with him in the past, that is inherent in the definition of past proven reliable informant, they are providing successful results in the past. If they didn't, they wouldn't be past proven and reliable.
Next informant providing a specific type of drug, location of the defendant's bedroom, this is a rooming house. This is not information in terms of the room number two where the defendant is residing, that is not information readily available to the public. The fact that the defendant goes by David, was identified by the confidential informant also goes to Officer Watson's reliance on past proven reliable informant information, coupled with sex offender, probationer status, Officer Watson noted that this is a rooming house, no one else in that house was on probation except for the defendant, David Burton.
All of those factors he relied upon, in addition to the defendant's prior criminal history, positive urine screens, prior violations for probation.

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Those are all factors that Officer Watson enumerated in the checklist. He is entitled to view those factors in the totality of circumstances, and he relied on those factors.
Again, the fact that Officer Watson said that those violations and his positive drug screens, that ranged from 1992, all the way up it 2010. That is why Officer Watson said that was a pattern that he considered.
With regards to defendant Guy, Detective Leary set for Your Honor the nature of Safe Streets and administrative warrants, how they are conducted. The inherent nature of the execution of administrative warrants and even search warrants are dangerous. You don't know what you are going into, how many people are inside and Wilmington Police are partnered up with probation for Safe Streets to provide that security.
January 31st of this year, Officers Vettori and Collins went up to that house by themselves, and Officers Vettori and Collins did not call WPD for assistance until they encountered defendant Guy who was hostile. The fact he said, defendant Guy, that the defendant was not home, even though Officer Vettori

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testified that he saw who was believed to be David Burton walk into the that home, that caused the officers concern because they knocked on the door, they asked to go in and verify that defendant Burton was home or was not home.

Couple that with defendant Guy threatening to sic dogs on the officers, and his hostile behavior, aggressive posture towards the officers, that prompted Officer Vettori and Officer Collins to call in Detective Leary, and additional officers for assistance especially since they see a large dog. As soon as they walk in they see David Burton at the top of the steps. There is a third individual in the house.

He don't know what they are going into. They need to control the situation.

It is very easy for the defense to say, to Monday morning quarterback and say Mr. Burton was older, had a cane, that is easy for them to say. The officers were in a volatile position. You heard testimony, they were in enough of a position to cause concern that they had to call for backup from their partners.

Your Honor, at this stage the State believes

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it has met its burden when Officer Leary put handcuffs on defendant Guy, that is important because Detective Leary testified he has been doing this a very long time, and he trains new officers as to how they should conduct themselves to make sure they are safe. Even if a defendant is in handcuffs, there is still dangers that arise from that. That is why Officer Leary patted down defendant Guy, and it is well settled that if an officer during a pat down by plain touch without manipulating anything, just plain touch can immediately identify contraband that that officer is justified in reaching in and seizing that contraband. Detective Leary was very clear in his testimony, that he not only knew it was contraband, he knew it was heroin from plain touch. Why?

Because heroin is packaged in bundles. He had several bags in that packaging. Based on his training and experience in patting down hundreds and hundreds of defendants, offenders he knew from plain touch that the defendant had heroin, not cocaine, not anything else but heroin.

So based on that testimony, Your Honor, the State has met its burden as to both defendant Burton

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and defendant Guy. Thank you.

THE COURT: Thank you.

MR. O'CONNELL: Thank you, Your Honor. I am going to be a little scatter brained. There is a lot to consider. There is a lot of problems with this search. It is almost like a law school exam there are so many issues.

First is that there was no independent determination by Officer Watson as to why the confidential informant that had spoken with Detective Leary was past, proven and reliable. The case law requires that. It requires -- the administrative procedures that they have put in place that 7.19, have required, and case law from Culver, Sierra, LeGrand, all of them require not be enough that a police officer say the magic words, past, proven and reliable. There has to be an independent assessment by Officer Watson why he is past, proven and reliable.

Has he worked with you in the past? Has he given you information that has led to results, like arrests or searches, or the like in the past. None of that was done. Importantly, on cross examination, Detective Leary said that first, he never spoke with

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Officer Watson; and second, everything that is in his report is all that he communicated to Officer Collins and in his report, there is nothing about this prior CI's work with Detective Leary. All we have is the incantation of the magical words, past proven and reliable. That does not meet case law, and most importantly, it does not meet the requirements of the Probation and Parole rules.

THE COURT: So let me see if I understand this, you are indicating that because Leary never talked to Watson and only communicated with Collins, that Collins who did communicate with Watson then obviously testimony there was lot more in the conference that went beyond, you are saying it was Watson's obligation to make an independent determination as to why the informant was, in fact, reliable in the past?

MR. O'CONNELL: Absolutely.

THE COURT: That information could have only come from Leary and not Collins?

MR. O'CONNELL: Well, Leary could communicate it theoretically to Collins, who could then communicate it to Watson. That did not happen. I asked Leary what

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you did tell Collins? I told him X, Y and Z. I had past proven and reliable that he told me that David is selling crack cocaine from 1232 Thatcher. He has Collins looking in the DACS system. Collins confirms William David Burton lives at 1232 Thatcher. He is a sex offender on Level II probation. They confirm, corroborate all of that. Before we even get to that, Culver requires, I am quoting from page -- I don't know what page. The Culver decision says "Although probation officers may typically rely on the information furnished them by police officers, probation procedures 7.196(e)2 and 3 requires that probation officers independently assess the reliability of the police officer's information." And says "police officers must provide probation officers sufficient set of facts so that the probation officers can independently and objectively assess the reasonableness of the inferences to be drawn from the caller's tip. If probation officer do not engage in an independent analysis of reliability of the facts supporting an independent informant's tip, then they contravene Procedure 7.19."

In this case, they didn't do anything to

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determine and Culver gives you four factors in evaluating reliability of information: Is the information detailed? Is it consistent? Was the informant reliable in the past? And consider the reason why the informant is supplying information. We don't -- the record is silent as to what the track record was of this informant. Why he is called past, proven and reliable, and why he is supplying information. Those are required, according to Culver. None of that was done here.

Watson may have considered all of this, the fact there was corroboration that he was on probation, there was corroboration that he is a sex offender, corroboration that he lived at 1232 Thatcher, and that those items that he testified to were corroborated, but as I pointed out, as the case law points out, those matters are not that important in the assessment of reliability of the informant's tip, because all of that information -- I mean, I could call in that a woman wearing black is going to leave this building at 6 o'clock, probably go to her car and drive to -- if I knew what your residence was, certain residence. I could say all those things about you, and from what

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Officer Watson is telling you as long as I corroborate that that is true, that you will be leaving this building at that time, you are going to a place that I can determine, that you are a judge, that is enough.

That is not what the case law says. Reasonable suspicion requires them to independently determine why I am reliable in telling that. They didn't do that here. Beyond that, probably the most important thing in this case, there was no -- he conceded it from the stand, there was no corroboration of concealed criminal activity. That is the lynch pin of Legrand, of Culver, of Sierra, of all the cases that deal with administrative warrants. Admittedly, Legrand is dealing with a search warrant, but Culver and Sierra are not. You go back all the way back to Florida versus Jayal, a US Supreme Court case. They say, Supreme Court says, when you are dealing with an anonymous tip, or past proven and reliable informant's tip, you have got to corroborate the concealed criminal activity.

In other words, there's got to be something to show that what this person is saying, he is not just some guy who, you know, lives in a rooming house with

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William David Burton who got ticked off because he wouldn't lend me a cup of sugar. You know what, I am going to call this in. This guy lives there, he is doing this, he is doing that, whatever. You have to have then some corroboration that what that person is saying is reliable.

That he possessed crack cocaine, that he is selling crack cocaine. There is a number of ways to do that. I pointed out two of them. Case law talks about those ways. The King case cited by the State, talks about how you do it? You get that CI to get on the phone, you call up William David Burton, you say hey, David, do you still have that crack cocaine that you had earlier today? Yes, I do. I am willing to sell, boom. I have corroborated the concealed criminal activity, or I send the CI with buy money, make a controlled buy. There is a myriad of ways that you can corroborate concealed criminal activity. None of it was done here.

The fact that he had a 1992 conviction for possession of cocaine, he thought it was 2002. DELJIS will show that it is 1992, somehow corroborated that the CI was correct, 21 years previously, the fact he

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had a 2002, 2005 problem with not participating in his sex offender group therapy was cited as a factor. The fact that he tested positive for marijuana, not crack, but marijuana in 2010 was in possession, I guess, of marijuana in 2005, none of this appears in any of the reports. This gentleman has done over 200 case conferences since then, somehow now we hear that was considered, as well, but it really does not matter because if you look also in Culver, Culver had the same factors.

Culver had them saying well, he failed a drug test, missed a curfew, he did other things. The Supreme Court of the State of Delaware said when examining whether a failed drug test, missed curfew without more could support reasonable suspicion that would justify an administrative search, it is important to remember that both incidents had occurred without probation considering a search of Culver's person or home before they issued a warrant. I asked him that. Did any of those factors ever generate the desire to violate him on probation, or generate an administrative warn previously? It happened five -- three, five, eight and 21 years ago? No. They had never caused

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anybody to suspect that this was a person dealing drugs.

The only way you get to that point is by having somebody do something that can confirm concealed criminal activity and that wasn't done here. That is why, the main reason why this warrant fails miserably, but before you even get to that, the fact that there was no independent corroboration of why the CI is past proven and reliable by Officer Watson, that is fatal right there, under Culver and other cases.

So for those reasons, Your Honor, I ask the Court to grant the Motion to Suppress. Thank you.

THE COURT: Thank you.

MR. ROOP: The State argues that Mr. Guy's erratic and hostile behavior make it reasonable to pat him down because there is officer safety concerns, but the State's analysis is flawed for the simple reason that objectively, Detective Leary did not have a reasonable articulable suspicion Mr. Guy was armed and presently dangerous. That is what you need to pat someone down. To aide the Court in its analysis, I point you to Hicks versus State, 631 A2d Six at Nine, Supreme Court case from 1993, the court says "we

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recognize that a police officer making a reasonable investigatory stop may protect himself or herself from attack by a hostile suspect, but that officer's authority under such circumstances is clearly limited by Constitutional principles. One such limitation is that the person searched must have been first detained pursuant to the requirements and consistent with the scope of 11 Del C Sections 1902 and 1903."

The important part of this is it goes on to say "another limitation is that the officer must possess a reasonable belief that the detainee is presently armed and dangerous. In the absence of such conditions, a police officer may not conduct a pat down search without violating the defendant's statutory and Constitutional rights against unreasonable search and seizures."

What that leaves us with is that the law is clear and that you can detain someone, but unless you have reasonable articulable suspicion that someone is armed and presently dangerous, you cannot pat them down. We don't have that here.

You know, the State talks about the fact that he wasn't initially uncooperative, well, we are not

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really sure if he was cooperative or not. They say, you know, we have reasonable suspicion that he was charged with hindering prosecution because he said Mr. Burton wasn't home. We have heard the circumstances. First, you have to consider under the totality of circumstances that Mr. Guy is not on probation. It's 8 o'clock at night, dark, Probation and Parole is knocking on his door saying let us in your house. If you think about it there is a reason why you have to get special permission as law enforcement to get a night time search warrant because it is really invasive. You have the implication in the testimony that Mr. Guy lied, but Detective Leary and Officer Vettori both testified that we don't know exactly when Mr. Burton entered the residence. We think we know he went in there because from two-blocks away, eight o'clock at night in the dark, it looked like him that went in.

What they said is you cannot see inside the residence. Mr. Guy went back in and checked, came back and said he was not here. We don't know if he said hey David, are you here? Didn't hear anything. We don't know that.

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Even if we are to assume that is justified, you know, first the Court during Detective Leary's testimony asked whether or not there was a detention, I would submit there was a detention. He was handcuffed. In Jones it was enough to support detention under Delaware's Constitution for an officer to say stop, take your hands out of your pockets. Handcuffing someone is certainly detention.

With respect to reasonable articulable suspicion as to whether Mr. Guy was armed and presently dangerous would justify a pat down, you have look at the objective facts available at the time, Mr. Guy wasn't on probation. There was no guns mentioned by this confidential informant which is the basis for why they are there in the first place. Mr. Guy was never mentioned in the investigation. There is zero testimony about a bulge or anything that is indicative of Mr. Guy having a weapon on his person.

There is zero testimony that Mr. Guy reached for anything. There is no threat of weapons from him. All he threatened them with was a dog, which by the time he was detained that dissipated. The dog was taken out back. You can't say well, he threatened me

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with a dog, maybe he has a gun on him, maybe he has a knife on him. You also have to consider law enforcement officers inside the house at the time he was patted down outnumbered the occupants.

We have Detective Leary saying there is three to five people inside there, law enforcement. Officer Vettori testified seven to nine people inside.

The fact that he was allegedly hostile, aggressive, doesn't automatically equal a pat down. It is a conclusory statement of officer safety. If you look at Holden, there is a couple Holden cases, you will need to look at the one with a car search cited at 23 A3d 843. There the Court said generalized conclusory searches are impermissible. The Delaware Supreme Court noted that "the mere incantation of officer safety does not provide the necessary reasonable articulable suspicion for a frisk."

The State also argued that search warrants are inherently dangerous. Well, so are car searches or car stops. If the Court looks at State versus Able 68 A3d 1228, there a Hell's Angel was stopped by a trooper on 95, allegedly had hostile behavior or could be hostile and aggressive because of his Hell's Angels insignia

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and the officer testified that well, he is a Hell's Angel and this is Pagan territory, therefore it makes him likely he could be hostile to police officers or other people. The State also argued that he is uncooperative because when the police officer said hey, where are you going? He said I am not telling where I am going. The State argued under those circumstances a pat down was reasonable, but Judge Jurden held, which was later affirmed by the Delaware Supreme Court, that the combination of those two factors was not sufficient to pat someone down.

Another point is we have hostility and aggressive behavior, that stopped as soon as he is handcuffed. If you were handcuffed he says well, I saw this bulge in his pocket, or he threatened me with a gun or weapon, maybe you get to a pat down. We don't have any of that here. So Mr. Guy argues that there was no justification for a pat down in this case. Therefore, the heroin found in his pocket should be suppressed.

Even if the Court finds that pat down was permissible in this case, you have to think about the fact plain touch, and plain touch makes it easy if the

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identity of contraband is readily apparent with no manipulation. Detective Leary testified when I asked him how can you tell the difference between bags of cocaine and bags of heroin? He said well, if you feel it, you can feel inside there is another bag inside of another bag. It is inside someone's pocket, so the Court can make a credibility determination as to whether someone is just feeling bags, whether or not he manipulated that to feel the little bags inside the other bag.

THE COURT: What difference does it make at that point is if it is bag of heroin or bag of cocaine?

MR. ROOP: Maybe it is a bag of heroin maybe it is a bag of something else. The point is; how can you tell it is a bag of anything. Plain touch was developed for oh, I feel a gun in someone's pocket. That is definitely a gun. To say I that you can feel a bag in someone's pocket I know that is contraband, maybe you think it is contraband you have to know under plain touch. Therefore, under those circumstances, Your Honor, I would submit that the heroin should be suppressed.

MS. WRIGHT: Briefly, Your Honor. First with

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regards to defendant Burton, the State wants to make it very clear Culver that was an anonymous tip, that tip was this guy may be selling something out of the house, based on traffic, foot traffic in and out of the house. Those four factors outlined by the Court, that middle factor Mr. O'Connell keeps on harping on is was the informant reliable in the past? The State will submit based on research so far that there is not one case that the officer has to outline in detail the past proven and reliable informant helped with arrest in the past. That is not required. That is not what Culver is stating in those four factors. It simply states was the informant reliable in the past?

Officer Watson testified that he had worked with Detective Leary for ten years. He knows who Detective Leary considers past proven and reliable. That is someone who has provided successful results in the past.

Officer Watson testified that he relied on that in making his determination in terms of information he received from that informant.

With regards to Culver, the defense also suggests well that --

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THE COURT: Are you saying that then the manner in which that information was corroborated was by virtue of Watson's knowledge of Detective Leary's track record, or Detective Leary's experience which spanned decades and his knowledge of what works, you are saying that, in and of itself, is corroboration?

MS. WRIGHT: Not just that, Your Honor. That is there was a home visit at that house, corroborated that tip, that it was in the second floor right above the stairwell that was there was a home visit that Officer Watson considered at the time, that totality of the circumstances, that is what Officer Watson was trying to harp on. It is not one factor alone. There is several factors that he determined in evaluating this information, not just that Detective Leary said past proven and reliable, knowing his experience was with Detective Leary about how his performance, and, again, the definition of past proven and reliable, that informant is reliable in the past. Otherwise, it would be a confidential source or confidential informant.

There is a reason why in every warrant, the administrative warrant you see PPRI, Past Proven and Reliable versus confidential source, versus

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confidential informant. So, again, Officer Watson considered all of those factors together. The State does submit that the fact that there was a home visit at that same room that the informant provided to Detective Leary, that is corroboration.

With regards to Mr. Guy, the State is confused by the defendant's argument. We have officers who; one, saw defendant Burton walk in the home. Again, this is Monday morning quarterbacking. Do they testify yes, at the time was there people, other people in the house. How do we know that defendant Guy asked around for David Burton? Totality of circumstances. They saw him walk in, then you have Bernard Guy delaying the officers coming in. You have him saying that Burton is not there, despite the fact officers saw him walk in.

They have aggressive behavior. Nowhere in Hicks or any of the case law regulating whether an officer should be concerned for officer safety, they don't have to articulate they have seen an actual weapon, their furtive movements, aggressive posture and threatened to harm the officers. Furtive movements and threatening to harm the officers is more than enough for the officers to conduct a pat down for their

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safety, to take control of the situation, Your Honor. Thank you.

THE COURT: Thank you.

MR. O'CONNELL: Can I make one more word, Your Honor?

THE COURT: Yes.

MR. O'CONNELL: What the State is arguing is exactly what Culver said is improper. That Officer Watson says I know Leary, he is a reliable guy. That may be true, but it is not his reliability that matters. Officer Cronin, relying upon Lt. Ogden in Culver was not enough. The Supreme Court said that. You may think he is a great guy, it is the informant that -- whose reliability we are looking at here, not I have a track record with Officer Watson, if he says past previous and reliable, it must be. That is not enough under Culver.

THE COURT: Thank you.

MR. ROOP: Nothing further.

THE COURT: When is our final case review?

THE CLERK: September 3rd.

THE COURT: September 3rd, trial is September 10th. All right. You will have my decision

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soon.

(Whereupon the proceedings were concluded.)

CERTIFICATE OF COURT REPORTER

I, John P. Donnelly, RPR, Chief 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, on the day therein stated, and that same remains of record in the Office of the Prothonotary at Wilmington, Delaware. This certification shall be void upon disposition of the case and it is further understood that this transcript is not to be disassembled in any manner by any party without authorization of the signatory below.

WITNESS my hand this 18th day of March, 2014.

/s/ John P. Donnelly, RPR
Chief Court Reporter

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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.

A17 HA121

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.

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ID. No. 1301022875
September 9, 2013

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

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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)).

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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.").

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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

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

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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).

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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)).

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

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

19

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.

Sarita Wright Attorney for the State

Attorney for the Defendant

Kevin O'Connell

2013 SP PROTHONOTARY FILED

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.

Wil Bur
Defendant

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

JUDGE

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REVISED 7/09

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HA13D

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?

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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.

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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

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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HA136

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: 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

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STATE OF DELAWARE
VS.
WILLIAM D BURTON
DOB: 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 .

APPROVED ORDER 2 November 1, 2016 13:58

A70

HA143

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
WILLIAM D BURTON
DOB: 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

APPROVED ORDER 3 November 1, 2016 13:58

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HA144

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
WILLIAM D BURTON
DOB: 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

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HA 145