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 II (A116-313)

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Dated: May 7, 2024

FILED
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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

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

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Dated: August 17, 2017

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INTRODUCTION

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

PROCEDURAL HISTORY

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

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

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

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

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[1] Hereinafter referred to as (A_).

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

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

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

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

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ENTITLEMENT TO RELIEF UNDER RULE 61

Jurisdiction.

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

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

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

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

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

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

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

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rule."[5]

Rule 61(d)(2) provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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LAW APPLICABLE TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

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

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

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

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

[20] Del. Const. art. I, § 7.

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

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

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

[24] *Id.* at 687.

[25] *Id.* at 694.

[26] *Id.*

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STATEMENT OF FACTS

Offenses.

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

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

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

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

Medical Examiner's Report.

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

Suppression Motion and Hearing.

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

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

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

Stipulated Trial.

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

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

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

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Sentencing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Since the Preliminary Report, additional allegations against OCME employees have

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OCME Guidelines and federal grant money.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Motions for Postconviction Relief.

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

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

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

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

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

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

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

A. This claim is not barred.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Law applicable to a *Brady* violation.

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

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[52] A22-27.

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

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

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

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

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

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

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

C. The information was favorable.

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

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[57] *Id.* at 439.

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

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

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

[61] *Id.*

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

[63] *Id.*

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

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

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

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

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

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

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

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

[70] *Id.*

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

1. The OCME scandal.

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

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

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

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

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

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

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

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

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

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

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

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(A212).

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

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

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

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

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

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

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

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

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

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

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employees propping open the door to the drug vault, and the silent alarm to the vault and building being turned off—violates FQS standards and challenges the integrity of the chain of custody for evidence stored in the vault, as any individual in the lab could tamper with evidence while leaving behind no record of access. (A389, 390, 392).

Additional violations which Mr. Bono found could affect the integrity of the chain of custody and integrity of test results include: having non-qualified OCME staff working on controlled substance testing, failing to properly audit the drug vault, improperly labeling evidence envelopes, and improperly testing and storing evidence. (A390-395). Mr. Bono has further opined that allowing OCME employees access to police colored sealing tape in the OCME intake office, while not expressly prohibited by lab protocols and accreditation standards, goes against best laboratory practices and indirectly calls into question the OCME's compliance with FQS standards. (A392, 393). When a lab employee is able to open a piece of evidence and reseal it without detection, the reliability and integrity of the chain of custody for that item of evidence is wholly called into question. (A393). Mr. Bono also opined that the reliability of the lab and any certificates it produces is challengeable and, until those challenges are resolved, not dependable. (*Id.*).

Additional impeachment information was also known concerning the OCME's reporting policies.[83] Mr. Bono revealed in his March 13, 2016 report that although the OCME was required to notify both the accrediting body and appropriate legal counsel when issues of evidence integrity were found, due to the impact on evidence admissibility, the OCME failed to satisfy its accreditation obligations. (A409, 410, 415). Mr. Bono opined that "had the accrediting body been aware of the

[83] Mr. Bono's March 13, 2016 Report and accompanying exhibits are attached as A406-443).

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severity of the evidence handling violations within the OCME drug analysis laboratory, their laboratory's accreditation could have been sanctioned on a number of levels. These sanctions could have resulted in the laboratory's accreditation being suspended, to the laboratory having been put on probation and been given a specified time-frame to [correct] the violations." (A410, 415). Mr. Bono also found no evidence of a policy in the OCME system for notifying legal counsel regarding corrective action requests ("CAR").[84] (A414). Nevertheless, Mr. Bono indicated that lab management still had a responsibility to take concerns related to violations of lab protocols up the chain of command. (A415).

Mr. Bono also found that the OCME failed to comply with accreditation and testing standards, which compromised the integrity of the evidence stored at the OCME. (A412). The OCME's failure to conduct annual audits revealed that there were 705 exhibits in the OCME drug vault that were unaccounted for, thus calling into question the reliability of the storage vault. (A413). The OCME's failure to conduct root cause analysis allows for the integrity and reliability of the evidence stored in the OCME lab to be challenged until such analysis is completed. (A415, 416). The failure to limit access to the OCME computerized data entry system to laboratory personnel, as required by the OCME's own lab protocols, allowed individuals outside of the lab to change the data in the system, which calls into question the reliability of that which was supposed to be secure in the vault. (A418). In addition, access to the evidence vault was not limited to specified times and specified personnel, thereby allowing unauthorized personal access to the vault and again, challenging the security and reliability of the stored evidence. (A418, 419).

Lastly, in relation to Mr. Bajwa, the forensic chemist in Mr. Burton's case, Mr. Bono has

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

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opined that without knowing exactly why Mr. Bajwa was placed on administrative leave, all judicial actions resulting from the evidence that he tested should have been suspended until a cause analysis determination had been performed, as all of Mr. Bajwa's prior testing is suspect until the root cause of the problem is disclosed. (A396). If Mr. Bajwa was placed on administrative leave due to stealing drugs, "dry labbing," or other substantive lab misconduct, then all of Mr. Bajwa's prior test results should be considered presumptively unreliable. (*Id.*).

The impeachment value of this evidence is clear. Mr. Burton would have been able to attack the credibility of Mr. Bajwa and his forensic conclusions that the suspected drugs were cocaine and marijuana, based upon the critically inaccurate test result Mr. Bajwa reported and testified to in the *Dollard* case.[85] In the face of such disclosures, there could have been no legitimate strategic reason for trial counsel to stipulate to the State's proffered facts regarding the substance and weight of the suspected drugs, as evidence of a prior false positive test would have been critical to impeaching the credibility of Mr. Bajwa and therefore, his work product.[86]

D. The evidence was suppressed by the State.

The State suppressed critical impeachment evidence in Mr. Burton's case when it failed to timely disclose to the defense the existence of ongoing problems at the OCME. Moreover, on June 24, 2014, while Mr. Burton's case was on remand for further record development and prior to the filing of trial counsel's motion for new trial, trial counsel requested "case specific discovery information" pursuant to *Brady v. Maryland* and Delaware Superior Court Criminal Rule 16,

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[85] The United States Supreme Court has opined that ". . . no one experienced in the trials of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." *Pointer v. Texas*, 380 U.S. 400, 404 (1965).

[86] *See Martin*, 60 A.3d at 1009 ("[T]he defendant must be able to confront the certifying analyst when her report is submitted into evidence.") (citing *Bullcoming*, 131 S. Ct. 2705).

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including, but not limited to: a copy of the complete laboratory file in this case, all records and logs of all transfers of the evidence, handwritten notes produced by the chemist assistants and laboratory workers who handled the substances in this case, and a description of the method used to draw, cut obtain or prepare the actual samples tested in this case. (DE36; A83-90). However, there is no indication in the record or in Mr. Burton's file that any of these requested materials were ever provided to the defense.

The United States Supreme Court has held that a prosecutor must seek out and learn of any favorable evidence known to parties acting on behalf of the government, including the police.[87] This would also include a search of all readily available sources of favorable evidence.[88] This duty extends beyond the police to any investigating agency.[89] As such, prosecutors should review through any "substantive" case-related communications.[90] Such communications tend to occur: (1) among prosecutors and/or agents; (2) between prosecutors and/or agents and witnesses and/or victims; and (3) between victim/witness coordinators and witnesses and/or victims.[91] Such communications may be recorded in emails, memos, notes, or reports.[92] While the disclosure of case impression and strategies is not required, factual reports regarding investigative activity, the merits of the evidence,

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[87] *Youngblood,* 547 U.S. 867; *see also Smith v. Cain*, 132 S.Ct. 627, 629-30 (2012) (finding a *Brady* violation for the failure to disclose the lead detective's notes, which contained impeachment evidence); *Johnson v. Folino*, 705 F.3d 117, 129 (3d Cir. 2013).

[88] *See Kyles*, 514 U.S. at 436-439; *United States v. Perdomo*, 929 F.2d 967, 970-71 (3d Cir. 1991); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980); *United States v. Burnside*, 824 F. Supp. 1215 (N.D. Ill. 1993).

[89] *Id.*

[90] David W. Ogden, Memorandum for Department Prosecutors, January 4, 2010, last visited July 26, 2017, http://www.justice.gov/dag/memorandum-department-prosecutors.

[91] *Id.*

[92] *Id.*

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information gained through interviews, and issues relating to credibility are, in contrast, required.[93]

While the State may claim that, prior to January 2014, the members of the Attorney General's Office had no knowledge of the impeachment material in relation to the OCME, the State is still responsible for failing to disclose the *Brady* material.[94] In relation to the Massachusetts drug lab scandal, both the Massachusetts Supreme Court and the District Court of Massachusetts have held that for purposes of *Brady*, the drug lab chemist was a member of the prosecution team.[95] Lastly, even if the State was not made aware of the *Brady* information until after Mr. Burton's trial, a *Brady* violation still occurred, as the State is under a continuing duty to disclose all exculpatory evidence in its possession regarding both the issue of guilt and/or innocence and the sentencing determination.[96]

It is clear that the OCME is an arm of the State for purposes of *Brady* as a result of its partnership with Delaware law enforcement agencies in prosecuting all drug cases.[97] Delaware law

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[93] *Id.*

[94] *See Kyles*, 514 U.S. at 437-38 (finding it irrelevant whether the prosecutor knew police suppressed material evidence); *Arizona v. Youngblood*, 488 U.S. 51, 55 (1988) (explaining that suppression of *Brady* violated the defendant's right to due process "irrespective of the good faith or bad faith of the prosecution").

[95] *See e.g., Hampton,* 109 F. Supp. 3d at 439-440; *Commonwealth v. Scott,* 467 Mass. 336, 5 N.E.3d 530, 542-43 (Mass. 2014) (noting that Massachusetts courts regard a state drug lab chemist who stole drugs from cases as a member of the Commonwealth's prosecution team for purposes of deciding whether to vacate guilty pleas); *Deberry v. State*, 457 A.2d 744, 751-52 (Del. 1988) (holding that the State's duty to preserve under *Brady* applies to all investigative agencies within the State).

[96] *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (stating "the duty to disclose is ongoing"); *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) (noting that "after a conviction the prosecutor . . . is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction"); *Barnes v. United States,* 760 A.2d 556, 562 (D.C. 2000) (stating that the obligation to disclose exculpatory evidence is continuous).

[97] The OCME's mission statement reads, "The OCME evidentiary guidelines are dedicated to all past, present, and future public servants who dedicate their careers to providing

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enforcement and the DOJ have relied solely upon the OCME crime lab to test the substances in all drug cases.[98] The degree to which the crime lab is an agent of the DOJ is also evidenced by the collaboration of the OCME and the DOJ to obtain federal grant monies. In order to obtain funds, then Chief Medical Examiner Callery and then Attorney General Biden jointly signed the March 20, 2007 Memorandum of Understanding, which certified that the Delaware DOJ would investigate "allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results . . . ."[99]

Here, the crime lab was part of the prosecution team that sought Mr. Burton's conviction. Multiple members of the team were corrupt and, by design, concealed the misconduct from Mr. Burton. The State, despite its claimed ignorance of the scandal, was still responsible for disclosing this information to Mr. Burton, and its failure to do so resulted in the suppression of the information.

Alternatively, if the Court finds that the OCME was not an arm of the State for purposes of *Brady*, then Mr. Burton submits that the information concerning problems at the OCME was known to Delaware law enforcement and thus, required the prosecutor to turn this information over to Mr. Burton. The United States Supreme Court has long held that a prosecutor must seek out and to learn

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the state of Delaware with the highest degree of law enforcement, forensic science, and medical-legal death investigation services while maintaining the traditions of fairness, professionalism, and integrity." (A180).

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

[99] *See* Memorandum of Understanding Delaware Office of the Chief Medical Examiner and Delaware Department of Justice In Accordance with the Justice For All Act, 2007. (A178).

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of any favorable evidence known to parties acting on behalf of the government, including the police.[100]

As law enforcement had knowledge of issues related to OCME problems with chain of custody, packaging of evidence and discrepancies of weight and/or quantity, it is reasonable to conclude, and would be demonstrated during an evidentiary hearing, that various law enforcement agencies possessed knowledge of the impeachment evidence. (A355-357, 362-364, 372). Emails provided by CS1 indicate that in July of 2007, a meeting was held between the OCME DNA unit and the New Castle County Police Department to discuss packaging and chain of custody concerns, which included how there have been "many bad NCCPD examples." (A363). Police knowledge of issues at the OCME is further demonstrated by the March 12, 2010 email in which the OCME's Forensic Quality Assurance Manager noted that over fifty pieces of evidence that the Delaware State Police were requesting be returned from the OCME could not be located. (A368-369). As such, it is obvious that Delaware law enforcement were aware of problems occurring at the OCME. Thus, the prosecutor was imputed with the knowledge of the OCME problems that were known to police and was required to disclose this information to Mr. Burton pursuant to *Brady* so that the defense could make adequate use of it.

E. Mr. Burton suffered prejudice as a result of the State's *Brady* violation.

Evidence of the crime lab corruption is material, as there is a reasonable probability that had it been disclosed to the defense in this case, the result of the proceeding would have been different.[101]

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[100] *Youngblood*, 547 U.S. 867; *see also Smith*, 132 S.Ct. at 629-30 (finding a *Brady* violation for the failure to disclose the lead detective's notes, which contained impeachment evidence); *Folino*, 705 F.3d at 129.

[101] *Bagley*, 473 U.S. at 682.

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"The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial.'"[102] The evidence of corruption would have thwarted the State's ability to authenticate the substance at issue and to establish that the substance consisted of unlawful drugs. Additionally, Mr. Bajwa's prior false positive testing of suspected drug evidence in the *Dollard* case would have demonstrated that both the lab and Mr. Bajwa were unreliable.

The impeachment evidence in Mr. Burton's case is material, as it goes directly to the heart of the case–that the substance is an illegal drug and that it belonged to the defendant. A significant factor in establishing chain of custody of the suspect drugs—"*the likelihood of intermeddlers having tampered with it*"[103]—is jeopardized by evidence of tampering and theft of drugs. The State's evidence that the substance in Mr. Burton's case consisted of illegal drugs and/or the State's evidence linking that substance to Mr. Burton has been compromised and is subject to a legitimate challenge from the defense.

This is reinforced by Mr. Bono, who has opined that the totality of the issues[104] referenced in his report justifies the conclusion that there were repeated violations of multiple forensic laboratory standards, accreditation standards and best laboratory practices, all of which could have

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[102] *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678); *see also Strickler*, 527 U.S. at 289 (petitioner must demonstrate "'a reasonable probability' that the result of the trial would have been different if the suppressed [information] had been disclosed to the defense").

[103] *Tricoche*, 525 A.2d at 152.

[104] These issues ranged from the lack of security, improper storage of evidence and employee misconduct, which included "dry labbing," theft and the storage of police sealing tape at the OCME. (A389-396).

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impacted the integrity and reliability of all evidence stored in the evidence vault. (A389). Mr. Bono also opined that due to the circumstances of Mr. Bajwa being placed on administrative leave, Mr. Bajwa's prior test results are suspect, and until the root cause of the problem is known, Mr. Bajwa's test results should be considered presumptively unreliable. (A396). Prior state and federal cases support the notion that problems with the drug lab and scandals involving chemists are favorable evidence that should be disclosed to the defense.[105]

There can be no question that, had defense counsel been provided with the required *Brady* material before trial, defense counsel would not have stipulated to the State's record "with respect to where the drugs were found and what they were and how much was found." (A49). Thus, the State would have been required to call the forensic analyst, Mr. Bajwa, to testify at trial, and there is a reasonable probability that trial counsel's cross-examination of Mr. Bajwa would have altered the outcome of the trial.[106] The cross-examination would have critically jeopardized, if not wholly undermined, the State's ability to prove that Mr. Burton possessed any illegal substances.[107] Armed with the *Brady* information, Mr. Burton would have been able to argue that the lab conditions cast

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[105] *See Chin*, 54 F. Supp. 3d at 93 ("It is easy to imagine how defendant could have used the OIG report to score points while cross-examining chemists from the Hinton Drug Lab at trial."); *Hampton*, 109 F. Supp. 3d at 437 n.7 ("The favorability of the evidence [relating to the chemist who was accused of dry-labbing] requires no explanation."); *Bibao*, No. 2442362, at 12 ("Madden's criminal record, her suspension from employment at SFPD, and the information described above relevant to the work of the Crime lab is both favorable to the defense and material.").

[106] *See Folino*, 705 F.3d at 129 ("[U]ndisclosed evidence that would seriously undermine the testimony of a key witness may be considered material when it relates to an essential issue or the testimony lacks strong corroboration.").

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

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significant doubt on the reliability of the chain of custody of the suspect drugs in this case, as well as on the drug testing itself.[108] Mr. Burton would have impeached the individuals testifying in the chain of custody with the fact that the alarm to the OCME building was turned off at times, giving individuals free access to the building. (A197). Additionally, there is much uncertainty as to who had access to what materials, as the software used to track admission through each door in the OCME lab was compromised after the year 2000, as it failed to capture the correct date that an employee used a specific door. (A198).

Furthermore, chain of custody was often compromised due to the fact that staff at the OCME have stated that over the years, the door to the drug vault was propped open, given unfettered access to its contents. (A199). The chain of custody would have been further impeached with evidence that the wrong office or wrong agency was incorrectly logged into the system with the submitted drugs, and lab managers would remove evidence from the drug vault without properly logging it out. (A205, 206). Most egregious is the fact that different colored evidence tape was found in the drug vault and was reported in the OCME office.[109] Having access to police colored sealing tape would allow OCME employees to tamper with evidence and then reseal the container without anyone knowing. Additionally, Mr. Burton would have been able to impeach State witnesses concerning

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[108] *See Martin*, 60 A.3d at 1009 ("[T]he defendant must be able to confront the certifying analyst when her report is submitted into evidence.") (citing *Bullcoming*, 131 S.Ct. 2705).

[109] At the August 20, 2014 OCME hearing, Lieutenant John Laird testified that during the OCME investigation, he was told that blue evidence tape used by police was seen lying around the OCME office. (A241). Additionally, Sergeant Scott McCarthy testified that during the audit of the OCME drug vault, a box of evidence tape was found. (A243). The box did not look to be hidden. (A243, 244). Sgt. McCarthy testified that there was "white tape, every type of tape. There was a variety of tapes in the box." (A245). Laura Nichols, who was employed at the OCME, testified that she saw blue police evidence tape in the receiving area of the OCME. (A255, 256). Ms. Nichols further testified that "we had all kinds of colors; we had blue, we had red, we had white, you know." (A256).

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the lack of cameras in the lab area, which would have enabled chemists to steal drugs without leaving behind a video record of their conduct. (A353, 372). With the level of corruption related to storing and stealing suspect drug evidence, the trier of fact could reasonably find that the suspect drug evidence in Mr. Burton's case had been tampered with and/or stolen.

Additionally, if supplied with the *Brady* information, Mr. Burton would have been able to critically assess Mr. Bajwa and discredit his certification that the suspect drugs were cocaine and marijuana, based upon his inaccurate test result in the *Dollard* case.[110] The impeachment evidence would have directly countered the presumption that the drug testing was performed correctly and the report's findings accurate.[111] Mr. Bajwa would then have been compelled to explain to the Court, as the trier of fact, why it should believe that the testing performed in Mr. Burton's case was accurate, when in fact testing performed by Mr. Bajwa in another criminal case during a similar time period was proven to be false.[112] Even more importantly, Mr. Bajwa would have been obliged to explain what went wrong in the *Dollard* case, as Mr. Bajwa had testified that he saw no signs of tampering with the *Dollard* evidence. (A264).

Mr. Burton would also have impeached Mr. Bajwa with additional facts surrounding the OCME scandal and the OCME's complete failure to track substances from the point at which they enter the OCME to the point at which they leave the facility.[113] This would include impeaching Mr.

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[110] *See Chin*, 54 F. Supp. 3d at 93 ("It is easy to imagine how defendant could have used the OIG report to score points while cross-examining chemists from the Hinton Drug Lab at trial."); *Hampton*, 109 F. Supp. 3d at 437 n.7 ("The favorability of the evidence [relating to the chemist who was accused of dry-labbing] requires no explanation.").

[111] *See* 10 *Del. C.* § 4330.

[112] The United States Supreme Court has opined that ". . . no one experienced in the trials of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." *Pointer*, 380 U.S. at 404.

[113] *See generally* Preliminary Findings. (A185-220).

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Bajwa on how he could certify that the substances he tested were in fact the same substances that the police dropped off, when intake procedures were known to incorrectly identify the officer.[114] Furthermore, Mr. Bajwa would have needed to explain the reason and support for his belief that the substances tested were not tampered with either before or after testing, in light of other OCME members having access to not only the building[115] but to the drug lab vault and notably, without any record of entry.[116]

It is also notable that Mr. Burton has been prejudiced even in seeking relief for the State's *Brady* violation. His motion for a new trial, or at minimum, the re-testing the suspected drug evidence, was denied in large part because trial counsel stipulated to the State's representation of facts concerning the purported drugs and failed to challenge Mr. Bajwa's report and/or the chain of custody during the bench trial. (A143, 144). However, there can be no question that had the State properly disclosed information of the OCME misconduct, trial counsel would not have stipulated to the State's facts, as a basis would have existed for challenging the chain of custody and the testing performed by Mr. Bajwa, in light of the evidence of misconduct by the three individuals involved in the handling and/or testing of the substances in this case–Mr. Woodson, Ms. Bailey and Mr. Bajwa. Thus, the State unjustly received the benefit, even on review, of having suppressed *Brady* material.

F. It is possible that some members of the Attorney General's Office were aware of *Brady* information relating to the OCME between the time period of 2008 and 2014 but failed to timely disclose the information to Mr. Burton.

While Mr. Burton asserts that the individual prosecutor's first hand knowledge of the OCME

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[114] A206.
[115] A196, 197.
[116] A198, 199.

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scandal is not necessary for the Court to find a *Brady* violation, it is possible that some members of the Attorney General's Office would have been made aware of impeachment information relating to problems with the OCME due to interaction with various police departments, members of the OCME, and the thousands of cases between 2008 and 2014 that would have involved collective discussion among deputy attorney generals concerning the forensic testing performed in their cases. If one member of the Attorney General's Office was aware of impeachment information, that knowledge is imputed upon members of the entire Office.[117] The failure to timely disclose information potentially known by certain members of the Attorney General's Office raises a reasonable inference that the State believes it should not have to disclose this information as required by *Brady*.

An evidentiary hearing[118] is required in the interest of justice in order to compel testimony in relation to the scope of knowledge that various members of the Attorney General's Office were possibly aware of but failed to disclose to Mr. Burton. Additionally, as there was no formal policy in place for the OCME lab to notify the accrediting body or legal counsel of issues with the lab, an evidentiary hearing will reveal who, if any, in the chain of command was notified of the multitude of problems at the OCME. (A414, 415). At the evidentiary hearing, Mr. Burton will call senior members of the Attorney General's Office to testify as to their contact with the OCME and their possible knowledge of issues at the OCME lab. Based upon the evidence that is presented at the

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[117] *See Mastracchio v. Vorse*, 274 F.3d 590, 600 (1st Cir. 2001) (holding that "the knowledge of other members of the attorney general's department and of the witness protection team must be imputed to the prosecuting attorney"); *Smith v. Sec'y of New Mexico Dep't of Corr.*, 50 F.3d 801,824 (10th Cir. 1995) (holding that "the 'prosecution' for *Brady* purposes encompasses not only the individual prosecutor handling the case, but also extends to the prosecutor's entire office") (citing *Giglio*, 405 U.S. at 154).

[118] Pursuant to Del. Super. Ct. Crim. R. 61(h)(1) and (3).

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evidentiary hearing, the Court will then need to determine the magnitude of the *Brady* violations[119] and what remedy is appropriate, including dismissal of all charges due to deliberate misconduct, which would be established through testimony presented at an evidentiary hearing.[120]

An evidentiary hearing is also needed in relation to Irshad Bajwa being placed on administrative leave. Given the circumstances of and inaccurate testing performed by Mr. Bajwa in *Dollard*, a hearing is needed to reveal the events that led to Mr. Bajwa's administrative leave. The State has already made Mr. Bajwa's file available to the Superior Court for pending cases in which Mr. Bajwa was the forensic chemist. (A342). Mr. Burton submits that Mr. Bajwa's personal file should be disclosed to him prior to the evidentiary hearing so as to allow sufficient time for Mr.

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[119] *See Williams v. Ryan*, 623 F.3d 1258, 1268 (9th Cir. 2010) (holding that "the district court erred by not further developing the factual record of the Brady claim" and remanding the "*Brady* claim in order for the district court to decide, on the basis of an appropriate record, whether there were witnesses who could have provided material evidence favorable to [the defendant] at trial"); *Gaither v. United States*, 759 A.2d 655, 664 (D.C. 2000) (remanding "for the court to make complete findings of fact," as the trial judge "'was in a far better position than we are to assess the atmospherics of the case' and determine whether the failure to disclose materially prejudiced the defendant") (quoting *Edelen v. United States*, 627 A.2d 968, 972 (D.C. 1993)); *Farley v. United States*, 694 A.2d 887, 890 (D.C. 1997) (remanding for an evidentiary hearing to determine whether a civilian complaint to a review board "was *Brady* material and, if so, whether had it been disclosed to the defense, there is a possibility that the result of the trial would have been undermined").

[120] *United States v. Struckman*, 611 F.3d 560, 577 (9th Cir. 2010) (recognizing "that dismissal with prejudice may be an appropriate remedy for a *Brady* or *Giglio* violation using a court's supervisory powers where prejudice to the defendant results and the prosecutorial misconduct is flagrant") (citing *United States v. Williams*, 547 F.3d 1187, 1202 (9th Cir. 2008); *United States v. Chapman*, 524 F.3d 1073, 1077, 1086 (9th Cir. 2010)); *Chapman*, 524 F.3d at 1086 (holding that the district court did not abuse its discretion in dismissing the indictment); *Gov't of Virgin Islands v. Fahie*, 419 F.3d 249 (3d Cir. 2005) (holding "that dismissal for a Brady violation may be appropriate in cases of deliberate misconduct because those cases call for penalties which are not only corrective but are also highly deterrent"); *United States v. Miranda*, 526 F.2d 1319, 1324 n.4 (2d Cir. 1975) (sanctions for a *Brady* violation include, "in exceptional circumstances, dismissal of the indictment or the direction of a judgment of acquittal") (citing *United States v. Heath*, 147 F. Supp. 877 (D. Hawaii 1957); *United States v. Jackson*, 508 F.2d 1001, 1005-08 (7th Cir. 1975); *United States v. Banks*, 374 F. Supp. 321, 328 n.2 (D.S.D. 1974)).

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Burton to meaningfully review the material and enable him to call relevant fact witnesses at the hearing.

The exact reason for Mr. Bajwa's administrative leave, as well as the circumstances of the inaccurate testing in *Dollard*, directly relate to Mr. Bajwa's credibility as a forensic chemist and the integrity of his certification that the substances he tested in Mr. Burton's case were illegal drugs. (A15). Mr. Bono has opined that due to Mr. Bajwa being placed on administrative leave, the results of testing performed by Mr. Bajwa, which would include the substances tested in Mr. Burton's case, are unreliable. (A396). Mr. Bono further opined that disclosure of the reason for Mr. Bajwa's administrative leave is needed in order to determine how to appropriately treat tests results already completed by Mr. Bajwa. (*Id.*). If Mr. Bajwa was placed on leave due to laboratory misconduct, then substantial scrutiny should be placed on his forensic testing, and this Court should presumptively hold that the testing was invalid. (*Id.*). As such, Mr. Bajwa's file must be disclosed to Mr. Burton prior to the evidentiary hearing to allow for meaningful review, which will enable Mr. Burton to call relevant fact witnesses.

Lastly, an evidentiary hearing is needed in order to determine the full scope of the *Brady* violation. As noted in Mr. Breslin's affidavit, multiple former members of the OCME were approached but declined to speak to Mr. Breslin concerning the problems at the OCME lab. (A373). Mr. Burton will call these individuals at the evidentiary hearing, so that they may testify as to the ongoing problems at the lab and whether any members of the Attorney General's Office were aware of the lab's many deficiencies, such as inadequate security, evidence tampering, and other types of

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misconduct.[121]

For all of these reasons, an evidentiary hearing should be scheduled in addition to the State's disclosure of the requested documents. Prior to an evidentiary hearing, Mr. Burton requests an order from this Court allowing for an approved laboratory, such as RJ Lee Group (www.rjl.com) which is a business previously hired by the State of Delaware to perform forensic tests. This is needed, as the purported drugs are currently stored in the courthouse along with other trial evidence, and it is not known who has keys to access the evidence in this case, who has viewed it, or whether law enforcement was granted access. As such there is no known chain of custody to substantiate the movement of the alleged drugs post-trial and who has accessed it.

G. Cumulative impact of the combined *Brady* violations.

The cumulative impact of the combined *Brady* violations resulted in the suppression of crucial impeachment information concerning the OCME lab and more specifically, the false positive testing by Forensic Chemist Irshad Bajwa. The United States Supreme Court has held that after the Court conducts an individual analysis of the suppressed evidence, the Court then evaluates the "cumulative effect" of the suppressed evidence separately.[122] "Individual items of suppressed evidence may not be material on their own, but may, in the aggregate, 'undermine . . . confidence in the outcome of the trial.'"[123] Had the *Brady* materials been provided to the defense, Mr. Burton would have been able to attack the credibility of Mr. Bajwa and his certification that the materials he tested were in fact cocaine ad marijuana by using evidence of his prior false testing results in

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[121] Notably, prior to the disclosure in *State v. Randolph Clayton*, it was unknown that Forensic Chemist Bipin Mody was violating the OCME's policies and procedures in regard to the testing of alleged drug evidence. *See* A444-446, 447-521.

[122] *Kyles*, 514 U.S. at 437 n. 10.

[123] *Johnson*, 705 F.3d at 129 (quoting *Bagley*, 473 U.S. at 678).

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another case. Additionally, the numerous problems with the drug lab's security, record keeping and staffing issues would easily rebut any claim that the chain of custody was clearly not tampered with in this case. The result of the full force of the suppressed evidence being presented at trial would undoubtedly have resulted in a different outcome of the proceeding, as the trier of fact would have found Mr. Burton not guilty of most, if not all, of the charges due to the unreliability of the chain of custody and test results in this case.[124] Due to this non-disclosure, Mr. Burton was deprived of his constitutional rights to a fair trial and due process of law, as protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, § 7 of the Delaware Constitution.[125]

The State's violation of *Brady*, by failing to timely disclose crucial impeachment information affecting the admissibility of the drug evidence in this case, raises questions about whether the evidence seized by police was the same evidence tested by the OCME and impacts the potential weight that could be assigned by the trier of fact to the State's purported drug evidence. For all of the stated reasons, Mr. Burton's conviction must be reversed and remanded for a new trial, and he must be provided with all *Brady* related materials.

H. Prior Rulings Concerning the OCME Scandal Do Not Bar Mr. Burton From Relief.

Recent Delaware Supreme Court cases addressing the OCME scandal have primarily focused on the impact the scandal has had on guilty plea cases.[126] In *Ira Brown*, the Delaware Supreme Court

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[124] *Bagley*, 473 U.S. at 682.

[125] *See Brady*, 373 U.S. at 87; U.S. Const. amend. XIV; Del. Const. art. I, § 7 (stating in relevant part, "nor shall he or she be deprived of life, liberty or property, unless by the judgment of his or her peers or by the law of the land").

[126] *Ira Brown v. State*, 108 A.3d 1201, 1204-05 (Del. 2015) ("There is no evidence to suggest that OCME employees tampered with drug evidence by adding known controlled

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held that a defendant who admits his guilt when pleading guilty is not permitted to have his case reopened in order to assert claims challenging the chain of custody.[127] As Mr. Burton proceeded to trial, these prior holdings are not controlling and do not bar Mr. Burton from relief. Additionally, new factual developments have rendered certain assumptions held by the Delaware Supreme Court concerning the OCME investigation outdated. In *Brown*, the Delaware Supreme Court noted that "to date, the investigation has yielded no indication that the OCME scandal involved the planting of false evidence to wrongly convict criminal defendants [and] . . . that misconduct occurred because the drugs tested by the OCME were in fact illegal drugs desired by users." This assertion no longer holds, as Forensic Chemist Irshad Bajwa was suspended after drugs that he certified and confirmed in court as being cocaine were retested by an independent lab and came back negative for any illegal substances.[128] According to Mr. Bajwa's testimony, there were no signs of tampering with the evidence envelope. (A264). While the exact details of Mr. Bawja's suspension have not been publicly disclosed, it is clear that the scope of misconduct involving the OCME lab scandal has expanded beyond the facts previously made available to our courts.

Additionally, the Delaware Supreme Court recently denied Anzara Brown's appeal[129] from

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substances to the evidence they received for testing in order to achieve positive results and secure convictions. That is, there is no evidence that the OCME staff 'planted' evidence to wrongly obtain convictions."); *Brewer v. State*, 2015 WL 4606541, at *1-3 (Del. July 30, 2015) (attached as Exhibit E); *Patrick L. Brown v. State*, 2015 WL 3372271, at *1-2 (Del. May 22, 2015) (attached as Exhibit F).

[127] *Ira Brown*, 108 A.3d at 1202 (citing *United States v. Ruiz*, 536 U.S. 622, 632 (2002)).

[128] *See Dollard*, ID No. 1206010837A. (A263-323).

[129] The OCME scandal broke while Brown was on direct appeal and the Delaware Supreme Court remanded the case to determine if a motion for a new trial was necessary. *Anzara Brown*, 117 A.3d at 570.

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the denial of his motion for a new trial, which was premised upon the OCME scandal.[130] Despite inconsistencies between the police report and the medical examiner's report, the Superior Court denied the motion.[131] The drugs would later be retested by an independent lab and found to be cocaine.[132] In affirming the denial, the Delaware Supreme Court distinguished Mr. Brown's case from *State v. Dollard*, recognizing that while Dollard maintained his factual innocence, Mr. Brown did not contest that the substance seized from him was not cocaine and even wrote a letter to his attorney discussing only the amount of missing drugs.[133]

Mr. Brown's case is both legally and factual distinct from the present case, as Mr. Brown did not argue that the State violated *Brady* by failing to disclose information relating to the OCME scandal. Moreover, Mr. Burton maintained his factual innocence by pleading not guilty and proceeding to trial, making his case more akin to that of Mr. Dollard.[134] Lastly and most importantly, Mr. Burton has demonstrated throughout this claim that there is a reasonable probability that the drugs in his case were tampered with and/or inaccurately tested, as the weight of the substances as reported by the police do not match the weight of the substances as reported by the OCME and admitted at trial,[135] and the substances were tested by the same forensic chemist who reported a false positive test result in *Dollard*. These critical differences demonstrate that the holding in Mr. Brown's case fails to directly address the facts and issues presently asserted by Mr. Burton.

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[130] *See Id.* at 568.
[131] *Id.* at 579.
[132] *Id.*
[133] *Id.* at 580-81.
[134] *Id.*
[135] The weights of the substances as reported by Detective Leary on January 31, 2013 were 29.0 grams of suspected cocaine and 1.0 gram of suspected marijuana. (A13, 14). Irshad Bajwa reported the weights in his May 15, 2013 forensic report as 28.45 grams of purported cocaine and 0.93 grams of purported marijuana. (A15).

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Furthermore, in *Hickman v. State*,[136] the Delaware Supreme Court, in affirming the denial of Mr. Hickman's fifth *pro se* motion for post conviction relief and motion for sentence modification, held that "the alleged misconduct by OCME employees was not revealed until 2014, and thus did not raise a concern that the State concealed material impeachment evidence, as required to find a *Brady* violation, at Hickman's trial in 2001."[137] The Delaware Supreme Court's conclusion that the State could not have violated *Brady* until January 2014 when the OCME scandal was officially investigated[138] is contrary to established United States Supreme Court case law, which has consistently held that a prosecutor's personal knowledge of suppressed materials is irrelevant, as he or she is imputed with the knowledge of the arms of the prosecution team.[139] As the OCME is an arm of the State,[140] the prosecutor, despite her own lack of knowledge, was still required to disclose the OCME scandal when drug evidence was first stolen or altered. Furthermore, Hickman did not raise a factually and legally comprehensive *Brady* argument that incorporated the State's obligation to acquire *Brady* material even in the absence of actual knowledge.

Similarly, in *Harmon v. Johnson*, the District Court of Delaware, denied defendant's petition for a writ of habeas corpus, holding that the OCME scandal was not relevant to Harmon's case since the drugs seized by police were never actually tested at the OCME drug lab.[141] Although the District

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[136] *Hickman v. State*, 116 A.3d 1243 (Del. 2015) (Table).

[137] *Id.* at *2.

[138] *Id.*

[139] *See Kyles*, 514 U.S. at 437-438; *Arizona*, 488 U.S. at 55.

[140] *See e.g., Hampton*, 109 F. Supp. 3d at 439-440; *Scott*, 5 N.E.3d at 542-43 (noting that Massachusetts courts regard a state drug lab chemist who stole drugs from cases as a member of the Commonwealth's prosecution team for purposes of deciding whether to vacate guilty pleas); *Deberry*, 457 A.2d at 751-52 (holding that the State's duty to preserve under *Brady* applies to all investigative agencies within the State).

[141] *Harmon v. Johnson*, D. Del., C.A. No. 15-166-RGA, Andrews, J., at 6 (Jan. 14, 2016) (Mem. Op.) (citing *Ira Brown*, 108 A.3d at 1202) (attached as Exhibit G).

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Court did note in dicta that the State did not commit a *Brady* violation, as there was nothing on the record to suggest that the State was aware of the OCME scandal when the defendant pleaded guilty in 2012,[142] Harmon was an incarcerated *pro se* criminal defendant with no legal training who presented sparse facts to the Court that pale in comparison to the record before this tribunal in a case for which no evidentiary hearing was held. Additionally, just as with *Hickman v. State*, the District Court's reasoning is flawed, as the prosecutor's personal knowledge of impeachment and exculpatory information is irrelevant for a court to find a *Brady* violation under United States Supreme Court precedent.[143] Furthermore, the drugs in Harmon's case were not tested at the OCME lab, and the District Court found that Harmon claim was procedurally barred pursuant to the one year statute of limitations.[144] As such, Mr. Harmon's case is factually distinct from this case and, significantly, is contrary to established United States Supreme Court case law. As such, the dicta noted in the *Hickman* opinion is noticeably distinguishable and carries no weight. Thus, this case provides no basis for barring Mr. Burton's requested relief.

Lastly, Judge Carpenter's November 17, 2014 opinion[145] concerning motions in limine in *State v. Hakeem Nesbitt, Michael Irwin,* and *Dilip Nyala* is also inapplicable to Mr. Burton's case.[146] Judge Carpenter held that wholesale suppression of all drug evidence seized by law enforcement

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[142] *Id.*

[143] *See Kyles*, 514 U.S. at 437-38 (1995) (finding it irrelevant whether the prosecutor knew police suppressed material evidence); *Arizona*, 488 U.S. at 55 (quoting *Brady*, 373 U.S. at 87) (explaining that suppression of *Brady* violated the defendant's right to due process "irrespective of the good faith or bad faith of the prosecution").

[144] *Harmon*, C.A. No. 15-166-RGA, at 7.

[145] *Irwin*, 2014 WL 6734821.

[146] Mr. Burton asserts that this opinion is being discussed due to its potential relevancy in anticipation of this Court reversing and remanding Mr. Burton's conviction for a new trial.

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over the past several years was not justified.[147] Judge Carpenter ruled that for pending drug cases, the State must call all available witnesses in the chain of custody, from the time the evidence was submitted to the OCME drug lab, when it was taken from Troop 2, to when it was sent to the independent lab for testing.[148] However, a defendant may not inquire as to the auditing result from the auditing officers included in the chain of custody.[149] Judge Carpenter also held that cross-examination of the State's witnesses concerning the OCME investigation is only permitted when there is "evidence of tampering of the packaging submitted by the police or a discrepancy in weight, volume or contents from that described by the seizing officer."[150]

For a number of reasons, this holding is not binding upon Mr. Burton. First, the opinion unequivocally states, "this Court's decision relates only to the *Nesbitt*, *Irwin* and *Nyala* cases" and notes that this decision would establish a "framework for addressing the volume of cases awaiting trial for drug offenses that at one time were stored at the OCME drug lab."[151] Thus, by the language of the opinion, it is clear that Mr. Burton, and all other defendants not captioned in the opinion, were never intended to be bound.

Furthermore, Judge Carpenter noted later in the opinion that the new requirement concerning chain of custody "only applies to drug cases that were sent to the OCME drug lab and are awaiting trial."[152] Reading this language in conjunction with the prior qualification that the opinion only binds Nesbitt, Irwin and Nyala, it reasonably appears that Judge Carpenter intended for his opinion to be

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[147] *Irwin*, 2014 WL 6734821, at*9.
[148] *Id.* at 10.
[149] *Id.* at 11.
[150] *Id.* at 12.
[151] *Id.* at 1.
[152] *Id.* at 11.

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an influential, but non-binding, framework to be followed in other criminal cases dealing with the OCME issue. If the opinion is read as binding for all criminal cases dealing with the OCME lab scandal, then such an application would violate Mr. Burton's due process rights, as Mr. Burton was not a party to Judge Carpenter's ruling.[153]

Moreover, "the law of the case" doctrine is inapplicable to Mr. Burton's case. The Delaware Supreme Court has held that "[t]he `law of the case' is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation."[154] It is clear that this principle does not apply to Mr. Burton, as both the legal principle and factual issues involved are different from those previously ruled upon by Judge Carpenter. Nesbitt, Irwin and Nyala did not argue that the State violated *Brady* by failing to disclose to the defense information concerning the OCME scandal for use in filling motions in limine and in the impeachment of the State's witnesses.[155] Rather, the defendants argued that the drug evidence in their cases was inadmissible due to the OCME scandal, that the evidence lacked requisite scientific reliability as required under *Daubert*[156] and that the State was unable to establish a reliable chain of custody.[157] Additionally, the specific facts involved in Mr. Burton's case, as well as those in *Dollard*, demonstrate that further factual development is needed on the issue. Even though these prior cases and Mr. Burton's case all touch upon the OCME scandal, the differences between them

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[153] *See Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) (holding that a litigant cannot be bound in a civil lawsuit to which they never appeared in the action, as they did not have an opportunity to litigate the issue).

[154] *See Kenton*, 571 A.2d at 784.

[155] *See O'Neil* v. *State*, 691 A.2d 50, 54 (Del. 1997) (The Delaware Supreme Court held that the State violated *Brady* by failing to disclose impeachment information relevant to a suppression hearing.).

[156] *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

[157] *Irwin*, 2014 WL 6734821, at*8.

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are sufficiently distinct to render the law of the case doctrine inapplicable.[158] As such, the November 17, 2014 Opinion is not binding upon Mr. Burton.

Even assuming that the November 17, 2014 Opinion is binding upon Mr. Burton,[159] the requisite showing of tampering has already been established. In *Dollard*, the forensic chemist in Mr. Burton's case, Irshad Bajwa, certified, and testified in court, that items he tested were in fact cocaine but upon subsequent retesting, were found to contain no illicit drugs. (A264, 265). Additionally, the discrepancies in the weight of the suspect drugs seized and the weight of the suspect drugs admitted at trial[160] raises an indication that the drugs were tampered with. As such, Mr. Burton exceeds the procedural bars put in place by Judge Carpenter for cross-examining the State's witnesses on the issue of the OCME scandal. Although this Court previously found that Mr. Burton failed to satisfy "the bright line test established in *Irwin*" because "[a]s admitted by Burton, he is 'unable to provide the Court with specific evidence of a discrepancy in weight, volume or contents that would call into question the evidence seized and tested by the OCME in this case,'" trial counsel

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[158] *See United Artists v. Twp. of Warrington*, 316 F.3d 392, 398 (3d Cir. 2003) ("The law-of-the-case doctrine relieves a court of the obligation of considering an issue *twice,* but we must be careful to prevent the doctrine from being used to prevent a properly raised argument from being considered even *once*. Where there is substantial doubt as to whether a prior panel actually decided an issue, the later panel should not be foreclosed from considering the issue.").

[159] This Court noted in the November 30, 2015 decision on remand that *Irwin* was "directly and indirectly applicable to this case," because Mr. Burton would need to satisfy the standard established in *Irwin*, in the event of a retrial, in order to challenge the OCME investigation at trial. (A141).

[160] *See Loper v. State*, 637 A.2d 827 (Del. 1993) (Table) (holding that the Superior Court erred in admitting drug evidence as the "fact that the officers who seized the drug and performed field tests on the drug testified that it was a hard, rock-like white pellet, coupled with the fact that the Medical Examiner's Office tested a powdered substance overwhelmingly suggests that the possibilities of misidentification and adulteration of the evidence were not eliminated as a matter of reasonable probability").

was incorrect when he informed the Court that there was no discrepancy in weight.[161] Moreover, it was unknown at the time of this Court's decision that the forensic chemist who performed the testing on the substances in this case had provided a false positive test result for cocaine in another case on months prior.

The most recent case to address the impact of the OCME misconduct was *King v. State*, in which the Delaware Supreme Court affirmed the Superior Court's denial of the defendant's motion for postconviction relief.[162] The defendant asserted that the discrepancy that existed between the drug weight listed on the police report and the weight reported when the drugs were tested indicated that the drugs had been compromised.[163] However, because the defendant had accepted a guilty plea and there was no indication that the plea was conditioned on the OCME report, he failed to show clear and convincing evidence to contradict the admission he made while knowingly, intelligently and voluntarily waiving his rights.[164] As Mr. Burton proceeded to trial, the holding of *King* is inapplicable to this case and does not serve as a basis for precluding Mr. Burton from relief.

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[161] The weight of the substances as reported by law enforcement on January 31, 2013 were 29.0 and 1.0 grams of suspected cocaine and marijuana respectively. (A13, 14). The weight of the substances as reported by the OCME in the May 15, 2013 forensic report were 28.45 and 0.93 grams of purported cocaine and marijuana respectively. (A15).

[162] *King v. State*, Del. Supr., No. 589, 2016, Seitz, Jr., J. (June 28, 2016) (ORDER) (attached as Exhibit H); *State v. King*, Del. Super., ID No. 1208013187, Witham, Jr., J. (Nov. 16, 2016) (ORDER) (attached as Exhibit I).

[163] *King*, ID No. 1208013187, at 1.

[164] *Id.* at 1, 3.

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CLAIM II. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY STIPULATING TO THE STATE'S EVIDENCE WITHOUT MR. BURTON'S KNOWLEDGE OR CONSENT, THEREBY UNDERMINING MR. BURTON'S RIGHT TO PLEAD NOT GUILTY, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 7 OF THE DELAWARE CONSTITUTION.

A. This claim is not barred under Rule 61.

As the Delaware Supreme Court has consistently held that claims of ineffective assistance of counsel will not be considered for the first time on direct appeal,[165] Mr. Burton was unable to raise this claim for direct appeal review, and this claim is not barred under Rule 61(i)(3).[166]

B. Trial counsel's performance fell below an objective standard of reasonableness when he stipulated to the State's evidence without Mr. Burton's knowledge or consent, undermining Mr. Burton's right to plead not guilty.

Mr. Burton pleaded not guilty to the charges filed against him and asserted his due process right to have the State prove beyond a reasonable doubt each and every element of the charged offenses.[167] On the morning of trial, Mr. Burton signed a "Stipulation of Waiver of Jury," electing to waive his right to a jury trial and proceed with a bench trial. (A47). Thereafter, the Court conducted a colloquy with Mr. Burton to confirm that his waiver was knowing, intelligent and voluntary. (A49, 50). In addition to proceeding with a bench trial, trial counsel informed the Court that "for purposes of a trial," they would "rely upon" the record made before Judge Rapposelli during the suppression hearing, "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." (A49).

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[165] *See Desmond*, 654 A.2d at 829; *Duross*, 494 A.2d at 1267.

[166] Del. Super. Ct. Crim. R. 61(i)(3) ("Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction. . . is thereafter barred. . . .").

[167] *In re Winship*, 397 U.S. 358, 363-64 (1970); *see also Holland v. United States*, 348 U.S. 121, 138 (1954) (stating that the Constitution requires proof of a criminal charge beyond a reasonable doubt).

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During the brief stipulated bench trial that followed, trial counsel did not challenge the State's evidence concerning the purported drugs, where they were found and in what quantity, and neither side presented a closing argument. (A50-52). Mr. Burton asserts that he was not aware of trial counsel's intent to stipulate to the State's evidence and would not have agreed to a stipulation, as he wanted and expected trial counsel to challenge the State's forensic evidence and chain of custody. Although trial counsel advised that he had "met with [Mr. Burton] on two occasions and discussed with him the nature of a stipulated trial in that in this case it's [their] belief that the suppression issue is really the most important issue in this case,"[168] Mr. Burton acknowledges that the importance of the suppression issue and the possibility of choosing a bench trial were discussed but denies ever discussing any possible stipulation to the State's record.

The State was required to demonstrate that Mr. Burton "[m]anufacture[d], deliver[ed], or possesse[d] with the intent to manufacture or deliver a controlled substance in a Tier 4 quantity" in order to prove his guilt as to the Drug Dealing charge.[169] To prove Mr. Burton's guilt for Aggravated Possession, the State needed to establish that Mr. Burton "[p]ossesse[d] a controlled substance in a Tier 5 quantity."[170] For Possession of Marijuana, the requisite elements for the State to establish were that Mr. Burton "knowingly or intentionally possesse[d], use[d], or consume[d] a controlled substance or a counterfeit controlled substance classified in [16 *Del. C.*] § 4714(d)(19). . . ."[171] In regard to Possession of Drug Paraphernalia, it was the State's burden to prove that Mr. Burton "use[d],or possess[ed] with intent to use, drug paraphernalia as defined in [16 *Del. C.*] § 4701(17).

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[168] A49.
[169] 16 *Del. C.* § 4752(1) (2013).
[170] 16 *Del. C.* § 4752(3) (2013).
[171] 16 *Del. C.* § 4764(b) (2013).

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For each of the four counts upon which Mr. Burton was convicted, it was essential that the State prove that purported drugs and/or drug paraphernalia were in Mr. Burton's possession, an element which trial counsel never affirmatively disputed and for which he in fact aided the State in proving by stipulating to where the alleged drugs were found and what they were. (A49). Likewise, trial counsel conceded that the purported cocaine recovered, which the State asserted was in Mr. Burton's possession, was a Tier 5 quantity[173] when he stipulated to the State's evidence as to what the substance was and the amount.[174] (*Id.*). Thus, in regard to both Aggravated Possession and Possession of Marijuana, trial counsel conceded nearly all of the requisite elements. Similarly, in regard to Drug Dealing, trial counsel conceded all but possession and that the possession was with the intent to manufacture or deliver a controlled substance. (*Id.*). Likewise, trial counsel conceded all but two of the elements for Possession of Drug Paraphernalia–possession and that the possession was with the intent to use drug paraphernalia.

In *Cooke v. State*, the Delaware Supreme Court found that trial counsel had violated Cooke's Sixth Amendment rights by asserting a guilty but mentally ill defense over the objections of Cooke and despite his plea of not guilty, even though trial counsel noted that they were not conceding guilt and were still going to challenge the State's evidence.[175] The Court stated that "certain decisions regarding the exercise or waiver of basic trial and appellate rights are so personal to the defendant

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[172] 16 *Del. C.* § 4771 (2013).

[173] A Tier 5 quantity means "25 grams or more of cocaine" and a Tier 4 quantity means "20 grams or more of cocaine." 16 *Del. C.* § 4751(c)(1)(a); 16 *Del. C.* § 4751(c)(2)(a).

[174] The OCME report concluded that 28.45 grams of cocaine and 0.93 grams of marijuana were recovered. (A15, 51).

[175] *Cooke v. State*, 977 A.2d 803, 809, 817, 850 (Del. 2009).

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'that they cannot be made for the defendant by a surrogate'" and that "a criminal defendant has 'ultimate authority to make certain fundamental decision regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.'"[176] The Court also acknowledged that "[s]uch choices 'implicate inherently personal rights which would call into question the fundamental fairness of the trial if made by anyone other than the defendant.'"[177] Accordingly, "as to these decisions on the objectives of the representation, a lawyer 'must both consult with the defendant *and* obtain consent to the recommended course of action,'" as "[t]hese rights cannot be waived by counsel without the defendant's fully-informed and publicly-acknowledged consent.'"[178]

Because trial counsel conceded multiple elements of the offenses without Mr. Burton's consent, Mr. Burton was deprived of his constitutional right to make the fundamental decisions concerning his case.[179] Akin to *Cooke*, Mr. Burton chose to plead not guilty, but his "fundamental right to enter a plea of not guilty was effectively negated by the conflicting objective" of his attorney, which was to stipulate to the State's record, thereby conceding Mr. Burton's guilt as to the charged offenses.[180] Moreover, the prosecution's case was not put to a meaningful adversarial test, which not only denied Mr. Burton the effective assistance of counsel in pursuing his goal of obtaining a not guilty verdict, but it undermined the due process requirement that the State's case be proven beyond a reasonable doubt.[181] Like *Cooke*, although "[t]he decision to pursue a verdict of not guilty and

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[176] *Id.* at 841.
[177] *Id.*
[178] *Id.* at 842.
[179] *See id.*
[180] *Id.* at 843
[181] *See Cooke*, 977 A.2d at 843, 850.

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assert his factual innocence belongs to the defendant," Mr. Burton was "deprived of the opportunity to meaningfully oppose the prosecution's case."[182] Trial counsel asked only four questions of the State's sole witness, all of which related to the process of popcorning, and informed the Court that he had no argument. (A52). Upon this record, it clear that the State's case was not subjected to meaningful adversarial testing.

Moreover, trial counsel's stipulation included consent to rely upon the lengthy record made at the suppression hearing for purposes of the trial.[183] In doing so, trial counsel's overly broad stipulation permitted the inclusion of numerous pages of factual testimony that would otherwise be inadmissible at trial, such as the fact that Mr. Burton was on probation, that a confidential informant identified him to law enforcement and that the confidential informant stated Mr. Burton was selling crack cocaine from his residence. (A29, 30). Unless the State took the highly unusual action of revealing the identity of a confidential informant involved in drug transactions and calling him/her to testify at trial, the State would not have been able to rely upon these facts to demonstrate, in particular, the elements of possession and intent to manufacture or distribute.

Assuming Mr. Burton had knowledge of and consented to the stipulations, which he did not, trial counsel could, and should have excised from the suppression hearing record facts that would be inadmissible at trial and not permitted the wholesale inclusion of facts irrelevant to and otherwise precluded from use during trial. Regardless, Mr. Burton was unaware when he consented to a bench trial that trial counsel would consent to the State's use of multiple detrimental facts not otherwise

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[182] *Id.* at 851.

[183] Trial counsel stated that "t]here 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. . . .". (A49).

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permissible at trial to meet its burden of proof. Accordingly, Mr. Burton never consented to this overly broad scope of the stipulation, revealing the danger in not maintaining a written record of which specific matters Mr. Burton was consenting to and in the Court's limited colloquy that addressed only the waiver of the right to a jury. (A47, 49, 50). Not only did Mr. Burton receive absolutely no benefit from this all-encompassing, detrimental stipulation, but it allowed the State to meet its burden of proof through facts otherwise inadmissible at trial and created such a one-sided situation that the State's case was not, and could not be, subjected to any semblance of meaningful adversarial testing.

In *State v. Taye*, the defendant raised an issue similar to Mr. Burton's claim. The defendant, who was charged with striking and killing a firefighter with his car, alleged that the waiver of his right to a jury trial was not knowing, intelligent or voluntary, because he was not aware at the time he made his decision that his attorney would concede his identify as the driver and the recklessness of his conduct.[184] The Court concluded, however, that Taye failed to establish an ineffective assistance of counsel claim for three reasons. First, trial counsel's concessions were made only for the purposes of a motion for judgment of acquittal, and second, at the conclusion of the trial, trial counsel argued that the State had failed to meet the burden of proof beyond a reasonable doubt.[185] Lastly, the trial court did not rely upon the concessions made by trial counsel in finding Taye guilty.[186] As such, any harm that may have resulted from trial counsel's conduct was remedied.[187] However, none of the facts that remedied the harm caused by trial counsel's concessions in *State v.*

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[184] *State v. Taye*, Del. Super., ID No. 0812020623, Rocanelli, J., at 6 (Feb. 26, 2014) (Mem. Op.) (attached as Exhibit J).

[185] *Id.* at 3, 7.

[186] *Id.* at 7.

[187] *Id.*

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Taye were present in Mr. Burton's. Trial counsel conceded multiple essential elements of the offenses not for a limited purpose such as a motion of judgment of acquittal but for the entirety of the trial. Moreover, trial counsel never asserted that the State had failed to meet its burden of proof. Accordingly, the harm was never remedied in Mr. Burton's case.

Similarly, in *State v. Miller*, the trial court engaged in a colloquy with the defendant to determine whether his decision to proceed with a stipulated trial was voluntary and knowing. The defendant advised the Court that he had "fully discussed" the issue with his attorney and that no one was forcing him to proceed with a bench trial or with the stipulated record.[188] However, unlike in *Miller*, the trial court's colloquy with Mr. Burton only inquired as to whether he was aware of his right to a jury trial and was knowingly, intelligently and voluntarily waiving that right. The Court made no inquiries of Mr. Burton's understanding of and consent to a stipulated bench trial or that the stipulation would entail the inclusion of multiple detrimental facts otherwise inadmissible during trial.[189] (A49, 50).

The record provides no indication that trial counsel's concessions were the result of a reasonable strategic decision. It is clear that at the time of the bench trial, trial counsel believed the most important issue in Mr. Burton's case to be the suppression issue and that he intended to appeal the adverse suppression ruling. Although a stipulated trial can be a tactic used to preserve an issue

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[188] *State v. Miller*, Del. Super., ID No. 1001009884, Parker, Comm'r, at 19 (Feb. 26, 2013) (Comm. Rep. and Rec.) (attached as Exhibit K); *see also Pendleton v. State*, Del. Supr., No. 487, 2011, Ridgely, J., at 3-4 (Jan. 19, 2012) (ORDER) (The State, defense counsel and the defendant all signed a stipulation of fact that conceded the evidence was sufficient to find him guilty beyond a reasonable doubt) (attached as Exhibit L).

[189] *Cf. Walker v. State*, 610 A.2d 728, 728 (Del. 1992) (Table) (finding that the trial court's failure to conduct a colloquy with the defendant to ensure he was intelligently and voluntarily choosing to proceed with a stipulated trial was unnecessary, because it was "obvious" that the decision was voluntary and intelligent).

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for appeal,[190] when one is held for that purpose, the defendant typically receives a benefit. In *Lambert v. State*, the defendant entered into a stipulated trial in order to preserve his right to appeal an adverse suppression ruling and because the State agreed to *nolle prosequi* some of his charges in exchange for the stipulations.[191] Similarly in *Wall v. State*, by agreeing to a future stipulated trial and to stipulated facts, the defendant was permitted to enter into a first time offender's program which exempted him from prosecution.[192] In *Miller*, the defendant agreed to a stipulated trial in order to preserve his right to appeal an adverse suppression ruling, as well as to avoid a minimum mandatory sentence for a Trafficking in Heroin charge.[193]

The Third Circuit Court of Appeals has stated that "the courts do not hold that an attorney who concedes his client's guilt on one count of a plural count indictment necessarily denies his client of the benefit of representation of counsel. To the contrary, the courts recognize that sometimes a trial attorney 'may find advantageous to his client's interests to concede certain elements of an offense or his guilt of one of several charges,' and that making such a concession may be an acceptable 'tactical' decision."[194] However, trial counsel's decision in this case cannot be considered such a "tactical" decision. Multiple critical elements of the indicted offenses were conceded, but for

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[190] *See Scarborough v. State*, Del. Supr., No. 38, 2014, Valihura, J., at 8-9, n.9 (July 30, 2015) (ORDER) (noting that had the defendant believed the Superior Court's ruling on his suppression motion to be erroneous, his "only option was to go to trial and then appeal," while acknowledging that "he could have negotiated an agreement with the State to hold a stipulated trial") (attached as Exhibit M).

[191] *Lambert v. State*, 110 A.3d 1253, 1255 (Del. 2015).

[192] *Wall v. State*, Del. Supr., No. 212, 2004, Steele, J., at 2 (Jan. 11, 2005) (ORDER) (attached as Exhibit N).

[193] *Miller*, ID No. 1001009884, at 18 (2013).

[194] *United States v. Holmes*, No. 09-4106, Greenberg, J., at 10-11 (3d Cir., Dec. 16, 2010) (not precedential) (quoting *United States v. Swanson*, 943 F.2d 1070, 1076 (9th Cir. 1991) (attached as Exhibit O).

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the issues of possession and intent to manufacture or distribute, which, although trial counsel did not explicitly stipulate to, neither did he contest during the trial. Mr. Burton did not receive a benefit in exchange for stipulating to the record made by the State both at trial and at the suppression hearing, and the chance of receiving a more favorable verdict, such as an acquittal on the more serious counts, did not increase as a result of trial counsel's concessions. Moreover, the appellate issue would still have been preserved regardless of whether a stipulated or non-stipulated trial was held. Accordingly, there could have been no sound trial strategy behind the stipulations, and trial counsel's actions cannot be considered a tactical decision.[195] As such, trial counsel's conduct fell below an objective standard of reasonableness.

C. Mr. Burton was prejudiced by trial counsel's deficient performance.

In *Cooke*, the Delaware Supreme Court noted that a structural defect was created in the entirety of the proceedings when defense counsel overrode the defendant's decisions concerning his constitutional rights.[196] The Court found that rather than a *Strickland* analysis, the *Cronic*[197] standard applied, because defense counsel undermined Cooke's fundamental rights, and "the wide range of reasonable professional assistance allowed under *Strickland* does not contemplate such a structural defect so inherently prejudicial to the adversarial process and a fair trial."[198] Likewise, Mr. Burton's trial counsel failed to subject the State's case to meaningful adversarial testing by conceding multiple elements of the indicted offenses and consenting to the wholesale inclusion of the record made at

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[195] *See Swanson* , 943 F.2d at 1074-76.

[196] *Cooke*, 977 A.2d at 849.

[197] *United States v. Cronic*, 466 U.S. 648, 659-62 (1984) (providing for the presumption of a Sixth Amendment violation where "there is a complete denial of counsel," where counsel is absent from a critical stage of the proceeding or prevented from assisting the defendant, or where counsel fails to subject the State's case to "meaningful adversarial testing").

[198] *Cooke*, 977 A.2d at 852.

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the suppression hearing, including factual testimony that would otherwise have been inadmissible at trial, thereby creating a structural defect in the proceedings. (A49). Not only did trial counsel offer no argument to the Court, or even assert that the State had failed to meet its burden of proof, no instructions were entered upon which the Court, as the trier of fact, was to make its findings. (A49-53). Although it was the responsibility of a judge, rather than a jury, to make the findings as to Mr. Burton's guilt, the absence of instructions on how the elements are proven further demonstrates the prejudicial situation that trial counsel created through his unreasonable stipulations, which prevented the State's case from being subjected to any real adversarial testing. Accordingly, the adversarial process was unreliable, and Mr. Burton was denied his due process right to a fair trial. Such a critical structural error requires that Mr. Burton's convictions be reversed.[199]

Even under a *Strickland* analysis, however, the record demonstrates that Mr. Burton was prejudiced by trial counsel's deficient performance. When trial counsel stipulated to the State's record concerning the purported drugs, including what they were and the amount recovered, trial counsel waived Mr. Burton's right to challenge the chain of custody and any issues related to the forensic testing of the alleged drugs. The Court denied trial counsel's January 30, 2015 motion for a new trial and/or for the retesting of the drugs, because it found that Mr. Burton "knowingly, intelligently, and voluntarily agreed to a stipulated bench trial instead of a jury trial," thereby waiving his right to test the chain of custody of the drug evidence. (A143, 144). The Court noted that Mr. Burton "stipulated that the drug evidence entered by the State was, in fact, illegal drugs," and that "the State entered the drugs and medical examiner's report without objection." (A143). Further

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[199] *Cronic*, 466 U.S. at 658 (noting that the three exceptions to the *Strickland* analysis are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified"); *see also Cooke*, 977 A.2d at 809, 852.

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evidence that Mr. Burton waived his right to challenge the chain of custody of the drug evidence was trial counsel's cross-examination of the testifying officer, which "did not challenge that the seized substance was illegal drugs." (*Id.*).

In *State v. Miller*, the Court likewise found that the defendant had waived his right to test the chain of custody of the drug evidence by entering into a stipulated trial and conceding facts concerning the drugs seized and the OCME report.[200] However, unlike in Mr. Burton's case, the trial court conducted a colloquy with the defendant concerning his choice to proceed with a stipulated trial and found that decision to be knowing and voluntary.[201] Furthermore, the defendant accepted a stipulated trial in exchange for the State's agreement to dismiss several indicted charges.[202] By stipulating to the State's record, trial counsel relinquished Mr. Burton's right, without his fully-informed knowledge and/or consent and in spite of his plea of not guilty, to test the chain of custody and the OCME's findings concerning the alleged drug evidence. Accordingly, Mr. Burton was denied the opportunity to challenge the authenticity, reliability and accuracy of the drug evidence when the issues at the OCME were revealed.

Trial counsel's stipulations denied Mr. Burton his constitutional right to make the fundamental decisions affecting his case and to meaningfully oppose the State's case against him, as well as deprived him of the opportunity to later challenge the chain of custody and findings of the OCME. Moreover, by stipulating wholesale to the record made at the suppression hearing, trial

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[200] *State v. Miller*, Del. Super., ID No. 1001009884, Carpenter, J., at 27 (May 11, 2017) (Mem. Op.) ("By knowingly, intelligently, and voluntarily agreeing to stipulated facts at trial regarding the drug evidence, [the defendant] 'waived his right to test the chain of custody of that drug evidence.'") (attached as Exhibit P).

[201] *Id.*

[202] *Id.*

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counsel allowed the State to meet its burden of proof, particularly in regard to the elements of possession and intent to manufacture or distribute, with otherwise inadmissible evidence. (A29, 30, 49).

Accordingly, Mr. Burton's due process rights pursuant to the Fourteenth Amendment of the United States Constitution and Article I, § 7 of the Delaware Constitution[203] and his right to the affective assistance of counsel pursuant to the Sixth Amendment to the United States Constitution and Article I, § 7 of the Delaware Constitution were violated. As a result, Mr. Burton's convictions should be vacated and a new trial ordered.

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[203] *See also Moore v. Hall*, 62 A.3d. 1203, 1208 (Del. 2013) (holding that the phrase "due process of law" as found in the Fourteenth Amendment and the phrase "law of the land" as found in Article I, § 7 of the Delaware Constitution are synonymous, with both incorporating the concept of fundamental fairness); *Hammond v. State*, 569 A.2d 81, 87 (Del. 1989) (recognizing "fundamental fairness, as an element of due process" under Article I, § 7 of the Delaware Constitution).

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CONCLUSION

WHEREFORE, based on the foregoing, Petitioner respectfully requests that this Court schedule an evidentiary hearing and grant all other appropriate relief.

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

Dated: August 17, 2017

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	
	)	
v.	)	
	)	ID # 1301022871
WILLIAM BURTON,	)	
	)	
Defendant	)	

Affidavit of Kevin J. O'Connell in Response to Allegations of Ineffective Assistance of Counsel.

Petitioner, William Burton's Amended Motion for Postconviction Relief alleges, at claim number 2, that "trial counsel rendered ineffective assistance of counsel by stipulating to the State's evidence without Mr. Burton's knowledge or consent, thereby undermining Mr. Burton's right to plead not guilty, in violation of the Sixth and Fourteenth Amendments to United States Constitution and Article One, Section 7 of the Delaware Constitution." *See Amended Motion for Postconviction Relief at pp. 64-76.* It is difficult for trial counsel to respond to this claim in as much as it constitutes more of a legal conclusion followed by an argument in the form of an appellate brief, rather than particular factual averments that trial counsel could respond to by either admitting, denying

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or explaining. Accordingly I will attempt to supplement the record as best I can, with the understanding that the colloquy conducted by the Court prior to the stipulated bench trial and the bench trial itself are the best record of counsel's legal assistance in this matter.

Following the suppression hearing conducted before Judge Medinilla (then Judge Rapposelli) on August 15 and August 21, 2013, a final case review was conducted on September 9, 2013. At that point, Judge Medinilla had not rendered her decision on the suppression motion. The suppression decision denying defendant's motion was received at the close of business on September 9, 2013. According to the Public Defender's database, I saw Mr. Burton in court on September 10, and a plea offer was extended wherein the State capped it sentencing recommendation at 15 years of unsuspended jail time.[1] The 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 database entry, I can only assume that I explained to Mr. Burton 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

[1] In preparation of this affidavit, the undersigned counsel has consulted the Office of Defense Services database wherein brief notes of client contact are regularly logged.

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suppression hearing in August. 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 Judge Scott. The court then engaged in its own conversation with the defendant to ensure that he understood the trial rights he was giving up. Following that colloquy, the State put on its evidence and the Court rendered its verdict.

Kevin J. O'Connell
Assistant Public Defender
State Office Building
820 North French Street
Wilmington, DE 19801

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IN WITNESS WHEREOF the said Kevin J. O'Connell has set his hand and seal the day and year aforesaid.

Notary Public/Attorney

Brett A. Hession

ATTORNEY AT LAW
WITH POWER TO ACT
AS NOTARY PUBLIC
PER 29 DEL C 4323 (A) (3)

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	
	)	
	)	I.D. No. 1301022871
	)	
WILLIAM BURTON,	)	
Defendant	)	

STATE'S RESPONSE TO DEFENDANT'S AMENDED MOTION FOR POSTCONVICTION RELIEF PURSUANT TO SUPERIOR COURT CRIMINAL RULE 61

COMES NOW, the State of Delaware, by and through its Deputy Attorney General, Daniel B. McBride, and responds to Defendant's Amended Motion for Postconviction Relief as follows:

PROCEDURAL BACKGROUND

On January 31, 2013, Officers of the Wilmington Safe Streets Unit arrested William Burton ("Burton"). DI 1. A New Castle County Grand Jury indicted Burton on charges of Drug Dealing, Aggravated Possession of Cocaine, two counts of Marijuana and Possession of Drug Paraphernalia. DI 2. Burton filed a motion to suppress on June 3, 2013. DI 7. Following briefing, the Superior Court held a suppression hearing on August 16th and 21st. DI 10, 12, 13, 14. The Motion to Suppress was ultimately denied. Following a one-day non-jury trial, the court found

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Burton guilty of all counts of the indictment (DI 20) and sentenced him to life as an habitual offender. A57.

Burton filed a notice of appeal on December 30, 2013. DI 24. On April 30, 2014, the Office of the Public Defender ("OPD") filed a Motion for Postconviction Relief to Vacate Burton's Title 16 Conviction. DI 33. On June 4, 2014, Burton filed a Motion to Stay his appeal and Remand to the Superior Court in order to further develop the record regarding the drugs in his case and to file a motion for a new trial. A66. The Supreme Court granted the motion and Burton filed a Motion for a new trial on January 30, 2015. DI 39. The State responded on March 27, 2015 (DI 43) and Burton filed his reply on April 17, 2015. DI 44. Burton filed a supplement on July 8, 2015 (DI 48) and the State filed a supplement on August 10, 2015. DI 47. This Court denied the Motion for a New Trial and retesting of the drugs on December 1, 2015[1] and returned the case to the Supreme Court. DI 49, 50. On June 8, 2016, the Delaware Supreme Court affirmed Burton's conviction and sentence.[2]

Burton filed a *pro se* Motion for Postconviction Relief and Motion for Counsel on August 11, 2016. DI 53, 54. By letter, the Superior Court denied the Motion for Postconviction Relief filed by the OPD. DI 57. Conflict Counsel entered

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[1] A136.

[2] *Burton v. State*, 2016 WL 3381847 (Del. June 8, 2016).

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Burton's case on November 1, 2016. DI 59. Counsel filed Burton's Amended Motion for Postconviction Relief and Memo in Support on August 17, 2017. DI 63, 64. Trial Counsel filed an affidavit on December 4, 2017. This is the State's Response to the Amended Motion.

STATEMENT OF FACTS

On January 31, 2013, as part of Operation Safe Streets, Detective Joseph Leary of the Wilmington Safe Streets Unit received a tip from a past-proven reliable informant ("the informant") that a black male known as "David" who lived at 1232 North Thatcher Street in Wilmington, was selling crack cocaine from this residence. A29. Detective Leary described a past-proven reliable informant as "a person who provides information that leads to an arrest or someone . . . who 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." A30. Here, the past-proven, reliable informant told Detective Leary that that "David" lived on the second floor of 1232 North Thatcher Street, he was on probation and was a sex offender. A30.

Detective Leary, who was working with Probation and Parole Officer Daniel Collins ("P.O. Collins"), conveyed the informant's tip to P.O. Collins, who corroborated the information provided by Detective Leary by checking probation

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records. A30. P.O. Collins confirmed that William David Burton, a Level II probationer and registered sex offender, lived at 1232 North Thatcher Street. A29. Detective Leary then sent a photograph of Burton to the informant *via* text. A30. After viewing the photo, the informant confirmed that the person he knew as "David" was Burton. A30.

P.O. Collins contacted his supervisor, Craig Watson ("P.O. Watson") and requested authorization to conduct an administrative search, which was granted following a telephone conference. A30. During the telephone conference, P.O. Collins and P.O. Watson reviewed an Arrest/Search Checklist that details several pre-arrest and pre-search criteria. A33. At the conclusion of this conference, P.O. Watson authorized P.O. Collins to conduct an administrative search of Burton's residence. A39.

During a search of Burton's bedroom the officers discovered baggies, a white plate containing an off-white substance, a razor blade with white residue upon it, a black digital scale, clear zip-lock bags containing a green, plant-like substance consistent in appearance with marijuana, a grinder, and smoking papers. A13. When the officers searched a jacket in Burton's bedroom closet, they found a clear, knotted plastic bag containing a white, powdery substance consistent in appearance with cocaine. A13. The white and green substances tested positive for cocaine

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(preliminary weight of 29 grams) and marijuana (preliminary weight of 1 gram), respectively. A13-14. Burton was present during the search and when P.O. Collins told Burton that he had seen him coming tom the bathroom, Burton told him that he had "flushed all his cocaine." (*See* Probation and Parole Report).

Burton waived his right to a jury trial and elected to have a stipulated bench trial. A50. At his stipulated trial, the State admitted into evidence, without objection, the Controlled Substances Laboratory Report prepared by a forensic chemist at the Office of the Chief Medical Examiner ("OCME"), which confirmed that the substances found in Burton's room were cocaine and marijuana. A15, 51. Burton did not raise any objections to the chain of custody or the results of the Controlled Substances Laboratory Report. A52.

Postconviction Claims

I. Procedural Bars

When reviewing a motion for postconviction relief under Superior Court Rule 61, the Court must first consider the procedural requirements of the rule before addressing any substantive issues.[3] "To protect the procedural integrity of

[3] *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996); *Flamer v. State*, 585 A.2d 736, 747 (Del. 1990); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

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Delaware's rules, the Court will not consider the merits of a post-conviction claim that fails any of Rule 61's procedural requirements."[4]

A. Rule 61(i)(1)

Burton's motion for postconviction relief must first comply with the one-year time limitation of Criminal Rule 61(i)(1).[5] Under this rule, a motion for post-conviction relief may not be filed more than one year after a conviction becomes final. Burton's conviction became final for purposes of Rule 61 when the Delaware Supreme Court issued its mandate on June 28, 2016.[6] Burton filed his *pro se* motion for postconviction relief within one year. As a result, his motion is not time barred.

B. Rule 61(i)(2)

Rule 61(i)(2) prohibits the filing of repetitive motions for postconviction relief. The Office of the Public Defender filed a Motion for Postconviction Relief on April 30, 2014. DI 33. Because the Delaware Supreme Court remanded Burton's direct appeal, but retained jurisdiction, the motion filed by the Public Defender was not in compliance with Superior Court Rule 61(b)(4). Therefore, the *pro se* motion filed on August 11, 2016 (DI 53) is deemed to be Burton's first motion for

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[4] *State v. Page*, 2009 WL 1141738, at *13 (Del. Super. April 28, 2009).

[5] *See Robinson v. State*, 584 A.2d 1203, 1204 (Del. 1990); *Younger*, 580 A.2d at 554.

[6] D.I. 52; Super. Ct. Crim. R. 61(m)(2).

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postconviction relief. DI 57. Rule 61(i)(2) does not prevent its consideration.

C. Rule 61(i)(3)

Under Rule 61(i)(3), a defendant who fails to raise any claim in the proceedings leading to conviction is barred from later bringing such a new claim for relief unless he can show: (A) cause for the default; and (B) actual prejudice. To establish cause sufficient to overcome the procedural default bar of Rule 61(i)(3), Burton must show that an external impediment prevented him from constructing or raising the claim either at trial or on direct appeal.[7] Burton is arguing that his counsel was ineffective, a claim appropriately raised in a properly filed postconviction motion.[8] He still must demonstrate actual prejudice resulting from the alleged flaws in representation in order to satisfy the second prong of Rule 61(i)(3).[9] As discussed below, Burton is unable to show actual prejudice.

D. Rule 61(i)(4)

Rule 61(i)(4) bars consideration of formerly adjudicated claims based upon principles of the "law of the case" doctrine.[10] The issues raised by Burton in

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[7] *Younger*, 580 A.2d at 556.

[8] *MacDonald v. State*, 778 A.2d 1064, 1071 (Del. 2001).

[9] *Younger*, 580 A.2d at 555-56.

[10] *See Weedon v. State*, 750 A.2d 521, 527 (Del. 2000) ("In our view, Rule 61(i)(4)'s bar on previously litigated claims is based on the 'law of the case' doctrine."). *See also State v. Denston*, 2007 WL 1848991, at * 7 (Del. Super. June 19, 2007); *State*

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this have been ruled upon by this Court when the Motion for a New Trial was denied on November 30, 2015. A136. The Delaware Supreme Court addressed the issue in affirming the decision of this court.[11] Thus, Burton's claim of a *Brady* violation is barred under Superior Court Rule 61(i)(4).

II. Applicable Standards - Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, Burton must show (1) that trial counsel's actions fell below an objective standard of reasonableness and (2) that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[12] In addition, the Delaware Supreme Court has consistently held that in setting forth a claim of ineffective assistance of counsel, a defendant must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal.[13]

Delaware courts have recognized that, while not insurmountable, the

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v. Truitt, 1996 WL 527217, at *4 (Del. Super. Aug. 14, 1996).

[11] *Burton v. State*, 2016 WL 3381847 (Del. June 8, 2016).

[12] *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). *Accord Skinner v. State*, 607 A.2d 1170, 1172 (Del. 1992); *Flamer*, 585 A2d. at 753-54; *Riley v. State*, 585 A.2d 719, 726-27 (Del. 1990); *Robinson v. State*, 562 A.2d 1184, 1185 (Del. 1989); *Stevenson v. State*, 469 A.2d 797, 799 (Del. 1983).

[13] *E.g., Skinner v. State*, 1994 WL 91138 (Del. Mar. 3, 1994); *Brawley v. State*, 1992 WL 353838 (Del. Oct. 7, 1992); *Wright v. State*, 1992 WL 53416 (Del. Feb. 20, 1992).

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Strickland standard as to the prejudice component of the inquiry is highly demanding and leads to a "strong presumption that the representation was professionally reasonable."[14] In evaluating an attorney's performance, a reviewing court should also "eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time."[15] Burton has the burden of showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[16]

When analyzing an ineffectiveness claim, it is not always necessary to look to the reasonableness of counsel's actions first. Because the defendant must prove both factors in the *Strickland* test, the Court may dispose of a claim by first determining if the defendant established prejudice. "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."[17] And, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient

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[14] *Wright v. State*, 671 A.2d, 1353, 1356 (Del. 1996); *Flamer*, 585 A.2d at 753-54.

[15] *See Strickland*, 466 U.S. at 689; *Gattis v. State*, 697 A.2d 1174, 1184 (Del. 1997).

[16] *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 A.2d at 687) (internal quotations omitted).

[17] *Strickland*, 466 U.S. at 697.

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prejudice, which [ ] [ ] will often be so, that course should be followed."[18]

The first consideration in the "prejudice" analysis alone "requires more than a showing of theoretical possibility that the outcome was affected."[19] The defendant must actually show a reasonable probability of a different result but for counsel's alleged errors.[20] A defendant must also make concrete and substantiated allegations of prejudice.[21] The "failure to state with particularity the nature of the prejudice experienced is fatal to a claim of ineffective assistance of counsel."[22] In the appellate context, a reviewing court determines whether a defendant has been prejudiced because his attorney failed to raise an issue on appeal by first considering the issue's merits.[23]

As discussed below, Burton fails to meet both prongs of the highly demanding *Strickland* test.

Claim I – State committed a "Brady violation by failing to timely disclose

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[18] *Id.*

[19] *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992).

[20] *Strickland*, 466 U.S. at 694; *Reese v. Fulcomer*, 946 F.2d 247, 256-57 (3d Cir. 1991).

[21] *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996) (citing *Wright*, 671 A.2d at 1356).

[22] *Id.* (citing *Flamer v. State*, 585 A.2d at 753).

[23] *Ploof*, 75 A.3d at 832.

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crucial impeachment information affecting the admissibility of the drug evidence."

Burton's *Brady* claim is procedurally barred because he did not raise it in the proceedings leading to the judgment of conviction and, this issue has been previously adjudicated by the Delaware Supreme Court.[24] Burton attempts to claim that new information has come to light regarding the performance of the testing chemist, Irshad Bajwa,[25] which would change this Court's decision regarding Burton's motion for a new trial and the Delaware Supreme Court's agreement with that decision. Burton asserts that "additional revelations concerning the OCME misconduct have continued to be uncovered" following the Delaware Supreme Court's affirmation of his conviction.[26] Burton characterizes these "revelations" as *Brady* material, and attempts to utilize such to circumnavigate the procedural bar set forth in Superior Court Rule 61(i)(4). However, Burton fails to acknowledge prior decisions that explicitly state "because the wrongdoing at the OCME was not known until 2014, incidents not falling within the relevant time period fail to qualify as

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[24] *Burton*, 2016 WL 3381847.

[25] *Amend. Pet.* at 28.

[26] *Amend Pet.* at 30.

Brady violations."[27] Additionally, in *Williams v. State*, the Delaware Supreme Court recently held that the Superior Court did not abuse its discretion by not permitting cross examination of the State's witnesses on the subject of OCME misconduct in other cases where he failed to demonstrate that his case was affected by the OCME misconduct.[28] Burton has not made a claim of actual innocence and he has not offered any evidence of OCME misconduct in his case. As such, a defendant who fails to allege and demonstrate that his case was directly affected by misconduct at the OCME cannot demonstrate prejudice and is not entitled to relief.[29] As the Delaware Supreme Court has noted, "[a]lthough sloppy evidence-handling practices and potentially worse behavior by OCME employees is disappointing and regrettable, there is no rational basis to infer that any sloppiness or other improprieties at OCME resulted in any injustice to [the Defendant]."[30] The same holds true here. Because Burton has failed to allege and show that his trial was directly affected by misconduct at the OCME, he cannot demonstrate prejudice

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[27] *Cannon v. State*, 127 A.3d 1164, 1169 (Del. 2015), see *State v. Absher*, 2014 WL 7010788, at *1 (Del. Super. Ct. Dec. 3, 2014), *aff'd sub nom. Aricidiacono v. State,* 125 A.3d 677 (Del. 2015).

[28] *Williams v. State*, 141 A.3d 1019, 1034 (Del. 2016) .

[29] *Anzara Brown v. State,* 117 A.3d 568, 570 (Del. 2015).

[30] *Id.*

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under Rule 61(i)(3). And, because his *Brady* claim is founded on OCME employee misconduct in *other* cases, it is procedurally barred.

Burton further argues that his case is distinguishable from unhelpful precedent because he was convicted after a stipulated trial, as opposed to entering a guilty plea. Again, Burton fails to recognize analogous, if not identical case law, which contradicts his position. In *State v. Miller,* the Court decided eight codefendants' motions for postconviction relief based on misconduct at the OCME.[31] Two of the codefendants elected to proceed with stipulated trials and one of the codefendants elected a jury trial. All three defendants were convicted, and their subsequent motions for postconviction relief were denied. In its decision, the Court found the following:

> "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 objection. Our courts have recognized that, '[w]here a defendant knowingly, intelligently, and voluntarily agreed to stipulated facts at trial regarding the drug evidence in that matter, the defendant has waived his [or her] right to test the chain of custody of that drug evidence.' Because there was no testimony by OCME employees presented at these trials, defendants' assertion that they were denied the opportunity to use the impeachment evidence on cross-examination holds little weight. Rather, Defendants Miller, Omar Brown, and Janard Brown effectively waived their rights to challenge the drug evidence at trial.

[31] *State v. Miller*, 2017 WL 1969780 (Del. Super. Ct. May 11, 2017).

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> Importantly, in all of these cases, the defendants never contested that the substances seized from them upon arrest were not illegal drugs. While some cases involve lab reports completed by former OCME employees whose conduct was implicated following the investigation, that 'does not mean that the State had any evidence or knowledge of the drylabbing at the time' these defendants were tried or entered pleas between 2010 and 2013. 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.'"[32]

Claim II –Trial Counsel's Stipulation to the evidence without Mr. Burton's knowledge or consent constituted ineffective assistance of counsel

Burton's ineffective assistance of counsel claim is properly before the court as those claims are generally not heard on direct appeal.[33] Burton signed a stipulation to a waiver of jury after losing a suppression hearing. In the amended

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[32] *Id* at 8, citing *State v. Burton,* ID No. 1301022871, at 8 (Del. Super. Nov. 30, 2015) (citing *Brown,* 108 A. 3d at 1205–06), *aff'd Burton v. State,* 142 A.3d 504 (Del. 2016), *See Demby v. State,* 148 A.3d 1170 (Del. 2016) ("There was... no testimony from any OCME employee that might be impeached by any mishandling that might have occurred there."). *See also Pendleton v. State,* 36 A.3d 350 (Del. 2012)(Table) (noting that the "very purpose of the stipulation" there "was to obviate the need for live testimony"), *See Hunt v. State,* 80 A.3d 960 (Del. 2013) ("[T]he Medical Examiner's report was admitted into evidence without objection by the defense because the identity and weight of the drugs was not in dispute at the trial....As such, Hunt's stipulation constituted a waiver of any objection to the admission of the Medical Examiner's report. Moreover, because the report was not testimonial in nature, there was no violation of Hunt's Sixth Amendment right of confrontation."); *Burton,* ID No. 1301022871, at 8 (citing *Brown,* 108 A.3d at 1205–06).

[33] *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

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motion for postconviction relief, Burton claims that he still expected trial counsel to challenge the State's evidence.

Burton's claim is predicated on the findings of misconduct at the Office of the Chief Medical Examiner ("OCME"). He contends that "[t]he State failed to disclose the scandal at the [OCME], specific prior instances of misconduct of Irshad Bajwa, and the full chemical testing documents that show discrepancies between the drugs that were seized by police and tested by the OCME."[34]

Defense counsel states that he counseled Burton to waive his jury trial in order to preserve the suppression issue and that in the case of a bench trial, the "allegation of the police officers would largely go unchallenged in cross-examination."[35] During the colloquy, Burton told the court that he had discussed the advantages and disadvantages of having a bench trial and did not want to discuss it any further with his attorney. The court found the waiver to be knowing, intelligent and voluntary. A50.

Defense counsel has the authority to make decisions as to the conduct of the strategy including when and whether to object.[36] Defense counsel asserted in his

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[34] *Def. Mot.* at 27.

[35] *Affidavit of Kevin J. O'Connell* at p. 3.

[36] *Clark v. State*, 2014 WL 5408410, at *4 (Del. Oct. 21, 2014).

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affidavit that he had explained the reasons for a stipulated bench trial and that it would preserve the issue of admissibility of the evidence for appellate purposes.[37] In essence, Burton's defense was that the evidence should have been suppressed, not that the evidence had been planted or incorrectly identified as a controlled substance. As such trial counsel's actions were sound and reasonable. It is impractical, illogical and unfair to assert that counsel was deficient for failing to raise issues unknown to all parties at the time of trial.

Conclusion

For the reasons stated above, the State respectfully requests that the Court deny Burton's Amended Motion for Postconviction Relief under Rule 61 without further proceedings.

Respectfully Submitted

Daniel B. McBride, #5034
Deputy Attorney General
820 N. French Street, 7th Floor
Wilmington, Delaware 19801

Date: January 29, 2018

[37] *Affidavit of Kevin J. O'Connell* at p. 3.

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

PETITIONER WILLIAM BURTON'S REPLY TO STATE'S RESPONSE TO DEFENDANT'S AMENDED MOTION FOR POSTCONVICTION RELIEF

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Dated: February 28, 2018

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I. THE STATE'S RESPONSE CONTAINS MULTIPLE FACTUAL AND LEGAL INACCURACIES IN RELATION TO MR. BURTON'S FIRST POSTCONVICTION CLAIM.

A. Mr. Burton's *Brady* claim is not procedurally barred under Rule 61(i)(3) or (4).

The State contends that this claim is procedurally barred because it was ruled upon by the Superior Court when the motion for new trial was denied and when the Delaware Supreme Court affirmed the decision on appeal.[1] From this, the State asserts that Mr. Burton's claim is both procedurally defaulted and previously adjudicated.[2] However, Mr. Burton cannot have both raised the claim and not raised the claim in a prior proceeding. Regardless, for the reasons already set forth in the Amended Motion,[3] Mr. Burton's claim is not procedurally barred under Rule 61(i)(3) or (i)(4).

As the Amended Motion articulated, the *Brady* claim previously raised on direct appeal did not encompass the breadth of information concerning the OCME that had been withheld by the State but is now known.[4] Although the State cites the law of the case doctrine as support for the applicability of a procedural bar,[5] the law of the case doctrine, upon which Rule 61(i)(4) is based, actually supports Mr. Burton's position. As explained in the Amended Motion,[6] the law of the case allows the Court to reexamine issues because of changed circumstances, since previously unavailable information can change the factual basis underlying the prior decision. The State rejects the significance of the chemist who tested the substances in Mr. Burton's case being suspended

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[1] The State's Response to Defendant's Amended Motion at 8 (hereinafter cited as "Response pg. _").

[2] Response pg. 11.

[3] Defendant's Amended Motion for Postconviction Relief at 27-31, (hereinafter cited as "Amended pg. _").

[4] Amended pg. 28-29.

[5] Response pg. 7.

[6] Amended pg. 28 (citing *State v. Wright*, 131 A3.3d 10, 321-24 (Del. 2016); *Hoskins v. State*, 102 A.3d 724, 729 (Del. 2014)).

following accusations of drylabbing.[7] However, this fact, along with the failure of trial counsel to acknowledge the discrepancy in weight,[8] was essential to properly assessing and resolving the motion for new trial. Most significantly, as Mr. Burton explained in the Amended Motion,[9] he did not knowingly, voluntarily or intelligently stipulate to the State's drug evidence, a significant factor in the Court's denial of his motion for new trial.[10] The State does not respond to this issue and does not address the impact that trial counsel's error clearly had on Mr. Burton's ability to challenge the chain of custody.

B. Mr. Burton's *Brady* claim has merit.

The State asserts that any new OCME revelations cannot be *Brady* information, because prior cases explicitly find that the OCME misconduct was not known until 2014 and can therefore not qualify as a *Brady* violation.[11] The State cites a series of cases in support of its position which the State incorrectly alleges Mr. Burton ignores.[12] However, the State fails to acknowledge the significant dissimilarities between the prior cases and the present case, which demonstrate that Mr. Burton's claim is not barred by these prior decisions.

The State references *Williams v. State*, noting that the Court's decision to deny trial counsel's request to cross-examine witnesses on the OCME misconduct was upheld on appeal.[13] However, the State fails to properly consider that Williams' case was decided under the Confrontation Clause of the United States Constitution and that unlike in Mr. Burton's case, Williams' trial counsel

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[7] Response pg. 12.
[8] Amended pg. 30; A167.
[9] Amended pg. 30.
[10] A143, 144.
[11] Response pg. 11-12.
[12] Response pg. 12-13.
[13] Response pg. 12 (citing *Williams v. State*, 141 A.3d 1019 (Del. 2016)).

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vigorously challenged the chain of custody at trial by extensively cross-examining the State's witnesses on errors with the chain of custody and the practices and protocols of the OCME.[14] The holding in *Williams* is wholly irrelevant to Mr. Burton's claim given the significantly different factual backgrounds of the cases.

In *Cannon v. State*, the defendant, after being read his Miranda rights, confessed to possessing the drugs and informed the police where he had purchases them, statements which were also corroborated by a witness.[15] The Delaware Supreme Court found that this neutralized any possible *Brady* violation.[16] Moreover, the Supreme Court's finding that Cannon need to allege actual innocence to overcome the procedural bar of Rule 61 was the result of it being his second motion for postconviction relief.[17] Not only is this Mr. Burtons' first postconviction motion, but he filed a motion that specifically tailored the facts of his case to the issue raised, unlike the boilerplate motion that was filed in *Cannon*.[18]

Similarly, *Aricidiancono v. State* involved defendants who all voluntarily admitted to possessing illegal substances and sought to overturn their guilty pleas following disclosure of the misconduct at the OCME.[19] As such, it has no applicability to Mr. Burton who rejected a plea offer and did not voluntarily consent to a stipulation to the State's evidence. Additionally, although the State references *Anzara Brown v. State*,[20] Mr. Burton's Amended Motion already articulated in detail

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[14] *Williams*, 141 A.3d at 1022, 1030-31, 1033.
[15] 127 A.3d 1164, 1165, 1169 (Del. 2015).
[16] *Id.* at 1169.
[17] *Id.* at 1167.
[18] *Id.* at 1167-68.
[19] 125 A.3d 677, 680-81 (Del. 2015).
[20] Response pg. 12 (citing *Anzara Brown v. State*, 117 A.3d 568 (Del. 2015)).

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the ways in which *Brown* is distinguishable from the present case,[21] contentions to which the State failed to respond.

The State denies that Mr. Burton's conviction following a stipulated trial is any different than entering a guilty plea and relies on *State v. Miller* to support this position.[22] The State incorrectly asserts that *Miller* is "analogous, if not identical" to Mr. Burton's case.[23] The key factor in the holding of *Miller* was that the OCME lab reports were stipulated to and admitted without objection, as a defendant's knowing, voluntary and intelligent stipulation to the drug evidence waives his or her right to test the chain of custody at a later date.[24] However, as Mr. Burton explained in his Amended Motion, he did not knowingly, voluntarily or intelligently consent to a stipulation of the State's drug evidence.[25] Although Mr. Burton consented to a bench trial, he did not consent to a stipulated bench trial, and trial counsel's affidavit in response to Claim II never asserts that he obtained Mr. Burton's consent or that Mr. Burton clearly understood the type of trial that would occur should they stipulate to the State's evidence.[26] From this, it is apparent that the *Brady* violation had a significant impact in this case, as Mr. Burton (both personally and through trial counsel) never had the opportunity to challenge the chain of custody or the findings of the OCME once trial counsel stipulated to the State's evidence, a stipulation that trial counsel would no doubt have not entered had he been aware of the misconduct at the OCME.

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[21] Amended pg. 56-57.
[22] Response pg. 13.
[23] Response pg. 13.
[24] *State v. Miller*, Del. Super., ID No. 1001009884, Carpenter, J., at 18 (May 11, 2017) (Mem. Op.).
[25] Amended pg. 64-72.
[26] Trial Counsel's Affidavit in Response to Allegations of Ineffective Assistance of Counsel at 3-4, attached as Exhibit Q (hereinafter cited as "Affidavit pg. _").

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The State asserts that no *Brady* violation occurred because there was no knowledge of OCME wrongdoing until 2014.[27] However, as Mr. Burton noted in the Amended Motion, trial counsel requested discovery in June 2014 for "case specific discovery information" concerning the OCME misconduct that does not appear to have ever been provided.[28] Thus, even if the State was unaware prior to 2014 of OCME wrongdoing, the State violated its continuing duty to disclose information concerning guilt or innocence to the defense.[29] The State ignores Mr. Burton's analysis and simply asserts that incidents that occurred prior to 2014 are outside of the relevant time period for a potential *Brady* claim.[30]

Moreover, the State also fails to acknowledge or respond to Mr. Burton's contentions that the State was aware of the OCME misconduct prior to 2014.[31] As such, the State ignores a 2007 email chain outlining a meeting that had been scheduled between the OCME DNA unit and the New Castle County Police Department to discuss packaging and chain of custody concerns, including how there had been "many bad NCCPD examples".[32] The State also disregards a 2010 email from an OCME manager detailing that over fifty pieces of evidence, which the Delaware State Police were requesting to be returned, could not be located at the OCME.[33] As the State chose to ignore these

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[27] Response pg. 11-12.

[28] A83-90.

[29] Amended pg. 43 (citing *United States v. Hampton*, 109 F. Supp. 3d 431, 439-440 (D. Mass. 2015); *Commonwealth v. Scott*, 467 Mass. 336, 5 N.E.3d 530, 542-43 (Mass. 2014) (noting that Massachusetts courts regard a state drug lab chemist who stole drugs from cases as a member of the Commonwealth's prosecution team for purposes of deciding whether to vacate guilty pleas); *Deberry v. State*, 457 A.2d 744, 751-52 (Del. 1988) (holding that the State's duty to preserve under *Brady* applies to all investigative agencies within the State)).

[30] Response pg. 11.

[31] Amended pg. 41-45, 50-51.

[32] A363.

[33] A368-369.

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critical documents rather than attempt to distinguish them, its assertion that there was no knowledge of wrongdoing at the OCME until 2014[34] is inaccurate and refuted by the evidence articulated by Mr. Burton.[35]

Furthermore, the State ignores that a prosecutor's duty to disclose *Brady* information is not limited to those materials that the prosecutor has personal knowledge of, as knowledge by another member of the prosecution team may be imputed upon that prosecutor.[36] The "prosecution team" includes, but is not limited to, "federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of a criminal case against the defendant".[37] Specifically in the realm of state crime labs, at least two courts have held that a drug

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[34] Response pg. 11, 14.

[35] Amended pg. 44-45.

[36] *Giglio v. United States*, 405 U.S. 150, 154 (1972) (holding that a promise "made by one attorney must be attributed, for these purposes, to the government"); *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984) (noting that the prosecution "cannot get around *Brady* by keeping itself in ignorance or compartmentalizing information about different aspects of a case"); *United States ex rel Smith v. Fairman*, 769 F.2d 386, 391-92 (7th Cir. 1984) (holding that "[t]he prosecutor's ignorance of the existence of [exculpatory ballistics] worksheets does not justify the State's failure to produce it, since *Brady* provides that good faith or bad faith of the prosecution is irrelevant to the due process inquiry"); *Freeman v. Georgia*, 599 F.2d 65, 69 (5th Cir. 1979) (holding "that when an investigative police officer willfully and intentionally conceals [an eyewitness], regardless of his motivation and the otherwise proper conduct of the state attorney, the policeman's conduct must be imputed to the state as part of the prosecution team"); *see also* Bennet L. Gershman, Litigating Brady v. Maryland: Games Prosecutors Play, 57 Case W.Res. L.Rev. 531, 556 (2007) (stating that "if a prosecutor is faced with a specific request for *Brady* evidence and know or should know that the evidence exists, he cannot bury his head in the sand").

[37] David W. Ogden, Memorandum for Department Prosecutors, 165, January 4, 2010, last visited February 13, 2018, http://www.justice.gov/dag/memorandum-department-prosecutors; *see also Smith v. Cain*, 132 S.Ct. 627, 629-30 (2012) (finding a *Brady* violation for the failure to disclose the lead detective's notes containing impeachment evidence); *Youngblood v. West Virginia*, 547 U.S. 867, 868-70 (2006); *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (stating "that the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police"); *Pennsylvania v. Ritchie*, 480 U.S. 39, 61 (1987) (finding, to a degree, that the defendant had a right to know whether a

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lab chemist was a member of the prosecution team.[38]

The OCME's partnership with Delaware law enforcement in the prosecution of all drug cases clearly demonstrates that the OCME is an arm of the State and therefore a member of the prosecution team for purposes of *Brady*.[39] Thus, it is apparent that the OCME is a member of the "prosecution team," and the State was then and is now imputed with the knowledge of the problems occurring at the OCME.[40] Thus, the State's failure to consider this well recognized principle of law renders its assertion that it could not have known of OCME misconduct prior to 2014 unpersuasive.

Because the State is incorrect that Mr. Burton's claim is procedurally barred under both Rule 61(i)(3) and (4), and fails to respond to Mr. Burton's evidence of the State's pre-2014 knowledge regarding OCME wrongdoing and uses inapplicable case law to supports its position, the State's

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Child and Youth Services file had any favorable information).

[38] *Hampton*, 109 F.Supp. 3d at 440; *Scott*, 5 N.E.3d at 543 (holding that misconduct of a chemist at a state drug lab was "attributable to the government"); *Commonwealth v. Martin*, 696 N.E.2d 904, 909 (Mass. 1998) (holding that "[a] prosecutor's obligations extend to information in possession of a person who has participated in the investigation or evaluation of the case and has reported to the prosecutor's office concerning the case"); *Commonwealth v. Woodward*, 694 N.E.2d 1277, 1292 (Mass. 1998) (holding that a medical examiner is a member of the prosecution team as the "[l]egislature contemplated coordination of efforts between the medical examiner and the district attorney in investigation of deaths where criminal violence appears to have taken place").

[39] Amended pg. 22-23, 42-44.

[40] *Giglio*, 405 U.S. at 154 (holding that a promise "made by one attorney must be attributed, for these purposes, to the Government"); *Carey*, 738 F.2d at 878 (noting that the prosecution "cannot get around *Brady* by keeping itself in ignorance, or compartmentalizing information about different aspects of a case"); *United States ex rel Smith*, 769 F.2d at 391-92 (holding that "[t]he prosecutor's ignorance of the existence of [exculpatory ballistics] worksheets does not justify the State's failure to produce it, since *Brady* provides that good faith or bad faith of the prosecution is irrelevant to the due process inquiry"); *Freeman*, 599 F.2d at 69 (holding "that when an investigating police officer willfully and intentionally conceals [an eyewitness], regardless of his motivation and the otherwise proper conduct of the state attorney, the policeman's conduct must be imputed to the state as part of the prosecution team"); *see also* Gershman, *supra* note 36.

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response to Mr. Burton's *Brady* claim is unpersuasive.

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II. THE STATE'S RESPONSE CONTAINS MULTIPLE FACTUAL AND LEGAL INACCURACIES IN RESPONSE TO MR. BURTON'S SECOND POSTCONVICTION CLAIM.

A. Mr. Burton's claim of ineffective assistance of counsel is not procedurally barred under Rule 61(i)(3).

It is unclear whether the State is in agreement with Mr. Burton that this claim is not procedurally barred,[41] as the State's Response presents contradictory positions on the matter. The State first asserts that Mr. Burton must meet the exception of Rule 61(i)(3) for failing to raise the claim in the proceedings leading to the judgment of conviction.[42] Presumably, the State asserts Mr. Burton has demonstrated that "an external impediment prevented him from constructing or raising the claim either at trial or on direct appeal" in that an ineffective assistance of counsel claim is "appropriately raised in a properly filed postconviction motion."[43] Yet the State alleges that Mr. Burton cannot demonstrate the actual prejudice necessary "to satisfy the second prong of Rule 61(i)(3)."[44] However, the State also contends that Mr. Burton's claim is properly before this Court, because ineffective assistance of counsel claims "are generally not heard on direct appeal."[45]

Because it would be illogical to assert that Mr. Burton is procedurally barred from raising a claim he was unable to raise prior to the postconviction review stage, barring extraordinary circumstances,[46] and because the State presents contradictory contentions on the topic, it suggests

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[41] Amended pg. 64.
[42] Response pg. 7.
[43] Response pg. 7.
[44] Response pg. 7.
[45] Response pg. 14.
[46] Only if the deficiency is so apparent on the record that the Delaware Supreme Court is able to fully consider the deficiencies in representation will an ineffective assistance of counsel claim be considered for the first time on appeal. *See Dobson v. State*, Del., No. 617, 2012, Ridgely, J., at 4 (Oct. 31, 2013) (attached as Exhibit R); *see also Mirabal v. State*, Del., No. 211 2013, Ridgely, J., at 4-5 (March 11, 2014) (attached as Exhibit S).

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the State's position is simply be an oversight. As the Public Defender's Office could not have raised a claim of ineffectiveness against itself on direct appeal, there is no basis for finding that Claim II is procedurally defaulted.

B. The State's answer is unresponsive to Mr. Burton's claim of ineffective assistance of counsel.

The State's Response does not truly address Mr. Burton's second postconviction claim, and appears to confuse the issue raised in Claim I with Claim II. Mr. Burton asserted in his Amended Motion that trial counsel provided ineffective assistance of counsel by stipulating to the State's evidence without Mr. Burton's knowledge or consent, which undermined his constitutional right to plead not guilty.[47] The State, however, misstates Mr. Burton's claim, simplifying it to: "Burton claims that he still expected trial counsel to challenge the State's evidence" following his decision to proceed with a bench trial.[48] However, this is a mischaracterization of both Mr. Burton's claim and the underlying facts.

The State attempts to conflate Mr. Burton's stipulation of waiver of jury[49] to implicit consent for an exceedingly brief trial during which no portion of the State's case would be challenged by trial counsel. The State notes that Mr. Burton informed the Court he had discussed the advantages and disadvantages of having a bench trial with his attorney, yet ignores the obvious; this colloquy

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[47] It should be noted that an issue highly similar to Mr. Burton's ineffectiveness claim is pending before the United States Supreme Court. In the case of *McCoy v. Louisiana*, No. 16-8255, the Supreme Court has been asked to decide whether a defendant's constitutional rights are violated when defense counsel, over the objection of the defendant, admits his client's guilt, or admits element(s) of the crime, as part of the trial strategy developed by defense counsel and whether the issue should be assessed under the *Strickland* standard or the *Cronic* standard. Oral argument was held in *McCoy v. Louisiana* on January 17, 2018.

[48] Response pg. 14-15.

[49] A47.

exclusively addressed Mr. Burton's decision to waive his right to a trial by jury, not to waive his right to challenge the State's case.[50] The Court's finding that Mr. Burton's waiver was knowing, intelligent and voluntary has no bearing on whether Mr. Burton consented to a stipulated trial in which the State's evidence was not subjected to any meaningful adversarial testing. Nor does it demonstrate that Mr. Burton had any knowledge of trial counsel's intentions, as the record is glaringly absent of a signed stipulation to facts or any affirmative acknowledgment by Mr. Burton that he understood and consented to such a trial.

Like the State, trial counsel places significance on Mr. Burton's pre-trial colloquy with the Court, while skipping over the fact that the colloquy never addressed Mr. Burton's knowledge of or consent to a *stipulated* bench trial.[51] Trial counsel notes that because his records reflect he discussed a plea offer and the prospects for an appeal on the suppression issue with Mr. Burton, from that he "can only assume that [he] explained to Mr. Burton 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."[52] Moreover, trial counsel asserts that "[i]t would have been [his] 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" and that he "probably conducted some explanation as to how the trial would proceed before Judge Scott."[53]

Trial counsel's assertions do nothing to dispel Mr. Burton's claim that he was unaware of trial counsel's intentions and would not have agreed to a stipulated bench trial because he wanted

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[50] Response pg. 15.
[51] Affidavit pg. 3-4.
[52] Affidavit pg. 3-4.
[53] Affidavit pg. 4.

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to challenge the State's evidence.[54] Trial counsel's contentions are all framed in the hypothetical, in that he "assumes" he discussed a stipulated bench trial with Mr. Burton and "probably" explained to him how such a trial would proceed. As Mr. Burton pleaded not guilty and, as trial counsel notes, rejected a plea offer shortly before trial, it is clear that Mr. Burton chose to exercise his constitutional right to have the State prove his case beyond a reasonable doubt.

As Mr. Burton explained in the Amended Motion, trial counsel conceded nearly all of the elements of all of the offenses the State was required to prove beyond a reasonable doubt.[55] As such, Mr. Burton's guilt as to the charged offenses was conceded and his plea of not guilty undermined, without his consent or knowledge, and without subjecting the State's case to meaningful adversarial testing. As noted in the Amended Motion, certain decisions are so inherently personal to the defendant that they cannot only be made by the defendant, such as the fundamental decisions to plead guilty or waive a jury.[56] For these rights to be waived by counsel, "fully-informed and public-acknowledged consent" are required.[57] Thus, just as trial counsel impeded the defendant's rights in *Cooke v. State* by pursuing a guilty but mentally ill defense over the defendant's objection, despite the fact that he pleaded not guilty and counsel intended to challenge the State's case,[58] trial counsel impeded Mr. Burton's rights by stipulating to the State's evidence without his consent and by failing to challenge the State's case. The State fails to respond to Mr. Burton's argument, which was clearly laid out in the Amended Motion.[59]

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[54] Amended pg. 65.
[55] Amended pg. 65-66.
[56] *Cooke v. State*, 977 A.2d 803, 841 (Del. 2009).
[57] *Id.* at 842.
[58] *Id.* at 809, 817, 850.
[59] Amended pg. 66-67.

Although trial counsel believes he informed Mr. Burton that a bench trial would be the most "expeditious" way of preserving the appellate issue,[60] both trial counsel and the State fail to acknowledge Mr. Burton's contention that a stipulated bench trial was unnecessary to preserve the appellate issue and provide Mr. Burton with no benefit. As Mr. Burton noted, not only does the defendant typically receive a benefit from agreeing to a stipulated trial, but in this case, the overly broad stipulation was actually to the detriment of Mr. Burton, as it allowed the State to prove its case through facts that would have otherwise been inadmissible at trial.[61] Thus, both trial counsel and the State ignore that the stipulation, entered into without Mr. Burton's consent, was unnecessary to preserve the appellate issue, allowed the State to obtain a conviction through the use of otherwise inadmissible evidence and failed to subject the State's case to meaningful adversarial testing.

As such, trial counsel's error essentially negated Mr. Burton's fundamental right to plead not guilty.[62] Accordingly, the central issue is not simply whether trial counsel's actions were "sound and reasonable" or whether defense counsel has the authority to make decisions of trial strategy, as the State suggests.[63] Rather, the question is whether trial counsel's decision to enter into a stipulation to nearly all of the State's evidence, thereby conceding guilt for the charged offenses, without Mr. Burton's consent, could be considered reasonable when it undermined Mr. Burton's constitutional right to make the fundamental decisions in his case, provided no benefit to Mr. Burton and allowed the State to use inadmissible evidence in proving its case. The answer to that can only be that trial counsel's conduct fell below an objective standard of reasonableness, conduct which clearly

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[60] Affidavit pg. 3.
[61] Amended pg. 68-69.
[62] *Cooke*, 977 A.2d at 843.
[63] Response pg. 15-16.

prejudiced Mr. Burton. This prejudice is even more so evident in that following knowledge of the OCME misconduct, Mr. Burton was unable to challenge the chain of custody and evidence in his case and was denied a new trial because trial counsel stipulated to that very evidence. The State confuses this element of prejudice with Claim I, incorrectly claiming that Mr. Burton's claim "is predicated on the findings of misconduct at the Office of the Chief Medical Examiner"[64] However, trial counsel still rendered ineffective assistance of counsel regardless of the misconduct at the OCME. As noted in the Amended Motion, the impact of trial counsel's error as on the *Brady* claim ans the denial of the motion for new trial, is simply one way in which Mr. Burton was prejudiced by trial counsel's unreasonable decision.[65]

Although the State asserts that "[i]t is impractical, illogical and unfair to assert that counsel was deficient for failing to raise issues unknown to all parties at the time of trial,"[66] the State ignores that trial counsel's performance was deficient for infringing on Mr. Burtons' constitutional right to plead not guilty and to subject the State's case to meaningful adversarial testing without Mr. Burton's knowledge or consent. Mr. Burton did not knowingly, voluntarily or intelligently consent to a stipulated bench trial, particularly one that essentially conceded his guilt for the charged offenses and made the State's case for it. As noted in the Amended Motion,[67] the Court made no inquiry of Mr. Burton's understanding of and consent to a stipulated bench trial and the record is devoid of any indication that Mr. Burton was aware of or consented to the stipulated bench trial.

Because the State fails to provide an applicable response to Mr. Burtons ineffective assistance

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[64] Response pg. 15.
[65] Amended pg. 71-73.
[66] Response pg. 16.
[67] Amended pg. 70-72.

of counsel claim and confuses Claim I and II, the State's response is unpersuasive.

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CONCLUSION

WHEREFORE, based on the foregoing, Petitioner respectfully requests that this Court schedule an evidentiary hearing and grant all other appropriate relief.

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Dated: February 28, 2018

16 AU47 HA1022

EFiled: Jul 19 2018 09:38PM EDT
Filing ID 62257504
Case Number 287,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM BURTON,	:	
	:	
Defendant-Below,	:	**No. 287, 2018**
Appellant,	:	
	:	**Court Below: Superior Court of the**
v.	:	**State of Delaware in and for New**
	:	**Castle County**
STATE OF DELAWARE,	:	
Plaintiff-Below,	:	**Case Below No. 1301022871**
Appellee.	:	
	:	

APPELLANT'S OPENING BRIEF

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Dated: July 19, 2018

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NATURE OF PROCEEDINGS

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

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

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

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[1] Hereinafter referred to as (A_).

[2] The Superior Court Docket Sheets for Case No. 1301022871 are attached as A1-12 and assigned DE #.

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On April 30, 2014, while Mr. Burton's case was still pending appeal, the Public Defender's Office filed a "Motion for Postconviction Relief to Vacate Title 16 Conviction Related to Drug Evidence." (DE33). On June 19, 2014, this Court stayed the appeal indefinitely and remanded the matter to the Superior Court for record development. (DE34). On January 30, 2015, trial counsel filed a motion for a new trial in the Superior Court. (DE39). The State filed a response to the defense's motion on March 27, 2015, and trial counsel filed a reply to the State's response on April 17, 2015. (DE43, 44).

On June 25, 2015, the Superior Court ordered the parties to submit supplemental filings on the motion for a new trial in light of the recently decided cases of *State v. Irwin*, *State v. Dilip Nyala* and *State v. Hakeem Nesbitt*, as well as related decisions of this Court. (DE45). Trial counsel filed a supplement on July 8, 2015, in which a request for re-testing of the suspected drug evidence was made. (DE48). The State filed its supplement on August 10, 2015. (DE47). On November 30, 2015, the defense's requests for a new trial and for re-testing of the suspected drug evidence were denied. (DE49). On June 8, 2016, this Court affirmed the judgment of the Superior Court on direct appeal. (DE52).

Mr. Burton filed *pro se* motions for postconviction relief and for the appointment of counsel on August 11, 2016. (DE53, 54). On September 27,

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2016, the Superior Court issued a letter raising significant concerns about the appropriateness of the Rule 61 previously filed by the Public Defender's Office, as the case had still been pending appeal. (DE57). To put the case in the proper procedural context and enable Mr. Burton to proceed with his *pro se* postconviction motion, the standard pleading previously filed by the Public Defender's Office was denied on September 27, 2016. (*Id.*).

Mr. Burton filed an Amended Motion for Postconviction Relief on August 17, 2017. (DE63). Trial counsel filed an affidavit in response on November 27, 2017, and the State filed a response brief on January 29, 2018. (DE70, 72). Mr. Burton filed a reply brief on February 28, 2018. (DE73). On April 30, 2018, the Superior Court denied Mr. Burton's Amended Motion for Postconviction Relief. (DE74; Exhibit A[3]). Mr. Burton filed a notice of appeal on May 30, 2018. This is Mr. Burton's Opening Brief on Appeal.

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[3] Attached as Exhibit A, hereinafter cited as "Denial pg.__".

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SUMMARY OF ARGUMENT

1. The Superior Court erred in denying Mr. Burton's *Brady* claim, as the court's conclusion that Mr. Burton did not meet the bright line test established in *State v. Irwin* is unsupported by the record. Moreover, the Superior Court failed to recognize that Mr. Burton demonstrated a sufficient inference that the drug evidence in this case had been tampered with and clearly articulated the ways in which the State's suppression of *Brady* material prejudiced his right to a fair trial.

2. The Superior Court erred by denying Mr. Burton's ineffective assistance of counsel claim, because it is clear that trial counsel violated Mr. Burton's due process right to a fair trial by stipulating to the State's evidence without Mr. Burton's consent. By failing to hold the State to its constitutional burden of proving each and every element of the offense beyond a reasonable doubt, and by conceding elements of the offenses, trial counsel denied Mr. Burton his due process right to meaningfully oppose the prosecution's case and conceded his guilt.

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STATEMENT OF FACTS

On January 31, 2013, Detective Leary received a phone call from an individual he identified as "a past-proven and reliable confidential informant." (A38). The informant notified Detective Leary that a black male, who he knew only as "David," was selling crack cocaine out of his residence at 1232 North Thatcher Street. (*Id.*). The informant advised that the individual was on probation as a sex offender. (A39). Detective Leary was advised by SBO Collins of Probation and Parole that an individual by the name of William David Burton lived at that residence and was on Level II probation. (*Id.*). At that point, Detective Leary sent a photo of the defendant, William David Burton, to the confidential informant via text message, who responded that this was the individual he knew as David. (*Id.*).

SBO Collins held a telephone conference with his supervisor who approved an administrative search of Mr. Burton's residence. (A39, 42). While searching Mr. Burton's bedroom, SBO Collins located the following items: a white-in-color plate with an off-white chunky substance, a razor blade, two Ziploc bags containing a green plant-like substance, a grinder, Top smoking papers, $150.00, a black digital scale, baking soda, a glass jar containing an off-white chunky substance, and a clear plastic bag containing a white powder substance. (A60).

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After collecting the evidence, Detective Leary ascertained a preliminary weight of 29.0 grams for the white powder substance and 1.0 gram for the green plant-like substance. (A22, 23). The clear plastic bag containing a white powder substance and the two small Ziploc bags containing a green plant-like substance were submitted to the Office of the Chief Medical Examiner on March 4, 2013 for testing. (A30).

The suspected drug evidence was weighed and tested by chemist Irshad Bajwa. According to Mr. Bajwa's report, the white powder tested positive for cocaine and weighed 28.45 grams, while the plant material tested positive for Cannabis and weighed 0.93 grams. (A30, 60). Mr. Bajwa's report, dated May 15, 2013, reveals that the suspected drug evidence was tested by the OCME on May 8, 2013. (A30, 35, 36).

On June 3, 2013, trial counsel filed a motion to suppress all evidence seized as a result of the administrative search of Mr. Burton's residence. Hearings on the motion were held on August 16 August 21, 2013. Trial counsel argued that the supervisor failed to independently assess whether the confidential informant was past, proven and reliable and instead, simply relied upon the word of Detective Leary. (A45). Furthermore, trial counsel argued that there had been no

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corroboration of concealed criminal activity before the search was conducted. (A46).

The Superior Court denied the defense's motion to suppress on September 9, 2013, finding that reasonable grounds had existed to conduct the administrative search of Mr. Burton's residence. (A52). In reaching this conclusion, the court relied upon the quality of information provided by the informant, Detective Leary's familiarity with the informant as past-proven and reliable, and the fact that the informant identified criminality with specificity. (*Id.*).

On September 24, 2013, Mr. Burton waived his right to a jury trial by signing a stipulation of waiver of jury. (A56, 58-59). The Court conducted a colloquy with Mr. Burton to ascertain whether his decision to waive a jury trial and proceed with a bench trial was knowing, intelligent and voluntary. (A58-59). Trial counsel informed the Court that it was their belief that the suppression issue was the most important issue in the case, and a "pretty thorough record" had been made before Judge Medinilla that they were willing to rely upon for the suppression issue. (A58). Trial counsel noted that the defense was willing to rely upon that record, in addition to the record the State "will make with respect to where the drugs were found and what they were and how much was found" for purposes of trial. (*Id.*). During the colloquy on Mr. Burton's waiver of his right

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to a jury trial, the Court did not discuss with Mr. Burton trial counsel's stipulation as to the identity and weight of the drug evidence or ascertain whether Mr. Burton understood and consented to a stipulated bench trial. (A58-59).

Detective Leary, the State's only witness, testified that the items found in Mr. Burton's bedroom were consistent with a process known as "popcorning," which is commonly used in the production and sale of cocaine. (A60, 61). Trial counsel called no witnesses and asked only a few questions during cross-examination regarding the process of "popcorning." (A61).

The Court found Mr. Burton guilty of one count each of Drug Dealing, Aggravated Possession, Possession of Marijuana and Possession of Drug Paraphernalia. (A62). The two separate counts of Possession of Marijuana as listed in the indictment were consolidated. (A61). Mr. Burton received a life sentence as an habitual offender, with trial counsel noting during the sentencing hearing that "[t]his was a search and seizure case where a stipulated trial resulted in a conviction", which Mr. Burton would appeal. (A66, 69, 70). Mr. Burton filed a notice of appeal with this Court on December 30, 2013. (DE24; A77). However, the appeal was stayed and the case remanded to the Superior Court for further record development once concerns were raised as to the reliability of testing performed at the OCME. (A75).

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On January 14, 2014, during the trial in *State v. Walker*[4], it was discovered that suspected drugs, which had been sealed in an evidence envelope and stored at the OCME, were missing and had been replaced with blood pressure pills. (A94). An investigation into possible misconduct at the OCME then commenced. In February 2014, Delaware's Department of Justice ("DOJ") publicly disclosed that from 2010 to early 2014, employees at the OCME's crime lab were stealing and/or tampering with alleged drug evidence stored at the crime lab. (A92-93).

On June 19, 2014, the DOJ published its preliminary findings report in which it was revealed that there were "systemic operational failings" at the OCME which "resulted in an environment in which drug evidence could be lost, stolen or altered, thereby negatively impacting the integrity of many prosecutions."[5] The DOJ's preliminary report documented numerous problems at the OCME. (A102-105, 107, 109, 111, 113-114, 116).

As a result of the scandal, three OCME employees were suspended and later fired. (A121). Chief Medical Examiner Dr. Richard Callery pleaded no contest to two counts of official misconduct and was sentenced to one year in prison.[6]

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[4] *State v. Walker*, ID No. 1202002406 (Del. Super. Ct.).

[5] *See* June 19, 2014 Investigation of Missing Drug Evidence: Preliminary Findings at A92-93.

[6] *See* Superior Court docket sheet for *State v. Richard Callery* (ID: 1505007228) at A315; October 22, 2015 Sentencing Order for *State v. Richard*

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Although most of the charges were later dropped,[7] lab manager Farnam Daneshgar was charged with drug possession and accused of "dry labbing".[8] Forensic Evidence Specialist James Woodson pleaded guilty to unlawful dissemination of criminal history and pleaded no contest to official misconduct.[9]

In August 2014, hearings were held before the Honorable William C. Carpenter, Jr. regarding the OCME scandal and what effect it would have on cases scheduled for trial.[10] During those hearings, testimony was presented about various colored evidence tape being found at the OCME. (A156, 158, 160, 170, 171).

Following the preliminary report and hearings, evidence of material problems with the OCME and instances of employee misconduct has continued to grow. Forensic Chemist Patricia Phillips was suspended and later resigned after she lost a bag of heroin in her lab coat, violated lab protocol and discrepancies

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Callery (ID: 1505007228) at A318-319.

[7] *See* May 12, 205 Delaware Online News Article: "State drops case against chemist Farnam Daneshgar" at A294-295.

[8] Dry labbing occurs when a chemist supplies fictional test results without conducting the necessary examination.

[9] *See* Superior Court docket sheet for *State v. James Woodson* (ID: 1405018655) at A296; Sentencing Order for *State v. James Woodson* (ID: 1405018655) at A307-208.

[10] *See* August 20, 2014 and August 21, 2014 OCME Hearing Transcripts at A136-172.

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were identified in another case.[11] In the corrective action request form documenting the misconduct, Ms. Phillips received the lowest rating for the categories of "[c]ontinues to demonstrate the required job skills and knowledge" and "uses resources available in an effective manner." (A188). Forensic Chemist Irshad Bajwa was placed on administrative leave and later terminated after drugs he certified as cocaine were retested and found to not contain illegal substances.[12] Forensic Chemist Bipin Mody resigned after it was revealed that he failed to abide by OCME policies and procedures and failed to timely test alleged drug evidence.[13]

In February 2016, postconviction counsel's law clerk, Mr. Daniel Breslin, spoke to a former employee of the OCME that had been employed as a Forensic Evidence Specialist from 2006 to 2010.[14] This individual, hereafter referenced as CS1, described numerous problems and issues at the OCME.[15] (A359-364). CS1

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[11] *See* October 6, 2014 Corrective Action Report concerning Patricia Phillips at A186-190; *Brown v. State*, 117 A.3d 568, 575-76 (Del. 2015).

[12] *See* January 15, 2015 Letter to Judge Carpenter from Nicole Walker, Esquire with Exhibits at A191-251.

[13] *See* April 6, 2016 Letter from the Honorable E. Scott Bradley in *State v. Randolph Clayton*, (ID: 1506019597) at A438-440; Bipin Mody personnel file at A441-515.

[14] *See* February 26, 2016 Affidavit of Daniel C. Breslin Regarding Confidential Source 1 at A359-377.

[15] This individual wished to remain anonymous prior to any evidentiary hearing that may take place.

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also provided Mr. Breslin with email correspondence detailing that a large amount of drug evidence had gone missing from the vault. (A363-364).

On February 26, 2016, Joseph Bono, a Forensic Science Consultant and former laboratory director of a DEA lab, authored a report concerning the problems at the OCME.[16] In the report, Mr. Bono described specific problems at the OCME and how the OCME violated forensic standards. (A383-391). Mr. Bono also rendered opinions as to how each problem affected the reliability of the chain of custody and the integrity of the evidence tested. (*Id.*). On March 13, 2016, Mr. Bono authored an additional report concerning the issues in the OCME lab.[17] Specifically, Mr. Bono noted that the OCME failed to comply with accreditation and testing standards and failed to report its problems to the accrediting body and appropriate legal counsel. (A404-414). In sum, Mr. Bono opined that "the OCME drug laboratory does not meet the requirement for reliability and integrity required by accrediting bodies and that serious violations challenging the laboratory's own accreditation. Therefore, any conclusions derived from an examination of the evidence in this case raise serious questions concerning the results reported by the forensic chemist." (A413).

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[16] *See* February 26, 2016 Report of Joseph Bono at A382-399.
[17] *See* March 13, 2016 Report of Joseph Bono at A400-437.

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As a result of the OCME investigation, trial counsel filed a motion with the Superior Court on January 30, 2015 requesting that Mr. Burton be granted a new trial. (DE39). In a July 8, 2015 supplement to the motion for a new trial, trial counsel requested, as an alternative remedy, re-testing of the suspected drug evidence. (DE48; A314). On November 30, 2015, the Superior Court denied the defense's request for a new trial and for re-testing of the evidence, after concluding that Mr. Burton had not shown a need for a new trial and had failed the bright line test created in *State v. Irwin*.[18] (DE49; A328-330). Moreover, the court reasoned that because Mr. Burton had agreed to stipulated facts at trial, which included the drug evidence, and both the drugs and medical examiner's report had been entered into evidence without objection from the defense, Mr. Burton had waived his right to challenge the chain of custody regarding that evidence. (A333).

Mr. Burton's case was returned to the this Court on January 4, 2016. (A74). Mr. Burton argued that: 1) the Superior Court erred in denying the defense's motion to suppress evidence seized during the administrative search of Mr. Burton's residence; and 2) the Superior Court erred in denying the defense's

[18] *Irwin* requires that the defendant demonstrate either evidence of tampering or the existence of a discrepancy in weight, volume or contents. *State v. Irwin*, 2014 WL 6734821, at 12 (Del. Super. November 17, 2014).

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motion for a new trial and for re-testing of the suspected drug evidence. (A73, 442). On June 8, 2016, this Court affirmed the September 9, 2013 and November 30, 2015 judgments of the Superior Court which respectively denied the motion to suppress and the motion for new trial and/or re-testing of the suspected drug evidence. (*Id.*).

On April 30, 2014, the Public Defender's Office filed a Motion for Postconviction Relief to Vacate Title 16 Conviction Related to Drug Evidence. (DE33, A78-91). This standard boilerplate type pleading was filed in hundreds of cases in which suspected drug evidence had been tested at the OCME. The motion remained unaddressed until three years later on September 27, 2016 when the Superior Court denied the filing "to ensure Mr. Burton may proceed appropriately [with the Rule 61 he has now filed] and to put this case in proper procedural context." (A523). The court's order was in response to Mr. Burton's *pro se* Motion for Postconviction Relief that was filed on August 11, 2016. (A518, 521).

Mr. Burton filed an Amended Motion for Postconviction Relief on August 17, 2017 raising one claim of ineffective assistance of counsel asserting that trial counsel violated Mr. Burton's right to a fair trial and meaningfully oppose the prosecution's case and one claim of a *Brady* violation stemming from the OCME

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misconduct. (DE63, A524-607). On April 30, 2018, the Superior Court issued an order denying both postconviction claims. (Exhibit A).

HA1056

ARGUMENT I. THE SUPERIOR COURT ERRED IN DENYING MR. BURTON'S CLAIM THAT THE STATE VIOLATED *BRADY* BY FAILING TO TIMELY DISCLOSE TO THE DEFENSE CRUCIAL EXCULPATORY AND IMPEACHMENT INFORMATION CONCERNING THE OCME.

QUESTION PRESENTED

Did the Superior Court err in finding Mr. Burton's *Brady* claim to be without merit? This issue was preserved as it was raised in the Amended Motion and the Reply to the State's Response. (A557-593, 632-639).

SCOPE OF REVIEW

Questions of law are reviewed *de novo*.[19] Claims of a constitutional violation are reviewed *de novo*.[20]

MERITS OF THE ARGUMENT

The Superior Court erred in denying Mr. Burton's *Brady* claim. (Denial pg. 3-8). The Superior Court appeared to not find Mr. Burton's *Brady* claim procedurally barred under either Rule 61(i)(3) or Rule 61(i)(4) but nevertheless denied it on the merits.[21] (Denial pg. 3-4). The Superior Court properly

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[19] *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

[20] *Hall v. State*, 788 A.2d 118, 123 (Del. 2001).

[21] Del. Super. Ct. Crim. R. 61(i)(3) ("[a]ny ground for relief that was not asserted in the proceedings leading to the judgement of conviction" unless, under Rule 61(i)(5), the claim asserts that the Court lacked jurisdiction, pleads with particularity that new evidence exists that creates a strong inference of actual innocence, or a new rule of constitutional law, retroactively applied to the movant's case, renders the conviction invalid) (citing Del. Super. Ct. Crim. R.

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considered Mr. Burton's claim under the three prong test used to analyze allegations that the State violated *Brady v. Maryland*. (Denial pg. 4). However, for the reasons outlined below, the court erred in finding that Mr. Burton is barred from relief because: 1) he does not meet the test set forth in *State v. Irwin*; 2) "[t]here was no indication of wrongdoing at the OCME until after [Mr. Burton] was found guilty and sentenced in late 2013"; and 3) Mr. Burton was not prejudiced "as a result of the OCME investigation and the fallout therefrom." (Denial pg. 5-7).

After analyzing Mr. Burton's claim under each of the three prongs of the *Brady* violation test, the Superior Court ultimately concluded that "[Mr. Burton] 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 [Mr. Burton] in such a light so as to 'undermine confidence' in his guilty verdict." (Denial pg. 8). However, this

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61(d)(2)(i) and (ii)); Del. Super. Ct. Crim. R. 61(i)(4) ("[A]ny ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred.").

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conclusion is erroneous in light of the contentions articulated and supported by Mr. Burton in the Amended Motion and Reply.

A. The State violated its *Brady* obligation by failing to timely provide Mr. Burton with exculpatory and impeachment information regarding the OCME's employees and the OCME's deficiencies affecting the reliability of its work product.

The United State Supreme Court in *Brady v. Maryland*, held that "suppression by the prosecution of evidence favorable to an accused violates due process when the evidence is material to either guilt or punishment, irrespective of good faith or bad faith of the prosecutor."[22] *Brady* requires the prosecutor to disclose all materially exculpatory and impeachment information to the defense.[23] Additionally, it is long standing precedent that *Brady* requires the prosecution to provide *Brady* information in a sufficient amount of time to allow the defense to make effective use of it.[24]

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

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

[24] *Miller v. United States*, 14 A.3d 1094, 1111 (D.C. 2011) (citing *Lindsey v. United States*, 911 A.2d 824, 839 (D.C. 2006); *Edelen v. United States,* 627 A.2d 968, 970 (D.C. 1993)); *Perez v. United States*, 968 A.2d 39, 66 (D.C. 2009) (citing *Edelen*, 627 A.2d at 970); *United States v. Pollack*, 534 F.2d 964, 973 (D.C. 1976) *cert. denied*, 429 U.S. 924 (1976); *Wright v. State*, 91 A.3d 989, 992 (Del. 2014); *Cooper v. State,* 992 A.2d 1236 (Del. 2010); *O'Neil v. State,* 691 A.2d 50, 54 (Del. 1997); *Rose v. State*, 542 A.2d 1196, 1199 (Del. 1988) (citing *United States v. Johnston,* 784 F.2d 416, 425 (1st Cir. 1986); *United States v. Mitchell,* 777 F.2d 248, 256 (5th Cir. 1985); *United States v. Higgs*, 713 F.2d 39, 44 (3d Cir. 1983);

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In Mr. Burton's case it is readily apparent that the State violated his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and under Article I, § 7 by failing to timely provide Mr. Burton, prior to his trial, with exculpatory and impeachment information regarding the OCME employees and the reliability of the OCME work product. The State's failure to do so deprived Mr. Burton of information that he needed prior to trial in order to make effective use of the information.

As noted in the Amended Motion,[25] the State failed to disclose to Mr. Burton the systemic operational failings of the OCME which directly resulted in the termination and the prosecution of three OCME employees. (A92, 93, 102-105, 107, 109, 111, 113-114, 116, 121, 156, 158, 160, 170, 171, 383-391). The State has also failed to disclose more recent exculpatory and impeachment information regarding the OCME's employees and the reliability of the OCME's work product.[26] This would include: 1) Irshad Bajwa being placed on administrative leave after certifying a substance as cocaine which, upon retesting,

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Pollack, 534 F.2d at 973-74) *cert. denied*, 429 U.S. 924 (1976)).

[25] A562-571.

[26] *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987); *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976); *Barnes v. United States*, 760 A.2d 556, 562 (D.C. 2000).

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was found to not be an illegal substance;[27] 2) Patricia Phillips being suspended and later resigning after losing a bag of heroin in her lab coat, violating lab protocol, and after discrepancies were identified in another case;[28] and 3) Bipin Mody resigning after it was revealed that he failed to abide by OCME policies and procedures and failed to timely test alleged drug evidence.[29] This information is particularly significant, as Irshad Bajwa was the OCME employee who tested the suspected drug evidence in Mr. Burton's case. (A30-36).

Additionally, the exculpatory and impeachment value of the *Brady* information regarding the deficiencies at the OCME is made even more evident by the reports and opinions of Joseph Bono. In his February 26, 2016 report, Mr. Bono opined that several of the OCME's practices violated forensic quality standards. Specifically, Mr. Bono opined that the OCME's failure to record entry into the drug vault, the propping open of the drug vault door, and the deactivation of the silent alarm violated forensic quality standards cast doubt on the integrity of the chain of custody for evidence stored in the vault. (A104-106, 383-391). Mr. Bono further noted that the integrity of the chain of custody of evidence stored at

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[27] Mr. Bajwa's testing in *Dollard* was conducted on September 10, 2012. (A352).

[28] A186-190; *see also Brown*, 117 A.3d at 575-76.

[29] A438-440, 441-515.

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the OCME and the testing of evidence at the OCME was diminished by the OCME permitting non-qualified individuals to conduct testing on controlled substances, the OCME's failure to conduct annual audits, the improper labeling of evidence envelopes, and the improper testing and storage of evidence. (A384-389).

In his March 13, 2016 report, Mr. Bono further reported concerns about the OCME's reporting policies. (A404-414). Mr. Bono noted that the OCME failed to satisfy its accreditation obligations by failing to notify the accrediting body and legal counsel of its ongoing deficiencies. (A404-405, 410). Mr. Bono opined:

> [H]ad the accrediting body been aware of the severity of the evidence handling violations within the OCME drug analysis laboratory, their laboratory's accreditation could have been sanctioned on a number of levels. These sanctions could have resulted in the laboratory's accreditation being suspended to the laboratory having been put on probation and been given a specified time-frame to [correct] the violations. (A405, 410).

Mr. Bono went on to note that the OCME failed to comply with accreditation and testing standards, which included the failure to conduct annual audits, the failure to conduct a root cause analysis, the failure to limit access to the OCME's data entry system, and the failure to limit access to the evidence vault to specific times and to specific personnel. (A408, 411-414).

It is apparent that the information the State was required to provide to Mr. Burton was extensive and would have required exhaustive review, the retention of

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expert witnesses, and the issuance of subpoenas in order to introduce relevant testimony in relation to the important deficiencies affecting the reliability of the OCME's work product and its employees. This Court cannot ignore the fact that the State was in clear violation of its *Brady* obligation, as recognized by both federal and state courts,[30] because it is obvious that an extensive amount of pre-trial preparation was needed in order to follow up on and synthesize the myriad of information and materials in order to make adequate use of this information at trial.

Additionally, in denying Mr. Burton's *Brady* claim, the Superior Court noted that the first prong of *Brady*, whether the evidence is favorable to the accused, "must be reviewed in light of the [c]ourt's decision in *State v. Irwin*". (Denial pg. 5). The court explained that under the bright line test established in *Irwin*, "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

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[30] *Miller*, 14 A.3d at 1111 (citing *Lindsey*, 911 A.2d at 839; *Edelen*, 627 A.2d at 970); *Perez*, 968 A.2d at 66 (citing *Edelen*, 627 A.2d at 970); *Pollack*, 534 F.2d at 973 *cert. denied*, 429 U.S. 924 (1976); *Wright*, 91 A.3d at 992; *Cooper*, 992 A.2d 1236; *O'Neil*, 691 A.2d at 54; *Rose*, 542 A.2d at 1199 (citing *Johnston*, 784 F.2d at 425; *Mitchell*, 777 F.2d at 256; *Higgs*, 713 F.2d at 44; *Pollack*, 534 F.2d at 973-74).

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weight, volume or contents from what is described by the seizing officer." (Denial pg. 5).

The Superior Court apparently found that Mr. Burton did not meet this bright line test; however, because the *Irwin* test had been applied by the court when it denied Mr. Burton's January 30, 2015 motion for a new trial and July 2, 2015 supplement request re-testing of the suspected drug evidence, the court "decline[d] to reiterate that analysis here." (Denial pg. 6). However, the court's conclusion fails to acknowledge or properly consider that Mr. Burton preemptively addressed the *Irwin* test in the Amended Motion, explaining why *Irwin* was not binding on his case and articulating how, even if *Irwin* was binding, he had established the requisite evidence of tampering. (A589-593). As Mr. Burton noted, the fact that the forensic chemist who tested the suspected drugs in Mr. Burton's case, Irshad Bajwa, was later terminated due to the lack of reliability of his work product, in addition to the discrepancies in weight between the substances seized and those admitted at trial, sufficiently indicates tampering. (A192-193, 592).

Moreover, the Superior Court's November 30, 2015 finding that Mr. Burton failed to satisfy the bright line test established in *Irwin* was due to trial counsel incorrectly informing the court that "he is 'unable to provide the Court with

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specific evidence of a discrepancy in weight, volume or contents that would call into question the evidence seized and tested by the OCME in this case.'" (A312, 592). However, as the record indicates, trial counsel was incorrect when he informed the court that there was no discrepancy in weight.[31] Moreover, it was unknown at the time of the Superior Court's November 30, 2015 decision that the forensic chemist who performed the testing on the substances in this case had provided a false positive test result for cocaine in another case only mere months prior.[32] The Superior Court's April 30, 2018 opinion fails to take this vital information into consideration, which undermines the court's finding that Mr. Burton fails the first prong of the three-part *Brady* test.

Thus, not only is it clear that the State violated it's *Brady* obligations by failing to timely provide Mr. Burton with information regarding the reliability of the OCME and its employees, but it is also clear that the Superior Court's

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[31] The weight of the substances as reported by law enforcement on January 31, 2013 were 29.0 and 1.0 grams of suspected cocaine and marijuana respectively. (A28, 29). The weight of the substances as reported by the OCME in the May 15, 2013 forensic report were 28.45 and 0.93 grams of purported cocaine and marijuana respectively. (A30).

[32] Mr. Bajwa's testing in *Dollard* was conducted on September 10, 2012. (A352). The testing in Mr. Burton's case was performed on May 8, 2013. (A30, 35, 36).

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conclusion that under *State v. Irwin* the information would not have been favorable to Mr. Burton is erroneous.

B. The information was suppressed by the State.

In evaluating the second prong of Mr. Burton's *Brady* claim, the Superior Court found that the evidence was not suppressed by the State, because the revelation of the OCME scandal did not occur until 2014, and Mr. Burton did not provide evidence "that there has been misrepresentation or concealment on the part of the State prior to any of his proceedings." (Denial pg. 7). However, the court's finding is not supported by law nor by the new facts developed by Mr. Burton.[33]

As Mr. Burton noted in his Amended Motion and Reply,[34] the State's personal knowledge of *Brady* materials is immaterial, as the knowledge of other members of the prosecution team may be imputed upon the prosecutor.[35] In this case, the OCME must be considered a member of the prosecution team due to the

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[33] A571-575.

[34] A572-574, 636-638.

[35] *Giglio*, 405 U.S. at 154; *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984); *United States ex rel Smith v. Fairman,* 769 F.2d 386, 391-92 (7th Cir. 1984); *Freeman v. Georgia*, 599 F.2d 65, 69 (5th Cir. 1979); Bennet L. Gershman, Litigating Brady v. Maryland: Games Prosecutors Play, 57 Case W.Res. L.Rev. 531 (2007).

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close working relationship it has with the Attorney General's Office.[36] As it is apparent that members of the OCME were aware of their own misconduct, such knowledge must be imputed upon the Attorney General's office.[37] Even if the OCME is not considered a member of the prosecution team, Mr. Burton presented the Superior Court with evidence establishing that law enforcement was aware of the problems at the OCME prior to Mr. Burton's arrest.[38] Thus, law enforcement's knowledge of the problems at the OCME must be imputed upon the State,[39] and

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[36] The OCME's mission statement provides that "[t]he OCME evidentiary guidelines are dedicated to all past, present, and future public servants who dedicate their careers to providing the state of Delaware with the highest degree of law enforcement, forensic science, and medical-legal death investigation services. . . ." (A15). The OCME's guidelines also provide that all evidence submitted for testing "must be in connection with investigations that take place in Delaware," outline how law enforcement must submit evidence for testing, and how the OCME should be contacted in the event that an employee is needed to testify. (A17-19). Furthermore, the Department of Justice and the OCME jointly signed a memorandum to obtain federal grant monies. (A13); *see also United States v. Hampton*, 109 F. Supp. 3d 431, 439-40 (D. Mass. 2015); *Commonwealth v. Scott*, 5 N.E.3d 530, 551 (Mass. 2014); *Deberry v. State*, 457 A.2d 744, 751-52 (Del. 1988).

[37] *Giglio*, 405 U.S. at 154; *Carey*, 738 F.2d at 878; *Fairman*, 769 F.2d at 391-92; *Freeman*, 599 F.2d at 69; Gershman, *supra* n.35.

[38] A574-575.

[39] *Smith v. Cain*, 132 S.Ct. 627, 629-30 (2012); *Youngblood v. West Virginia* 547 U.S. 867 (2006); *Giglio*, 405 U.S. at 154; *Johnson v. Folino*, 705 F.3d 117, 129 (3d Cir. 2013); *Carey*, 738 F.2d at 878; *Smith*, 769 F.2d at 391-92; *Freeman*, 599 F.2d at 69; Gershman, *supra* n.35.

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the State was required to disclose this information to Mr. Burton in a timely manner pursuant to *Brady*.

C. Mr. Burton was prejudiced by the State's *Brady* violation.

The Superior Court found that Mr. Burton likewise failed the third prong of the *Brady* test, because "[n]o evidence has been proffered to indicate that [Mr. Burton] has been prejudiced as a result of the OCME investigation and the fallout therefrom." (Denial pg. 7). However, in his Amended Motion,[40] Mr. Burton presented sufficient evidence to establish a strong inference that the evidence in his case had been tampered with.

As was noted above, an off-white chunky substance and green plant-like substance were found in Mr. Burton's bedroom. (A60). Law enforcement reported that the bag of suspected cocaine weighed approximately 29.0 grams and the bag of suspected marijuana weighed approximately 1.0 grams. (A28, 29). However, none of the substances tested by the OCME had the same weight as what was reported by law enforcement. (A30). The difference in the weight of the suspected cocaine was 0.55 grams. (*Id.*). The difference in the weight of the suspected marijuana was 0.07 grams. (*Id.*). Mr. Bajwa's report did not indicate a

[40] A575-580.

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reason for the inconsistent weights nor has the State proffered an explanation for the discrepancies in weight.

The unexplained discrepancies in weights of the suspected drug evidence warrant an inference that the drug evidence in this case has been tampered with, especially in light of all the exculpatory and impeachment information regarding the OCME and its employees that was disclosed in the DOJ's preliminary report and has since been revealed. Moreover, it is of great significant that the chemist who tested the suspected drugs in Mr. Burton's case was Irshad Bajwa. Mr. Bajwa tested the suspected drugs in the *Dollard* case only eight months before testing the suspected drugs in Mr. Burton's case.[41] The fact that the chemist who performed the testing in Mr. Burton's case was later terminated after the substances he certified as cocaine in *Dollard* and were later revealed to not be an illegal substance is important;[42] however, the fact that Mr. Bajwa's misconduct occurred

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[41] Mr. Bajwa's testing in *Dollard* was conducted on September 10, 2012. (A352) The testing in Mr. Burton's case was performed on May 8, 2013. (A30, 35, 36).

[42] Forensic Chemist Irshad Bajwa was suspended after the drugs he certified as cocaine were retested and came back negative for any illegal substances. In *State v. Jermaine Dollard*, Mr. Bajwa authored a report that stated two tightly wrapped bricks weighing 2 kilograms were in fact cocaine. (A191-194). Mr. Bajwa testified consistently with his report at trial and noted that there were no signs of tampering. (A193). Dollard was found guilty of aggravated possession of cocaine and other related charges. (*Id.*). While his case was pending on appeal, the OCME scandal broke, and it was revealed that James Woodson handled the

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in the same time period that he conducted the forensic testing in Mr. Burton's case is of great significance both for impeachment purposes and in proving Mr. Burton's innocence.

There can be no question that had trial counsel been provided with the required *Brady* material before trial, trial counsel would not have stipulated to the State's record "with respect to where the drugs were found and what they were and how much was found." (A58). Thus, the State would have been required to call the forensic analyst, Mr. Bajwa, to testify at trial, and there is a reasonable probability that trial counsel's cross-examination of Mr. Bajwa would have altered the outcome of the trial.[43]

Mr. Burton would have been able to critically assess Mr. Bajwa and discredit his certification that the suspect drugs were cocaine and marijuana, based upon his inaccurate test result in the *Dollard* case.[44] The impeachment evidence

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substance in Dollard's case. (*Id.*). The case was remanded to the Superior Court, at which time the substance was retested by an independent lab. (A194). The lab determined that the substance contained no illicit drugs, at which point the Superior Court granted the State's motion to *nolle prosequi* the charges. (*Id.*).

[43] *See Folino*, 705 F.3d at 129 ("[U]ndisclosed evidence that would seriously undermine the testimony of a key witness may be considered material when it relates to an essential issue or the testimony lacks strong corroboration.").

[44] *See United States v. Chin*, 54 F. Supp. 3d 87, 93 (D. Mass. 2014) ("It is easy to imagine how defendant could have used the OIG report to score points while cross-examining chemists from the Hinton Drug Lab at trial."); *Hampton,* 109 F. Supp. 3d at 437 n.7 ("The favorability of the evidence [relating to the

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would have directly countered the presumption that the drug testing was performed correctly and the report's findings accurate.[45] Mr. Bajwa would then have been compelled to explain to the Court, as the trier of fact, why it should believe that the testing performed in Mr. Burton's case was accurate, when in fact testing performed by Mr. Bajwa in another criminal case during a close time period was proven to be false.[46] Even more importantly, Mr. Bajwa would have been obliged to explain what went wrong in the *Dollard* case, as Mr. Bajwa had testified that he saw no signs of tampering with the *Dollard* evidence. (A193). As such, it is clear that the cross-examination of Mr. Bajwa would have critically jeopardized, if not wholly undermined, the State's ability to prove that the evidence admitted at trial and allegedly possessed by Mr. Burton were in fact illegal substances.[47]

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chemist who was accused of dry-labbing] requires no explanation.").

[45] *See* 10 *Del. C.* § 4330.

[46] The United States Supreme Court has opined that ". . . no one experienced in the trials of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." *Pointer v. Texas*, 380 U.S. 400, 404 (1965).

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

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Moreover, there can be no question that had the State properly disclosed information of the OCME misconduct, the *Brady* material would have revealed that three individuals involved in the handling and/or testing of the substances in this case—Mr. Woodson, Ms. Bailey and Mr. Bajwa—were all accused and/or convicted of misconduct while employed at the OCME. Thus, trial counsel would clearly not have stipulated to the State's facts, as he would have had a basis for challenging the chain of custody and the testing performed by Mr. Bajwa.

The Superior Court's April 30, 2018 denial order also noted that Mr. Burton had the opportunity to contest the evidence presented at trial but failed to do so. (Denial pg. 8). However, the court ignores that it was the State's failure to disclose the favorable information regarding the OCME that resulted in trial counsel choosing to not contest the evidence. Furthermore, the court ignores that Mr. Burton alleged in Claim II of his Amended Motion that trial counsel made the decision to stipulate to the State's evidence without his knowledge or consent and that Mr. Burton's consent to a bench trial did not encompass consent to a *stipulated* bench trial. (A594-605).

Additionally, the Superior Court noted that Mr. Burton also "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

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so." (Denial pg. 8). However, the record refutes this finding, as Mr. Burton requested a stay of his direct appeal proceedings so that he could move for a new trial and/or for re-testing of the suspected drug evidence. (A75). It was the Superior Court's denial of these requests that prevented Mr. Burton from contesting the evidence presented against him in any further manner. Accordingly, the Superior Court's conclusion that Mr. Burton was not prejudiced by the State's *Brady* violation is erroneous, as is the court's finding that Mr. Burton failed to contest the evidence when presented with the opportunity.

After analyzing Mr. Burton's claim under each of the three prongs of the *Brady* violation test, the Superior Court ultimately concluded that "[Mr. Burton] 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 [Mr. Burton] in such a light so as to 'undermine confidence' in his guilty verdict." (Denial pg. 8). However, for the aforementioned reasons, these conclusions are all erroneous. Accordingly, this Court must reverse Mr. Burton's convictions and remand for a new trial.

ARGUMENT II. THE SUPERIOR COURT ERRED IN DENYING MR. BURTON'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR STIPULATING TO THE STATE'S EVIDENCE WITHOUT MR. BURTON'S CONSENT, WHICH UNDERMINED HIS DUE PROCESS RIGHT TO A FAIR TRIAL AND TO MEANINGFULLY OPPOSE THE PROSECUTION'S CASE.

QUESTION PRESENTED

Did the Superior Court err by denying Mr. Burton's claim that trial counsel was ineffective for stipulating to the State's evidence without Mr. Burton's consent, thereby conceding elements of the offenses and undermining Mr. Burton's due process right to a fair trial and to meaningfully oppose the prosecution's case? This issue was preserved, as it was raised in both the Amended Motion for Postconviction Relief and the Reply Brief. (A594-605, 640-646).

STANDARD AND SCOPE OF REVIEW

This Court reviews questions of law *de novo*.[48] Claims of constitutional violations are reviewed *de novo*.[49]

MERITS OF ARGUMENT

The Superior Court erred by denying Mr. Burton's ineffective assistance of counsel claim. (Denial pg. 8-12). The court's analysis in the April 30, 2018

[48] *Dawson*, 673 A.2d at 1190.
[49] *Hall*, 788 A.2d at 123.

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denial order makes it clear that the Superior Court misunderstood Mr. Burton's claim, and therefore relied on improper findings and conclusions to deny Mr. Burton's allegation of ineffective assistance of counsel.

Mr. Burton made clear in the Amended Motion that the issue presented was not that trial counsel "fail[ed] to contest the evidence presented at trial thereby violating his constitutional rights", as the Superior Court interpreted it, but rather that Mr. Burton did not consent to trial counsel's stipulation to the State's evidence, and in light of the evidence and elements the State needed to prove to secure a conviction, this essentially conceded guilt, undermining Mr. Burton's due process right to a fair trial and overriding Mr. Burton's intent to meaningfully oppose the State's case. (Denial pg. 8; A595).

The Superior Court places undue emphasis on Mr. Burton's voluntary, intelligent and knowing waiver of his right to a jury trial, noting that "the colloquy included having discussed the decision with his attorney and understanding the benefits and potential repercussion of that decision. (Denial pg. 10-11). The court proceeded to state, "[t]o 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." (Denial pg. 12). However, such statements demonstrate that the Superior Court failed to understand the core

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question raised by Mr. Burton's claim–whether trial counsel's stipulation to the State's evidence, done without Mr. Burton's consent, undermined his due process right to a fair trial and overrode Mr. Burton's decision to exercise his due process right to have the State prove beyond a reasonable doubt each and every element of the charged offenses.[50]

The fact that Mr. Burton consented to a bench trial does not answer whether he agreed to a *stipulated* bench trial in which the State's evidence against him would be uncontested. The decision to not hold the State to its constitutional burden of proving every element of the charged offenses beyond a reasonable doubt was made by trial counsel and trial counsel alone. There is no rational basis to assume that because the defendant consented to a bench trial by waiving his right to a trial by jury, he also waived his right to meaningfully oppose the prosecution's case and/or his right to a fair trial. Nor is such an assumption supported by any legal authority.[51]

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[50] *In re Winship*, 397 U.S. 358, 363-64 (1970); *see also Holland v. United States*, 348 U.S. 121, 138 (1954) (stating that the Constitution requires proof of a criminal charge beyond a reasonable doubt).

[51] *See State v. Taye*, Del. Super., ID No. 0812020623, Rocanelli, J., at 6 (Feb. 26, 2014) (Mem. Op.) (attached as Exhibit B); *State v. Miller*, Del. Super., ID No. 1001009884, Parker, Comm'r, at 19 (Feb. 26, 2013) (Comm. Rep. and Rec.) (The defendant's colloquy with the court specifically noted that he was not being forced to proceed with a bench trial *or* with the stipulated record) (attached as Exhibit C); *Pendleton v. State*, No. 487, 2011, at 3-4 (Del. Jan. 19, 2012)

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As Mr. Burton clearly explained in the Amended Motion, defense counsel is not permitted to concede a client's guilt over his or her objection or without his or her consent.[52] As this Court stated in *Cooke*, certain decisions that are so personal to the defendant that they cannot be made by a surrogate "implicate inherently personal rights which would call into question the fundamental fairness of the trial if made by anyone other than the defendant."[53] In a divergence from the directives of *Cooke*, trial counsel did not obtain Mr. Burton's consent to stipulate to the State's evidence, and Mr. Burton's due process right to a fair trial that "meaningfully oppose[s] the prosecution's case"[54] was not waived by obtaining Mr. Burton's "fully-informed and publicly-acknowledged consent."[55]

(Fastcase) (The State, defense counsel and the defendant all signed a stipulation of fact that conceded the evidence was sufficient to find him guilty beyond a reasonable doubt) (attached as Exhibit D); *c.f. Walker v. State*, No. 307, 1991, at 3 (Del. April 20, 1992) (Fastcase) (finding that the trial court's failure to conduct a colloquy with the defendant to ensure he was intelligently and voluntarily choosing to proceed with a stipulated trial was unnecessary, because it was "obvious" that the decision was voluntary and intelligent) (attached as Exhibit E); A599-600.

[52] A596-598 (citing *Cooke v. State*, 977 A.2d 803, 809, 817, 850 (Del. 2009) (finding that even though trial counsel noted that they were not conceding guilt and were still going to challenge the State's evidence, trial counsel had violated Cooke's Sixth Amendment rights by asserting a guilty but mentally ill defense over the objections of Cooke and despite Cooke's plea of not guilty)).

[53] *Id.* at 841-42.

[54] *Id.* at 851.

[55] *Id.* at 842.

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This Court's holding in *Cooke* was premised on the United States Constitution, specifically the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment right to the effective assistance of counsel, as well as the Delaware Constitution.[56] Thus, it is clear that under the precedent of this Court, Mr. Burton's right to a fair trial under both the state and federal constitution was infringed upon when trial counsel relinquished, without Mr. Burton's consent, his right to have the prosecution prove each and every element of the offenses beyond a reasonable doubt.

Mr. Burton noted in his Reply[57] that a highly similar issue was pending before the United States Supreme Court in the case of *McCoy v. Louisiana*. The United States Supreme Court issued a decision in *McCoy v. Louisiana* on May 14, 2018.[58] In *McCoy*, the Supreme Court was asked to decide "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection" and granted certiorari because there was a split between state courts of last resort on this issue, specifically citing this Court's decision in *Cooke v. State* as an example.[59]

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[56] *Id.* at 809, 840-843, 846, 849-851.

[57] A641 at n.47.

[58] *McCoy v. Louisiana*, 584 U.S. ___ (2018) (slip opinion).

[59] 584 U.S. __, __ (2018) (slip op., at 5) (2018) (citing *Cooke*, 977 A.2d at 842-846).

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The Supreme Court held in *McCoy* that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty."[60] The Supreme Court noted that "a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her",[61] because "[t]hese 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*."[62] As the Supreme Court noted, "[w]hen a client expressly asserts that the objective of "*his* defence" is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt."[63] The Supreme Court found defense counsel's error in *McCoy* to be structural, and therefore, there was no need for the defendant to demonstrate prejudice; a new trial was required.[64]

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[60] *Id.* at 2.

[61] *Id.* at 6.

[62] *Id.* at 7 (citing *Weaver v. Massachusetts*, 582 U.S. __, __ (2017) (slip op., at 6) (2017); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165 (2000)).

[63] *Id.* at 7 (citing U.S. const. VI; ABA Model Rule of Professional Conduct 1.2(a) (2016)). Conversely, the Court held that "[i]f a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest." *Id.* at 9.

[64] *Id.* at 11-12.

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Akin to *McCoy*, Mr. Burton steadfastly refused to plead guilty, and trial counsel impermissibly overrode Mr. Burton's objective of maintaining his innocence when he conceded, without Mr. Burton's consent, the elements of the offenses. As Mr. Burton clearly explained in his Amended Motion, based upon the offenses with which he was charged and the elements the State was required to prove to meet its burden of guilt beyond a reasonable doubt,[65] by stipulating to the State's evidence, trial counsel essentially stipulated to the State's entire case against Mr. Burton. Despite not expressly stating that Mr. Burton was pleading guilty, through his actions, trial counsel conceded Mr. Burton's guilt without obtaining his consent, waived Mr. Burton's right to meaningfully oppose the prosecution's case and denied him his right to a fair trial. As Mr. Burton wanted and expected trial counsel to challenge the State's forensic evidence and chain of custody, he would not have agreed to a *stipulated* bench trial and had no reason to believe that by agreeing to a bench trial, he was simultaneously agreeing to the State's case, conceding his guilt and relieving the prosecution's constitutional burden to prove each element of the offenses beyond a reasonable doubt.

In denying Mr. Burton's claim, the Superior Court also emphasized that the bench trial was agreed to so as to "preserve the right to appeal the Court's ruling

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[65] A595-596.

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on his suppression motion." (Denial pg. 9, 10). However, this does not save the court's analysis, as the court ignores the case law cited by Mr. Burton[66] demonstrating that if trial counsel encouraged Mr. Burton to agree to a bench trial for the strategic purpose of preserving the right to appeal, this decision fell below an objective standard of reasonableness, as Mr. Burton would have retained the right to appeal the denial of his suppression motion even if he had exercised his constitutional right to a jury trial. Furthermore, as Mr. Burton noted in the Amended Motion,[67] not only did the stipulated bench trial allow the State to meet its burden of proof through facts otherwise inadmissible at trial and created such a one-sided situation that the State's case was not and could not be subjected to any

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[66] A599-602 (citing *Scarborough v. State*, No. 38, 2014, at 3 n.9 (Del. July 30, 2015) (Fastcase) (noting that had the defendant believed the Superior Court's ruling on his suppression motion to be erroneous, his "only option was to go to trial and then appeal," while acknowledging that "he could have negotiated an agreement with the State to hold a stipulated trial") (attached as Exhibit F); *Lambert v. State*, 110 A.3d 1253, 1255 (Del. 2015) (The defendant received the benefit of the State entering a *nolle prosequi* on some of his charges in exchange for a stipulations); *Wall v. State*, No. 212, 2004, at 2 (Del. Jan. 11, 2005) (Fastcase) (The defendant was permitted to enter into a first time offender's program which exempted him from prosecution by agreeing to a future stipulated trial with stipulated facts) (attached as Exhibit G); *Miller*, ID No. 1001009884, at 18 (2013) (The defendant avoided a minimum mandatory sentence by agreeing to a stipulated trial)).

[67] *Id.*

HA1081

semblance of meaningful adversarial testing, but Mr. Burton received absolutely no benefit in exchange for agreeing to a stipulated trial.

The Superior Court finds that this decision was reasonable at the time trial counsel made it, because the wrongdoing that occurred at the OCME was not then known. (Denial pg. 12). However, the court fails to acknowledge that Mr. Burton only cited Mr. Burton's limited ability to challenge the purported drug evidence and request a new trial and/or re-testing the evidence due to trial counsel's stipulation as *one* way in which Mr. Burton was prejudiced by trial counsel's conduct. (A603-604).

Moreover, Mr. Burton's claim of ineffective assistance of counsel is not dependent on the separate issue of the OCME misconduct. The Superior Court overlooks that because of trial counsel's unreasonable decision to stipulate to the State's evidence without his client's consent: 1) Mr. Burton was denied the opportunity to meaningful oppose the State's case against him and deprived of his constitutional right to make fundamental decisions affecting his case; 2) the State was permitted to meet its burden of proof, particularly in regard to the elements of possession and intent to manufacture or distribute, with otherwise inadmissible

HA1082

evidence;[68] 3) the State was relieved of its constitutional burden to prove each element of the offense beyond a reasonable doubt; and 4) Mr. Burton's decision to exercise his due process right to a fair trial was negated by the "conflicting objective" of his attorney.[69]

The Superior Court's denial of this claim fails to properly address the core issue raised by Mr. Burton and relies on inapplicable findings and conclusions to support its denial order. Under both *Cooke* and *McCoy*,[70] it is clear that as a result of trial counsel's actions, Mr. Burton's due process right to a fair trial, to meaningfully oppose the prosecution's case and to make fundamental decisions concerning his case under the Fourteenth Amendment of the United States Constitution and Article 1, § 7 of the Delaware Constitution, as well as his right to the effective assistance of counsel under the Sixth Amendment of the United

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[68] Trial counsel's stipulation included consent to rely upon the lengthy record made at the suppression hearing for purposes of trial, thereby admitting numerous pages of factual testimony that would have been otherwise inadmissible at trial, such as the fact that Mr. Burton was on probation and that he was identified by a confidential informant alleging that Mr. Burton was selling crack cocaine out of his residence. (A38-39, 58). Unless the State took the unusual action of revealing the identity of the confidential informant and calling him/her to testify at trial, the State would have been unable to rely on these facts to demonstrate the elements of possession and intent to manufacture or distribute.

[69] *Cooke*, 977 A.2d at 843.

[70] *See Cooke*, 977 A.2d at 809, 840-843, 846, 849-851; *McCoy,* 584 U.S. __, __ (2018) (slip op., at 5-7, 11-12) (2018).

HA1083

States Constitution and Article 1, § 7 of the Delaware Constitution were violated. Accordingly, Mr. Burton's convictions should be vacated and the case remanded for a new trial.

HA 1084

CONCLUSION

WHEREFORE, based on the foregoing, Mr. Burton respectfully requests that this Court grant appropriate relief and remand the case for an evidentiary hearing or reverse and remand for a new trial.

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Dated: July 19, 2018

HA1085

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Filing ID 62427081
Case Number 287,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM BURTON,	:	
	:	
Defendant-Below,	:	**No. 287, 2018**
Appellant,	:	
	:	**Court Below: Superior Court of the**
v.	:	**State of Delaware in and for New**
	:	**Castle County**
STATE OF DELAWARE,	:	
Plaintiff-Below,	:	**Case Below No. 1301022871**
Appellee.	:	
	:	

APPELLANT'S REPLY BRIEF

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Dated: September 7, 2018

HA1117

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ARGUMENT I. THE STATE'S ANSWERING BRIEF CONTAINS FACTUAL AND LEGAL INACCURACIES IN RELATION TO MR. BURTON'S FIRST POSTCONVICTION CLAIM.

A. The standard of review for constitutional claims is *de novo*.

In response to Mr. Burton's assertion that the Superior Court erred by denying the first postconviction claim raised in Mr. Burton's Amended Motion, the State asserts that the applicable standard of review is an abuse of discretion.[1] The State's assertion, however, is incorrect. As noted in Mr. Burton's Opening Brief,[2] this Court reviews questions of law *de novo*[3], as well as claims of a constitutional violation.[4]

As Mr. Burton alleged in his Opening Brief that the Superior Court erred in denying his postconviction claim asserting that the State violated its *Brady*[5] obligations, thereby violating Mr. Burton's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the

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[1] State's August 20, 2018 Answering Brief at 8, 15 (hereinafter cited "Answer at _").

[2] Mr. Burton's July 19, 2018 Opening Brief at 16 (hereinafter cited "Opening at _").

[3] *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

[4] *Hall v. State*, 788 A.2d 118, 123 (Del. 2001).

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

HA1120

Delaware Constitution,[6] *de novo* is the appropriate standard of review for Mr. Burton's argument of constitutional due process violations.

B. Mr. Burton's *Brady* claim is not procedurally barred.

In response to Mr. Burton's's *Brady* argument, the State erroneously asserts that this claim is procedurally barred. Specifically, the State asserts that this claim "is procedurally barred as formerly adjudicated under Rule 61(i)(4)."[7] The State further contends that because Mr. Burton has not "pled with particularity that new evidence exists strongly inferring his actual innocence or that a new rule of constitutional law retroactively applies to him and renders his convictions invalid",[8] then he "cannot overcome this procedural bar."[9] The State's assertion is unpersuasive.

The State correctly notes that under Rule 61(i)(4),"any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred."[10] However, the State overlooks that the Superior Court denied Mr. Burton's *Brady* claim on the merits, not based on a

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[6] Opening at 16, 19.
[7] Answer at 12.
[8] Answer at 12.
[9] Answer at 12.
[10] Del. Super. Ct. Crim. R. 61(i)(4).

HA1121

procedural bar.[11] The State contends that the Superior Court mistakenly "analyzed Burton's amended postconviction motion under a version of Rule 61 no longer applicable when he filed the motion";[12] specifically, the State refers to the procedural bar exception of former Rule 61(i)(5) that applied when there was a "colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability or fairness of the proceedings leading to the judgment of conviction."[13] The State is mistaken.

Despite noting that "[t]he Court considers *Brady* claims under Rule 61(i)(5) narrow 'miscarriage of justice' exception",[14] the Superior Court stated that "Defendant claims 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)."[15] The State's argument ignores Mr. Burton's Superior Court filings[16] which explain in detail the applicability of the law of the case doctrine to Rule 61(i)(4) and identify with specificity the changed

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[11] Opening at 16 (citing Denial at 3-4).
[12] Answer at 9 n.11, 12.
[13] Answer at 9, n.11, 12.
[14] Denial at 4 (citing *Wright v. State*, 91 A.3d 972, 985 (Del. 2014)).
[15] Denial at 3.
[16] A557-561, 632-63. Procedural bars were not addressed in the Opening Brief, as the Superior Court's denial of Mr. Burton's *Brady* claim was based on the merits and did not implicate Rule 61(i)(4). However, as the State's Answering Brief raised the issue, Mr. Burton must now offer a response.

HA11 22

circumstances and new evidence warranting reconsideration of his claim despite Rule 61(i)(4).

In light of Mr. Burton's analysis in his Superior Court filings, and the court's acknowledgment of Mr. Burton's position, the Superior Court clearly found that Mr. Burton's *Brady* claim passed the procedural hurdle of Rule 61(i)(4) and demonstrates that the court did not erroneously analyze Mr. Burton's claim under the now defunct Rule 61(i)(5); rather, because changed circumstances warranted reconsideration in the interest of justice, the Superior Court considered the merits of Mr. Burton's *Brady* claim. Accordingly, the State is mistaken that the court erroneously analyzed Mr. Burton's claim under a version of Rule 61 no longer applicable and in alleging that Mr. Burton's *Brady* claim is procedurally barred as formerly adjudicated.

C. Evidence of misconduct at the OCME is favorable to Mr. Burton, and the State's suppression of this evidence prejudiced Mr. Burton.

The State contends that the Superior Court correctly determined evidence of the OCME investigation is "neither exculpatory nor materially impeaching"[17] to Mr. Burton's case. Specifically, the State asserts that "Burton's allegations concerned the weight, not admissibility, of the drug evidence and did not create a

[17] Answer at 9, 13-14.

HA1123

reasonable probability that the substances had been misidentified, tampered with, or adulterated."[18] Moreover, the State posits that "Burton '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.'"[19] The State further contends that "[a]bsent a showing of misconduct in his specific case, Burton's evidence from other cases was irrelevant."[20] The State is mistaken.

Mr. Burton did not merely level accusations at OCME staff members "generally." To the contrary, Mr. Burton specifically identified the OCME members accused of work place misconduct who also handled the alleged drug evidence in Mr. Burton's case.[21] More specifically, these people included: James Woodson, who received the alleged drug evidence, Aretha Bailey, who handled the alleged drug evidence, and Irshad Bajwa, who tested the alleged drug evidence and authored the report certifying the substances to be cocaine and marijuana.[22]

In regard to Forensic Chemist Bajwa specifically, Mr. Burton explained that the alleged misconduct involved Mr. Bajwa certifying the substances he tested in *State v. Dollard* as cocaine and those substances later being revealed as a non-

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[18] Answer at 13-14.
[19] Answer at 13.
[20] Answer at 14 (citing *Williams v. State*, 141 A.3d 1019, 1034 (Del. 2015)).
[21] Opening 10-11,19, 20, 23, 28, 31; A30-36, 186-251, 296, 307-308, 592.
[22] *Id.*

HA1124

illegal substance.[23] Most significantly, Mr. Burton described how the deficient testing Mr. Bajwa performed in *Dollard* occurred less than eight months before he tested the substances in Mr. Burton's case.[24]

The State's Answer fails to explain how it is insignificant, let alone irrelevant, that three individuals accused of misconduct and/or unreliable work product were involved in Mr. Burton's case; in fact, the State fails to address the issue entirely. Rather, the State simply concludes that Mr. Burton's accusations of misconduct were no more than allegations directed at OCME employees generally. The State's position is unpersuasive, particularly as it relates to Mr. Bajwa and the proven unreliability of his testing during the same time frame that testing was performed in Mr. Burton's case.

Moreover, although the State notes that "Burton's identification of slight weight discrepancies between the time the police seized the controlled substances and the OCME's lab report . . . were evident from the lab and police reports in existence before trial", the State's argument fails to consider the fact that the significance of this evidence was masked by the State's suppression of the

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[23] Opening at 28-29; A191-194.

[24] Opening at 24, 28 n.41; Mr. Bajwa's testing in *Dollard* was conducted on September 10, 2012. (A352). The testing in Mr. Burton's case was performed on May 8, 2013. (A30, 35, 36).

HA1125

evidence of OCME misconduct.[25] Similarly, the State contends that "Burton's stipulation to the chain of custody and admission of the drugs tacitly acknowledged that the substances were in fact illegal drugs"[26] but again ignores that this establishes no more than trial counsel not having a factual basis, *at that time*, to challenge the chain of custody and/or lab report.[27] This was a direct result of the State's suppression of evidence regarding the OCME investigation.

Mr. Burton has demonstrated prejudice, as he was unable to review and effectively use relevant *Brady* material at trial, retain and present an expert witness, such as Mr. Bono, to challenge the State's chain of custody and forensic testing, have the alleged drug evidence re-tested, or issue subpoenas to introduce relevant testimony as to how the deficiencies at the OCME affected the reliability of the OCME's work product and employees. Thus, as well as the evidence demonstrating the ways in which the OCME misconduct and unreliability of

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[25] Answer at 12-13.

[26] Answer at 13.

[27] The State also contends that because "Burton admitted that he had flushed cocaine prior to officers seeing him exit the bathroom in his residence" when he was arrested, it further evidences his inability to demonstrate any showing of misconduct in his specific case. (Answer at 14, 24 (citing B-1)). However, no law enforcement officers testified as to this alleged confession during Mr. Burton's trial, and even if it had been admitted into evidence, it would not absolve the State of responsibility for any misconduct committed by employees of the OCME.

HA1126

employees' work product specifically affected Mr. Burton's case, the State ignores these other forms of prejudice.

The State relies on *Williams v. State* to support its argument that "weight discrepancies with controlled substances are common"[28] and that Mr. Burton's "evidence from other cases was irrelevant" without "a showing of misconduct in his specific case".[29] The State's reliance on *Williams* is misplaced, however.

In *Williams*, law enforcement seized several bags of cocaine and marijuana from the defendant.[30] The drug evidence was placed in to two separate evidence envelopes.[31] The evidence envelopes "identified the complaint number . . . the type and weight of the drugs, and indicated that the drugs were seized from Williams and were kept within plastic baggies . . . . [T]he envelopes also reflected that Detective Keller collected the evidence and transported it to Troop 4."[32] The drug evidence was eventually transported to the OCME, and placed in the OCME evidence locker.[33]

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[28] Answer at 14 (citing *Williams*, 141 A.3d at 1028).
[29] Answer at 14 (citing *Williams*, 141 A3d. at 1034).
[30] *Williams*, 141 A.3d at 1023.
[31] *Id.* at 1023-24.
[32] *Id.* at 1024.
[33] *Id.*

HA1127

Due to the discovery of the misconduct at the OCME, the drug evidence was removed from the OCME vault and transported to the evidence vault at Troop 2.[34] An audit of the drug evidence determined "that there was no 'discrepancy' between the contents of the evidence containers and the description of the evidence on the outside of the containers."[35] A chemist at NMS Labs later determined that "the seals on the evidence envelopes were 'completely intact,' that the evidence tape 'had not been tampered with at all,' and that the evidence itself had not been tampered with. . . ."[36] The chemist also determined that the drug evidence was marijuana and cocaine.[37]

During the pre-trial stage, the defendant filed a motion *in limine* to permit cross examination of state witnesses about the OCME investigation.[38] The Superior Court denied the motion finding that the OCME investigation was not relevant, as the drug evidence was not opened or tested at the OCME.[39] After the Superior Court's decision in *Irwin*, the Superior Court revisited the issue of whether the defendant would be able to cross-examine state witnesses about the

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[34] *Id.* at 1025.
[35] *Williams*, 141 A3d. at 1025.
[36] *Id.* at 1026.
[37] *Id.*
[38] *Id.*
[39] *Id.*

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OCME investigation.[40] The Superior Court concluded that "unless it was established that the envelopes related to the drug evidence had been opened at the OCME, the investigation into misconduct at the OCME was not relevant to Williams' case."[41]

On appeal, the defendant asserted "that his right to confront witnesses against him . . . was unconstitutionally infringed" because "he should have been allowed to present evidence of the misconduct at the OCME as a possible explanation for the weight discrepancies."[42] This Court found that "[t]he trial court did not abuse its discretion by limiting questioning with respect to the misconduct at the OCME. . . ."[43] In support, this Court noted that the trial court "made the logical decision that if there was no evidence that the envelopes had been opened at the OCME, raising the subject would invite the jurors to speculate."[44]

Unlike *Williams* where the State was able to demonstrate that the drug evidence was neither opened nor tested by the OCME,[45] no such evidence exists in

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[40] *Williams*, 141 A.3d at 1028-29.
[41] *Id.* at 1029.
[42] *Id.* at 1031-32.
[43] *Id.* at 1034.
[44] *Id.*
[45] *Williams*, 141 A.3d at 1023-26, 1028-29.

HA 1129

Mr. Burton's case. As noted above, the drug evidence in Mr. Burton's case was opened and tested at the OCME by an employee who's work product has proven unreliable and was handled by two other OCME employees accused of misconduct. Moreover, there was a discrepancy in weight between what testing revealed and what was initially reported by law enforcement. Although the State describes these weight discrepancies as "slight",[46] even assuming accurate, the lack of a greater discrepancy does not quell the other evidence of prejudice demonstrated by Mr. Burton nor the cumulative impact of the weight discrepancy *and* the other evidence. Thus, *Williams* does not support the State's conclusion that Mr. Burton was not prejudiced.

D. The State was aware of the exculpatory and impeachment information regarding the OCME's employees and the OCME's deficiencies affecting the reliability of its work product prior to January 14, 2014.

The State's Answer mentions in passing that the Superior Court correctly determined there was no suppression of evidence by the State, because the State could not suppress that which it did not know "until after [Burton] was found guilty and sentenced in late 2013."[47]

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[46] Answer at 12.
[47] Answer at 9.

HA113D

However, as Mr. Burton explained in the Opening Brief and in his Superior Court filings,[48] several Delaware law enforcement agencies were aware of the problems at the OCME.[49] The State fails to even address this issue. In doing so, the State ignores several key pieces of evidence that directly corroborate Mr. Burton's allegation, such as: a 2007 email chain which outlined that a meeting was scheduled between the OCME DNA unit and the New Castle County Police Department to discuss packaging and chain of custody concerns, which included how there had been "many bad NCCPD examples"[50] and a 2010 email from an OCME manager detailing that over fifty pieces of evidence that the Delaware State Police were requesting to be returned could not be located at the OCME.[51] As the State chose to ignore these critical documents rather than attempt to distinguish them, the argument that the State was unaware of problems at the OCME until after Mr. Burton was convicted and sentenced is inaccurate and refuted by the evidence presented by Mr. Burton to the Superior Court and to this Court.[52]

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[48] Opening at 25-26; A573-575; 636-638.

[49] *Id.*

[50] A369-370.

[51] A375-376.

[52] As noted in Mr. Burton's Superior Court filings, through an evidentiary hearing, testimony can be compelled in relation to the scope of knowledge that various members of the Attorney General's Office were possibly aware of but

HA1131

The State's assertion also ignores the well recognized principle of law that a prosecutor's duty to disclose *Brady* information is not limited to those materials that the prosecutor has personal knowledge of, as the knowledge of *Brady* materials by another member of the prosecution team may be imputed upon that prosecutor.[53] The "prosecution team" could include, but is not limited to, "federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of a criminal case against the defendant."[54] Specifically in the realm of state crime labs, at least two courts have held that a drug lab chemist was a member of the prosecution team. The State's failure to consider this well recognized principle of law renders its assertion that it was unaware of the exculpatory and impeachment information regarding the OCME until after Mr. Burton was convicted and sentenced is unpersuasive.

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failed to disclose to Mr. Burton. (A581-584, 647; Opening at 11 n.15, 44).

[53] *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984); *United States ex rel Smith v. Fairman*, 769 F.2d 386, 391-92 (7th Cir. 1984); *Freeman v. Georgia*, 599 F.2d 65, 69 (5th Cir. 1979).

[54] David W. Ogden, Memorandum for Department Prosecutors, 165, January 4, 2010, last visited Aug. 31, 2018, http://www.justice.gov/dag/memorandum-department-prosecutors; *see also Smith v. Cain*, 132 S.Ct. 627, 629-30 (2012); *Youngblood v. West Virginia*, 547 U.S. 867, 868-70 (2006); *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *Pennsylvania v. Ritchie*, 480 U.S. 39, 61 (1987).

HA1132

ARGUMENT II. THE STATE'S ANSWERING BRIEF IS FACTUALLY AND LEGALLY INACCURATE IN RELATION TO MR. BURTON'S SECOND POSTCONVICTION CLAIM.

A. The standard of review for constitutional claims is *de novo*.

In response to Mr. Burton's contention that the Superior Court erred by denying the second postconviction claim raised in Mr. Burton's Amended Motion, the State asserts that the applicable standard of review is an abuse of discretion.[55] The State's assertion, however, is incorrect. As noted in Mr. Burton's Opening Brief,[56] this Court reviews questions of law, as well as claims of a constitutional violation, *de novo*.[57]

Mr. Burton alleged in his Opening Brief that the Superior Court erred by denying his postconviction claim asserting that he was denied the effective assistance of counsel in violation of his rights under the Sixth Amendment to the United States Constitution and Article I, § 7 of the Delaware Constitution, and his due process rights under the Fourteenth Amendment to the United States Constitution and Article 1, § 7 of the Delaware Constitution.[58] Thus, this Court

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[55] Answer at 4, 16, 24.
[56] Opening at 33.
[57] *Dawson*, 673 A.2d at 1190; *Hall*, 788 A.2d at 123..
[58] Opening at 33, 42, 43.

HA1133

must review Mr. Burton's constitutional claim *de novo*, and the State's assertion otherwise is inaccurate.

B. The State's Answer is unresponsive to Mr. Burton's ineffective assistance of counsel claim.

The State describes Mr. Burton's ineffective assistance of counsel claim as "unsupported."[59] However, the State's argument is belied by the record.

In an attempt to provide some support for its contention, the State relies on the Superior Court's erroneous conclusion that trial counsel's decision to stipulate to the State's evidence was "reasonable" from "[his] p[er]spective at the time."[60] Yet the State, akin to the Superior Court, erroneously focuses on whether it was a reasonable decision, at the time, to stipulate to the State's evidence, not whether doing so without Mr. Burton's consent was unreasonable and whether it violated Mr. Burton's due process right to a fair trial and to make fundamental decisions concerning his case. Although the State acknowledges that Mr. Burton argued in the Opening Brief that the Superior Court erred in this regard,[61] the State fails to appropriately tailor its response accordingly so that the State's Answer is accurately responsive to Mr. Burton's argument.

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[59] Answer at 16.

[60] Answer at 17 (citing *State v. Burton*, 2018 WL 2077325, at *4 (Del. Super. Ct. Apr. 30, 2018)).

[61] Answer at 17.

HA1134

The State argues that the Superior Court correctly concluded trial counsel made a strategic decision to rely on the record developed at the suppression hearing for purposes of the bench trial[62] but fails to address Mr. Burton's claim, clearly explained in the Opening Brief and Superior Court filings,[63] that even if strategic, the decision was unreasonable because trial counsel secured no benefit to Mr. Burton by doing so and prejudiced him in the process. As Mr. Burton has previously advanced, there was no reason to stipulate to the State's evidence, as it was not favorable to Mr. Burton and ultimately deprived him of his right to subject the State's case to meaningful adversarial testing and to later challenge the State's chain of custody and forensic testing of the alleged drug evidence.

Moreover, the State fails to address Mr. Burton's claim that he did not voluntarily, intelligently and knowingly consent to a *stipulated* bench trial. Instead, the State focuses on the fact that the Superior Court engaged in an "extensive colloquy" with Mr. Burton and concluded that Mr. Burton's decision was made in consultation with trial counsel and was therefore knowingly, intelligently and voluntarily made.[64] Yet, as Mr. Burton has repeatedly explained

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[62] Answer at 20.
[63] Opening 39-41; A599-602.
[64] Answer at 20-21.

HA1135

and both the Superior Court and State overlook,[65] these facts have no bearing on whether Mr. Burton consented to a *stipulated* bench trial or consented to relinquishing his right to subject the State's case to meaningful adversarial testing.

Thus, the State's argument is unresponsive to Mr. Burton's claim, as Mr. Burton has never once contended that his decision to waive his right to a jury trial and proceed with a bench trial was not knowingly, voluntarily or intelligently made; this issue was never in dispute. Again, the State continues to misunderstand Mr. Burton's claim and fails to acknowledge the difference between a bench trial and a stipulated bench trial in which the State's case in not subjected to adversarial testing and trial counsel concedes nearly all the elements of the offenses, despite his client exercising his due process right to plead not guilty.

The State contends "[t]he record reflects that Burton understood that he was waiving his right to a jury trial and stipulating to the State's drug evidence."[66] However, the State noticeably offers no record citations to support this assertion, as it is clear that the record does not establish that Mr. Burton "understood" he was "stipulating to the State's drug evidence." To the contrary, the record of the

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[65] Opening at 34-36.
[66] Answer at 22.

HA1136

court's colloquy with Mr. Burton reveals that the issue of a stipulated trial was never once discussed.[67]

Furthermore, the State erroneously relies on trial counsel's affidavit to establish that Mr. Burton consented to a stipulated bench trial, alleging "trial counsel denied that he stipulated to the State's evidence without Burton's knowledge or consent."[68] However, the State's contention is not supported by the actual language of trial counsel's affidavit. Based upon the affidavit, trial counsel appears to have no independent recollection of this particular issue in this particular case, nor possess any supporting documentation.

Rather, trial counsel asserted in his affidavit that "*[he] can only assume* that [he] explained to Mr. Burton that the most expeditious way to preserve an appellate issue was to conduct a bench trial" based upon his database entry from September 23, 2013 reflecting that he "discussed plea offer and prospects for appeal for suppression issue" with Mr. Burton at the prison.[69] Moreover, trial counsel stated "it would have been [his] practice" to explain to a client how a stipulated bench trial would be conducted.[70] Trial counsel also noted that he

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[67] A58-59.
[68] Answer at 2.
[69] Answer at 21 (citing A610-611) (emphasis added).
[70] *Id.*

HA 1137

"probably conducted some explanation as to how the trial would proceed before [the trial judge]."[71]

All of trial counsel's statements are hypothetical and suggest what he *probably* did in this case and what he *can only assume* he told Mr. Burton; trial counsel never once makes an affirmative statement as what actually transpired and what information was given to Mr. Burton. Thus, the State's assertion that trial counsel denied stipulating to the State's evidence without Mr. Burton's knowledge or consent is clearly unsupported by the record and no more than an assumption.

The State's argument that "the Superior Court acted well within its discretion in concluding that counsel's representation that Burton agreed to stipulate to the State's drug evidence after he had discussed the strategy with Burton was more credible than Burton's assertion that counsel had not"[72] is also an unsupported assertion. If the Superior Court did in fact make that credibility determination, it was erroneous, as trial counsel never actually made such a claim. The State's argument is quite simply refuted by the record, including the bench trial transcripts, the court's colloquy with Mr. Burton, the signed stipulation of waiver of jury, and trial counsel's affidavit.[73]

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[71] *Id.*
[72] Answer at 21-23.
[73] A56-62, 610-611.

HA1138

The State asserts that in affirming the Superior Court's denial of Burton's motion for a new trial, "this Court implicitly upheld the Superior Court's finding that Burton 'knowingly, intelligently, and voluntarily agreed to a stipulated bench trial. . . .'"[74]; however, this Court was never asked to make a determination on this particular issue or whether Mr. Burton's due process rights to a fair trial, to subject the State's case to meaningful adversarial testing and to make fundamental decisions concerning his case were impeded due to the constitutional ineffectiveness of trial counsel.

The State argues that Mr. Burton is similarly situated to the defendant in *State v. Miller*[75] because "[f]acts concerning the controlled substances and the OCME lab reports were stipulated to and admitted into evidence without objection." However, the State's reliance on *Miller* is misplaced, because, as previously explained in the Superior Court filings,[76] it is easily distinguishable from Mr. Burton's case. In contrast to Mr. Burton's case, in *Miller*, the court conducted a colloquy with the defendant that specifically addressed his choice to

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[74] Answer at 23.

[75] Answer at 22 (citing *State v. Miller*, 2017 WL 1969780 (Del. Super. Ct. May 11, 2017)).

[76] A604, 635.

HA1139

proceed with a *stipulated* trial.[77] Moreover, the defendant in *Miller* received a benefit in exchange for agreeing to proceed with a stipulated trial, as the State agreed to dismiss several indicted charges.[78] Mr. Burton received no such benefit, further demonstrating that trial counsel's decision, strategic or not, was unreasonable. Moreover, *Miller* does not involve the question of whether trial counsel stipulated to the State's evidence without the consent of the defendant and whether that violated the defendant's due process right to a fair trial and to meaningfully oppose the State's case, as well as to make fundamental decisions concerning his case and his right to effective counsel.

The State fails to address Mr. Burton's argument, articulated in the Opening Brief,[79] that trial counsel deprived Mr. Burton of his due process right to make fundamental decisions concerning his case and whether trial counsel conceded Mr. Burton's guilt without his consent, in violation of the Fourteenth Amendment. Furthermore, the State ignores entirely Mr. Burton's explanation of the recently decided United States Supreme Court case *McCoy v. Louisiana*,[80] which addresses

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[77] *State v. Miller*, ID No. 1001009884, at 27 (Del. Super. Ct. May 11, 2017) (Fastcase) (attached as Exhibit H).

[78] *Id.*

[79] Opening at 36-37.

[80] *McCoy v. Louisiana*, 584 U.S. ___ (2018) (slip opinion).

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a highly similar issue to the one raised by Mr. Burton.[81] Moreover, despite the Supreme Court's holding in *McCoy* that a structural error, for which a defendant need not demonstrate prejudice, results when an attorney overrides the objective of his or her client by conceding guilt,[82] the State merely notes that the evidence against Mr. Burton was overwhelming, rendering him unable to demonstrate prejudice.[83] Because the State made no attempt to distinguish Mr. Burton's case from *McCoy*, the State has apparently conceded *McCoy's* applicability to the issues raised by Mr. Burton.

The State's Answer is unresponsive to Mr. Burton's claim, as well as factually and legally inaccurate. Accordingly, the State's argument against Mr. Burton's second postconviction claim is unpersuasive.

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[81] Opening at 37-39.
[82] Opening at 38 (citing 584 U.S. __, __ (2018) (slip op., at 7, 11-12) (2018).
[83] Answer at 23-24.

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CONCLUSION

WHEREFORE, based on the foregoing, Mr. Burton respectfully requests that this Court grant appropriate relief and remand the case for an evidentiary hearing or reverse and remand for a new trial.

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