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 III (A314-459)

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Counsel of Record for Petitioner
William Burton

Dated: May 7, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WILLIAM BURTON,	:	
Petitioner,	:	**C.A. No. 1:19-cv-01475-MN**
	:	
v.	:	
	:	
PERRY PHELPS, Commissioner,	:	
Delaware Department of Corrections	:	
Respondent,	:	
	:	
DANA METZGER, Warden,	:	
James T. Vaughn Correctional Center	:	
Respondent.	:	

AMENDED PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY
PURSUANT TO 28 U.S.C. § 2254

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Counsel for William Burton

Date: December 24, 2019

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INTRODUCTION

Pursuant to 28 U.S.C. § 2254, Petitioner William Burton, by and through undersigned counsel, respectfully submits his Petition for Writ of Habeas Corpus. Mr. Burton alleges that he is being held in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

PRELIMINARY STATEMENT

This pleading is a fact petition and follows the guidelines set forth in Rule 2(c) of the Rules Governing 2254 Cases in the United States District Court.[1] Thus, consistent with federal practice and procedure, this petition does not contain extended legal argument or extensive case law authority.[2] Nevertheless, the Prayer for Relief does request an opportunity to fully brief the claims raised within this petition. As such, undersigned counsel requests that this Court allow the Parties to provide a status report for the filing deadline for Petitioner's Opening Brief in Support of this Petition for a Writ of Habeas Corpus, the State's Answer, and Petitioner's Reply.

Petitioner William Burton is referred to as "Petitioner" throughout this petition and the vast majority of facts set forth within are derived from materials made part of the record by Petitioner's filings pursuant to Delaware Superior Court Rule of Criminal Procedure 61 ("Rule 61") (i.e. state postconviction proceedings). Undersigned Counsel will discuss with Opposing Counsel the filing of an appendix containing the state court record, in hopes of reaching an accommodation that would be acceptable to this Court.

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[1] Pursuant to Rule 2(c), the petition must: "(1) specify all the grounds for relief available to the petitioner; (2) state the facts supporting each ground; (3) state the relief requested; (4) be printed, typewritten, or legibly handwritten; and (5) be signed under penalty of perjury by the petition or by a person authorized to sign it for the petitioner under 28 U.S.C. § 2242."

[2] *See Bounds v. Smith*, 430 U.S. 817, 825 (1977); *Jones v. Jerrison*, 20 F.3d 849, 853 (8th Cir. 1994); *Johnson v. Puckett*, 929 F.2d 1067, 1070 (5th Cir. 1991); *see also* Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 29.1 (6th ed. 2011).

THE PARTIES

Mr. Burton is incarcerated by the Delaware Department of Corrections and is currently confined in the James T. Vaughn Correctional Center in Smyrna, Delaware. Respondent Perry Phelps is the Commissioner of Delaware's Department of Corrections. Respondent Dana Metzger is the Warden of the James T. Vaughn Correctional Center in Smyrna, Delaware which currently maintains custody of Mr. Burton.

PRIOR COUNSEL

Kevin O'Connell, Esquire, represented Mr. Burton from his arraignment through his trial. Nicole Walker, Esquire, represented Mr. Burton on his direct appeal. Undersigned Counsel represented Mr. Burton on his motion for postconviction relief, subsequent appeal and petition for writ of certiorari to the United States Supreme Court.

PROCEDURAL HISTORY

Petitioner William Burton (hereinafter referred to as "Mr. Burton" or "Petitioner") was arrested on January 31, 2013 and later charged by indictment with one count each of Drug Dealing, Aggravated Possession, and Possession of Drug Paraphernalia and two counts of Possession of Marijuana.[3] Defense counsel unsuccessfully challenged the search and seizure of the alleged drug evidence.[4] A stipulated bench trial followed, and on September 24, 2013, Mr. Burton was found guilty of once count each of Drug Dealing, Aggravated Possession and Possession of Drug Paraphernalia and two counts of Possession of Marijuana.[5] Mr. Burton was sentenced to life in

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[3] *See State v. William Burton*, ID# 1301022871, Delaware Superior Court Docket, attached as Exhibit A, DE# 2, 20, cited hereinafter as "Ex. A, DE#_";

[4] Ex. A, DE# 7, 16; Delaware Superior Court denial order attached as Exhibit F.

[5] Ex. A, DE# 19, 20.

prison pursuant to Delaware's habitual offender statute on December 13, 2013.[6]

Petitioner timely appealed his sentence to the Delaware Supreme Court.[7] In January 2014, while Mr. Burton's appeal was pending, it was revealed during a trial in the Superior Court that illegal drugs that had been stored at Delaware's Office of the Chief Medical Examiner ("OCME") were missing and had been replaced with blood pressure pills. In February of 2014, the Delaware State Police (DSP) shut down the OCME and launched a criminal investigation into the OCME's operation. It was also publicly disclosed that from 2010 into early 2014, that employees of the OCME were stealing and/or tampering with drug evidence stored at the OCME. On June 19, 2014, Delaware's Department of Justice (DOJ) published its preliminary findings report which 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."

In light of the aforementioned, Mr. Burton's appeal was stayed, and the case was remanded to the Superior Court for record development on this issue.[8] Defense counsel filed a motion in the Superior Court for a new trial and/or for re-testing of the suspected drug evidence.[9] Following the Superior Court's denial of the requested relief,[10] Petitioner's direct appeal resumed, and on June 8, 2016, the Delaware Supreme Court affirmed the judgment of the Superior Court.[11]

Thereafter, Petitioner timely filed a *pro se* Motion for Posconviction Relief pursuant to Rule

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[6] Ex. A, DE# 21, 22, 23.
[7] Ex. A, DE# 24.
[8] Ex. A, DE# 34.
[9] Ex. A, DE# 39.
[10] Delaware Superior Court denial order attached as Exhibit E.
[11] Ex. A, DE# 49, 52; Delaware Supreme Court opinion attached as Exhibit D.

61 on August 11, 2016.[12] Undersigned counsel was appointed to represent Mr. Burton in his postconviction proceedings.[13] On August 17, 2017, Mr. Burton filed an Amended Motion for Postconviction Relief.[14] On April 30, 2018, the Superior Court denied Mr. Burton's Amended Motion for Postconviction Relief.[15] On May 30, 2018, Petitioner timely appealed the denial of his Amended Motion for Postconviction Relief to the Delaware Supreme Court.[16] On December 26, 2018, the Delaware Supreme Court affirmed the Superior Court's denial of Petitioner's Amended Motion for Postconviction Relief.[17]

On March 22, 2019, Petitioner timely filed a petition for writ of certiorari to the United States Supreme Court. The Supreme Court declined to hear the case on April 22, 2019.[18] Accordingly, Petitioner has exhausted all of his state court remedies in relation to his claims that defense counsel's stipulation to the prosecution's evidence deprived him of the effective assistance of counsel and his due process right to a fair trial, that the prosecution violated *Brady v. Maryland* by failing to timely disclose to the defense crucial impeachment information concerning the Office of the Chief Medical Examiner entitling Mr. Burton to a new trial, and that the warrantless administrative search of Mr. Burton's residence violated his Fourth Amendment rights.

TIMELINESS

Pursuant to 28 U.S.C. § 2244(d)(1), "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State

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[12] Ex. A, DE# 53.
[13] Ex. A, DE# 60.
[14] Ex. A, DE# 63, 64, 65, 66, 67, 68.
[15] Ex. A, DE# 74; Delaware Superior Court denial order attached as Exhibit C.
[16] Ex. A, DE# 75.
[17] Delaware Supreme Court opinion attached as Exhibit B.
[18] No. 18-8574.

court."[19] The one year period of limitation begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."[20] However, the one year period of limitation will be tolled when there is "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending. . . ."[21]

In the present case, Petitioner was convicted of the charged offenses on September 24, 2013 and was sentenced on December 13, 2013.[22] Thereafter, pursuant to Delaware Supreme Court Rule 6(a)(iii), Petitioner had 30 days from December 13, 2013 to file a notice of appeal.[23] Petitioner timely filed his notice of appeal with the Delaware Supreme Court on December 30, 2013.[24]

Petitioner's sentence was affirmed by the Delaware Supreme Court on June 8, 2016.[25] Thereafter, Petitioner had 90 days in which to file a petition for writ of certiorari with the United States Supreme Court before the one year period of limitations for the filing of § 2254 petition began to run.[26] Petitioner did not file a petition for writ of certiorari. Thus, the one year period of limitations for the filing of a § 2254 petition began to run on September 6, 2016.

On August 11, 2016, Petitioner timely filed his *pro se* Rule 61 motion,[27] thereby tolling the one year period of limitations before it began to run.[28] On April 30, 2018, the Superior Court denied

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[19] 28 U.S.C. § 2244(d)(1).
[20] 28 U.S.C. § 2244(d)(1)(A).
[21] 28 U.S.C. § 2244(d)(2).
[22] Ex. A, DE# 20, 22.
[23] Del. Supr. Ct. R. 6(a)(iii).
[24] Ex. A, DE# 24.
[25] Ex. A, DE# 52.
[26] 28 U.S.C. § 2244(d)(1)(A).
[27] Del. Super. Ct. Crim. R. 61(i)(1); Ex. A, DE# 53.
[28] 28 U.S.C. § 2244(d)(2).

Petitioner's Amended Motion for Postconviction Relief.[29] Thereafter, Petitioner timely filed a notice of appeal with the Delaware Supreme Court on May 30, 2018.[30] On December 26, 2018, the Delaware Supreme Court denied Petitioner's appeal.[31] Although Mr. Burton timely filed a petition for writ of certiorari, which the Supreme Court declined to hear, this action did not toll the period of limitations for filing of a § 2254 petition. Thus, the one year period of limitations for the filing of a § 2254 petition began to run on December 26, 2018, with all 365 days of the one year period of limitations remaining. Accordingly, this petition is timely, as it was filed before the one year deadline of December 26, 2019.

FACTUAL BACKGROUND[32]

Based on information received from a "past-proven and reliable confidential informant", officers from Probation and Parole conducted an administrative search of petitioner's residence in Wilmington, Delaware. During their search, law enforcement seized an off-white chunky substance, a green plant-like substance, a white powder substance, and miscellaneous items such as a scale, grinder and baking soda. The substances were submitted to the OCME for testing on March 4, 2013. The substances were weighed and tested at the OCME, and a report was authored on May 15, 2013 asserting that the substances tested positive for cocaine and Cannabis and weighing 28.45 grams and 0.93 grams respectively.

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[29] Ex. A, DE# 74; Delaware Superior Court denial order attached as Exhibit C.

[30] Ex. A, DE# 75.

[31] Delaware Supreme Court opinion attached as Exhibit B.

[32] The individual facts alleged below are based on Counsel's good-faith reliance on the Delaware Superior Court docket, police reports and sentencing materials that were provided to the Delaware Supreme Court on appeal, as well as the information and facts contained in the parties' submissions to the Delaware Supreme Court and those developed during undersigned counsel's investigation.

Prior to trial, petitioner's attorney challenged the constitutionality of the administrative search of petitioner's residence and filed a motion to suppress all evidence seized as a result of the search. Mr. Burton argued that his rights under the Fourth Amendment to the United States Constitution and under Article I, Section 6 of the Delaware Constitution were violated by Probation and Parole's administrative search of his residence, as officers failed to independently determine the reliability of the confidential informant whose information was relied upon in authorizing the search and failed to independently corroborate the alleged concealed criminal activity. Following a two-day hearing, the motion was denied.[33] The Superior Court concluded that "officers had reasonably grounds to search Burton's residence" and therefore "all evidence seized pursuant to that search was lawful and met statutory and constitutional requirements."

On September 24, 2013, petitioner signed a stipulation of waiver of jury trial and engaged in the following colloquy with the trial court:

> THE COURT: Okay. Mr. Burton, I'm informed that you desire to waive your right to a jury trial. Is that correct?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Before accepting your waiver, there are a number of questions I'm going to ask you to ensure that it's a valid waiver. If you do not understand any of the questions at any time and you wish to interrupt the proceedings to consult further with your attorney, please say so.
>
> Can you tell me what your full name is?
>
> THE DEFENDANT: William David Burton.
>
> THE COURT: And how old are you?

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[33] This issue was raised on direct appeal and denied by the Delaware Supreme Court on June 8, 2016. Thus, this issue has been preserved for habeas corpus review pursuant to 28 U.S.C. § 2254.

THE DEFENDANT: 57 years old.

THE COURT: Okay. And how far did you go in school?

THE DEFENDANT: 12th grade, Your Honor.

THE COURT: Okay. Have you taken any drugs, medicine, or any alcoholic beverages within the last 24 hours?

THE DEFENDANT: Just my diabetic medication.

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

THE DEFENDANT: Yes.

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

THE DEFENDANT: Yes.

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

THE DEFENDANT: Yes.

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

THE DEFENDANT: Yes.

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

THE DEFENDANT: Yes.

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

THE DEFENDANT: Yes.

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

THE DEFENDANT: No.

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

THE DEFENDANT: Yes.

THE COURT: What is your decision?

THE DEFENDANT: To waive.

Thereafter, the trial court concluded that petitioner's waiver of his right to a trial by jury was knowingly, intelligently and voluntarily made. Defense counsel advised the trial court that a "pretty thorough record" had been made during the suppression hearing that they were willing to rely on for purposes of appealing the court's suppression decision. Defense counsel additionally advised that for purposes of trial, the defense was willing to rely on that record, as well as the record that the State "will make with respect to where the drugs were found and what they were and how much was found".[34] As evidenced in the transcript, the trial court's colloquy with petitioner did not include a discussion of petitioner's consent to a stipulated bench trial nor did the court ascertain whether petitioner understood that his attorney was conceding the weight and identity of the prosecution's drug evidence and that the evidence had been found in his residence, and more specifically, in his jacket.

An exceptionally brief bench trial followed,[35] during which the State called only one witness. The State's witness testified that Mr. Burton identified the room in which the drugs were found as

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[34] As such, defense counsel conceded that 28.45 grams of cocaine and 0.93 grams of marijuana were found in Mr. Burton's bedroom, and in his jacket also located in his bedroom, at the address Probation and Parole identified as his place of residence and which Mr. Burton acknowledged was his place of residence.

[35] The entire trial portion of the transcript spans only ten pages.

his bedroom, and that having been a drug investigator for twelve years, in his opinion, the weight of the cocaine was not indicative of personal use. Defense counsel asked only a few simple questions on cross-examination, all pertaining to whether Mr. Burton had access to a microwave, which he would have needed if he were cooking cocaine as the witness believed him to be. No opening or closing arguments were given by either party. Petitioner was quickly found guilty of all counts by the trial judge. Mr. Burton received a sentence of life imprisonment pursuant to Delaware's habitual offender statute, 11 *Del. C.* § 4214(b).

Mr. Burton timely appealed his convictions to the Delaware Supreme Court. On January 14, 2014, while Mr. Burton's appeal was pending, it was discovered during the trial in *State v. Walker*[36] that alleged drug evidence, which had been sealed in an evidence envelope and stored at the OCME, was missing and had been replaced with blood pressure pills. Thereafter, an investigation began into possible misconduct at the OCME. In February of 2014, the DOJ publicly disclosed that from 2010 into early 2014, OCME employees were stealing and/or tampering with alleged drug evidence stored at the lab.

On June 19, 2014, the DOJ published its preliminary findings report in which the DOJ documented the "systemic operational failings" at the OCME. According to the State, the security in both the lab and drug evidence vault was found to be severely lacking, as there was no established criteria for providing or revoking employee access to the vault and the door to the vault was often left propped open. Additionally, everyone in the lab had access to the combinations for the lock boxes used to transport suspected drug evidence from law enforcement agencies to the OCME. Furthermore, the digital media used to store security camera footage was kept unsecured, and OCME

[36] *State v. Tyrone Walker*, ID: 1202002406.

employees were aware that there was no long-term storage for video footage.

The OCME also used inadequate software to track the chain of custody of suspected drug evidence. This software created unreliable reports, an issue that was further exacerbated by the fact that OCME employees were failing to log evidence into the computer system when the evidence was received.

It was also discovered that the manager of the drug lab failed to maintain any policies or procedures for the lab. She also kept boxes of drug evidence, some of which were very old, in her unsecured office and purportedly pulled evidence from the vault to use for training purposes.

As a result of the misconduct at the OCME, three OCME employees were suspended and later fired. Chief Medical Examiner Dr. Richard Callery pleaded no contest to two counts of official misconduct and was sentenced to one year in prison.[37] Lab manager Farnam Daneshgar was charged with drug possession and accused of "dry labbing"; however most of the charges were later dropped. Forensic Evidence Specialist James Woodson pleaded guilty to unlawful dissemination of criminal history and pleaded no contest to official misconduct.[38]

In August of 2014, a multiple day evidentiary hearing was held in the Superior Court in pending drug cases for which evidence was originally stored at the OCME but later seized by the Delaware State Police and tested at an independent lab. During these hearings, it was revealed that many of the technicians and chemists employed by the OCME had significant credibility issues. For example, Aretha Bailey, who left her former place of employment following allegations of theft, was granted access to the drug vault, allowing her to work in the drug vault alone on weekends and early

[37] *State v. Richard Callery*, ID: 1505007228.
[38] *State v. James Woodson*, ID: 1405018655.

morning weekdays, despite being hired by the OCME as an administrative assistant. Ms. Bailey was also assigned the duties of a Forensic Evidence Specialist, a position for which she was not qualified. During the DSP's investigation, Ms. Bailey was questioned but not charged.

During this multiple day evidentiary hearing, testimony was also presented regarding various colored evidence tape found at the OCME. This revelation was significant, as the color of the tape was used to assist in tracking the number of times an evidence envelope was legitimately opened and resealed. Each agency had its own color evidence tape, and when an individual in the chain of custody legitimately opened an evidence envelope, he/she was required to do so at a different spot than where it had previously been opened and resealed. The individual was also required to use the color tape that corresponded with his/her agency.

It was also revealed that the DSP discovered several cases in which the evidence had been compromised by an illegitimate entry made underneath legitimately placed evidence tape and hidden by resealing the envelope with new evidence tape of the same color. The DSP also located 705 unaccounted for pieces of drug evidence in the vault.

Since the preliminary report and the hearings, evidence of material problems at the OCME and instances of employee misconduct have continued to grow. Forensic Chemist Patricia Phillips was suspended and later resigned after three reported incidents of misconduct. Mr. Bajwa was placed on administrative leave and later terminated after alleged drug evidence he certified as cocaine was found to not contain any illegal substance. Forensic Chemist Bipin Mody also resigned due to his failure to abide by OCME policies and procedures and his failure to timely test alleged drug evidence. James Daneshgar, who was hired to replace James Woodson, also resigned after testing positive for the use of marijuana.

In February of 2016, undersigned Counsel and his staff conducted an investigation of the misconduct occurring at the OCME. This investigation included interviewing Farnam Daneshager and another former OCME employee,[39] who worked as a Forensic Evidence Specialist from 2006 to 2010. Mr. Daneshgar described various problematic practices employed by the OCME, including leaving the drug vault and intake office open and unattended and leaving drug evidence unattended in the lab during employee breaks. Mr. Daneshgar also described how the OCME would contact law enforcement when there were discrepancies between the actual weight of alleged drug evidence and the weight reported by law enforcement and that law enforcement would instruct the OCME to still proceed with testing. CS1 also described numerous problems at the OCME and provided email correspondence demonstrating that Delaware law enforcement was aware of problems at the OCME prior to the date reported by the DOJ.

Undersigned counsel also retained the expert services of Joseph Bono, an independent Forensic Science Consultant and a former laboratory director of the United States Secret Service Laboratory, Forensic Services Division, the Drug Enforcement Administration Special Testing and Research Laboratory, the DEA Mid-Atlantic Laboratory, and a former Quality Manager of the nine-forensic science laboratories in the DEA Office of Forensic Sciences. Mr. Bono authored two reports and rendered opinions as to how each problem at the OCME affected the reliability of the chain of custody and the integrity of the evidence tested. Mr. Bono ultimately opined that "the OCME drug laboratory d[id] 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

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

questions concerning the results reported by the forensic chemist."

In light of the aforementioned, Mr. Burton's appeal was stayed to allow him to move for a new trial in the Superior Court based on this newly disclosed evidence of OCME misconduct, which had occurred while the suspected drug evidence in Mr. Burton's case was being stored and tested at the OCME. Mr. Burton's motion for a new trial was denied by the Superior Court,[40] predominantly because defense counsel had conceded the identity and weight of the alleged drug evidence, as well as the chain of custody, through the stipulated bench trial. Specifically, the Superior Court found that by "knowingly, intelligently, and voluntarily agree[ing] to a stipulated bench trial instead of a jury trial," Mr. Burton waived his right to test the chain of custody of the drug evidence, because he had "stipulated that the drug evidence entered by the State was, in fact, illegal drugs.".

The Superior Court's decision was affirmed on appeal for the reasons articulated in the Superior Court's November 30, 2015 denial order, and Petitioner's challenge to the legality of the administrative search of Mr. Burton's residence was likewise rejected by the Delaware Supreme Court for the reasons articulated by the Superior Court in its September 9, 2013 order denying the motion to suppress.

Postconviction.

Mr. Burton thereafter sought postconviction relief.[41] Mr. Burton's Amended Motion for Postconviction Relief raised two claims: 1) that the State of Delaware violated *Brady v. Maryland*

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[40] This issue was raised on direct appeal and denied by the Delaware Supreme Court on June 8, 2016. Thus, this issue has been preserved for habeas corpus review pursuant to 28 U.S.C. § 2254.

[41] Petitioner initially filed a *pro se* Motion for Postconviction Relief, which was later amended once postconviction counsel was appointed by the Superior Court.

by failing to timely disclose evidence of misconduct at the OCME; and 2) that petitioner's attorney was constitutionally ineffective for stipulating to the State's evidence without petitioner's consent and that this ineffectiveness deprived petitioner of his due process right to a fair trial, to meaningfully oppose the State's case and to make fundamental decisions concerning his case, pursuant to both the federal and state constitutions. Following an affidavit from petitioner's attorney,[42] a response from the State, and a reply from petitioner, the Superior Court denied both of Mr. Burton's postconviction claims on April 30, 2018.

Petitioner timely appealed the denial of his Amended Motion for Postconviction relief to the Delaware Supreme Court. Following briefing from both petitioner and the State, the Delaware Supreme Court issued an opinion on December 26, 2018, denying petitioner's appeal and affirming the judgment of the Superior Court as to both of petitioner's postconviction claims. The Delaware Supreme Court denied petitioner's ineffective assistance of counsel claim after determining that petitioner had not demonstrated prejudice under *Strickland v. Washington*. However, the Court's December 26, 2018 opinion did not address petitioner's constitutional claim that his attorney's ineffectiveness deprived him of a fair trial and a meaningful opportunity to oppose the State's case, as well as overrode his decision to plead not guilty, and indicated a material misunderstanding and

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[42] Defense counsel's November 27, 2017 affidavit indicated that he had no independent recollection of discussing the stipulation with Mr. Burton nor did his records confirm that such a discussion took place. Rather, defense counsel could state no more than "[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 based upon his database entry from September 23, 2013, he had "discussed plea offer and prospects for appeal for suppression issue" with Mr. Burton at the prison. Defense counsel additionally asserted that "it would have been [his] practice" to explain to a client how a stipulated bench trial would be conducted and therefore, assumed that he "probably conducted some explanation as to how the trial would proceed before [the trial judge]."

unreasonable determination of the key facts underlying Petitioner's claim.

CLAIMS FOR RELIEF

I. THE STATE COURTS UNREASONABLY APPLIED THE FACTS IN MR. BURTON'S CASE TO THE CLEARLY ESTABLISHED FEDERAL LAW OF *STRICKLAND V. WASHINGTON* AND ITS PROGENY AND ERRONEOUSLY FAILED TO APPLY THE CLEARLY ESTABLISHED FEDERAL LAW OF *MCCOY V. LOUISIANA*.

A. This claim may be considered by this Court.

Petitioner argued on direct appeal that the Superior Court erred by denying Mr. Burton's claim that defense 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. Accordingly, Petitioner has exhausted all of his state court remedies in relation to this claim.

B. The state courts unreasonably applied the *Strickland* standard to the facts of Mr. Burton's case and failed to consider the clearly established federal law of *McCoy v. Louisiana*.

As Mr. Burton argued to the state courts, defense counsel provided ineffective assistance of counsel that violated his Sixth and Fourteenth Amendment rights to a fair trial and to meaningfully oppose the prosecution's case by stipulating to the prosecution's evidence without Mr. Burton's consent and despite Mr. Burton's plea of not guilty. However, the Delaware Superior Court determined that Mr. Burton consented to the stipulated bench trial by waiving his right to a jury

trial;[43] the Delaware Supreme Court made no express factual finding on the issue.[44] Nevertheless, both state courts concluded that Mr. Burton was not prejudiced by defense counsel's stipulation to the prosecution's evidence.[45] Such conclusions are objectively unreasonable, as they are refuted by both the factual record and a reasonable application of the *Strickland* standard and such conclusions ignore clearly established federal law.

As Mr. Burton explained to the state courts in abundant detail, although he voluntarily, knowingly and intelligently waived his right to a jury trial and consented to a bench trial, he did not waive his right to contest the State's evidence, as he did not agree to a *stipulated* bench trial. As the transcript of the colloquy confirms, Mr. Burton engaged in a discussion with the Superior Court to determine whether he was knowingly, intelligently and voluntarily consenting to a bench trial; there was no mention of a stipulated bench trial in which the prosecution's evidence would not be contested. Rather, 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 defense counsel and defense 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 have the state courts pointed to any legal authority that would support such an assumption.

Mr. Burton steadfastly refused to plead guilty, and defense counsel impermissibly overrode

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[43] Specifically, the Superior Court stated, "[c]ounsel avers that as a matter of practice the decision to agree to a bench trial would have been clearly discussed with Defendant and that the consequences of doing so would be evaluated." The court also concluded that based on his colloquy with the court, petitioner's "decision to waive a trial by jury was knowing, intelligent, and voluntary" and "made strategically with the advice of counsel". Ex. C, at 11-12.

[44] Ex. B, at 5.

[45] Ex. B, at 5; Ex. C, at 12.

petitioner's objective of maintaining his innocence when he conceded, without petitioner's consent, the elements of the offenses. As Mr. Burton explained to the state courts, and the state courts failed to consider, based upon the offenses with which he was charged and the statutory elements required to prove guilt beyond a reasonable doubt, by stipulating to the State's evidence, defense counsel conceded all elements of the State's case but for possession and possession with intent to manufacture or distribute. However, by failing to cross-examine the State's witness on his opinion that the weight of the cocaine did not indicate personal use, defense counsel similarly offered no opposition to the State's evidence of possession with intent to manufacture or distribute.

Albeit never admitting that Mr. Burton was guilty of the charged offenses, through his actions and non-actions, defense counsel: 1) conceded petitioner's guilt without obtaining his "fully informed and publicly acknowledged consent",[46] thereby overriding petitioner's Sixth Amendment right to decide whether to plead guilty or not guilty;[47] 2) waived Mr. Burton's Sixth Amendment right to meaningfully oppose the prosecution's case;[48] 3) denied Mr. Burton his Fourteenth Amendment due process right to a fair trial;[49] and 4) deprived Mr. Burton of his Sixth Amendment

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[46] *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988); *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966).

[47] *Gonzalez v. United States*, 553 U.S. 242, 250 (2008) (citing *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Taylor*, 484 U.S. at 417-18)); *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977); *Brookhart*, 384 U.S. at 7-8.

[48] *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").

[49] 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").

right to the effective assistance of counsel.[50] Petitioner never wanted or expected his attorney to relieve the prosecution of its constitutional burden to prove each element of the offenses beyond a reasonable doubt, and defense counsel violated Mr. Burton's constitutional right by overriding the objectives of the defense as decided by Mr. Burton.[51]

This United States Supreme Court held long ago that a defense attorney has authority to manage the day-to-day conduct of the defense and "has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop."[52] However, it is also well-settled that under the federal constitution, some decisions belong solely to the defendant, such as whether to exercise or waive basic trial and appellate rights, because they are so personal to the defendant "that they cannot be made for the defendant by a surrogate."[53] As federal constitutional precedent clearly establishes, a criminal defendant has "ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal",[54] and such fundamental decisions cannot be waived by counsel "without the fully informed and publicly acknowledged consent of the client."[55] As such, even though a defense attorney is not required to obtain the defendant's consent to "every

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[50] *Strickland*, 466 U.S. at 686 ("[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)).

[51] *McCoy v. Louisiana*, 584 U.S. ___, ___ (2018) (slip op., at 7, 9); *see also Nixon*, 543 U.S. at 187; *Faretta v. California*, 422 U.S. 806, 819-20 (1975); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Brookhart*, 384 U.S. at 7-8; *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

[52] *New York v. Hill*, 528 U.S. 110, 114-15 (2000); *Taylor v. Illinois*, 484 U.S. 400, 418 (1988); *Wainwright*, 433 U.S. at 93, 97 (Burger, C.J., concurring).

[53] *Nixon*, 543 U.S. at 187.

[54] *Jones*, 463 U.S. at 751; see also *Nixon*, 543 U.S. at 187; *Wainwright*, 433 U.S. at 93 n.1.

[55] *See Taylor*, 484 U.S. at 417-18; *Brookhart*, 384 U.S. at 7-8.

tactical decision",[56] "some basic trial choices are so important that an attorney must seek the client's consent in order to waive the right."[57]

Recently, the United States Supreme Court was asked in *McCoy v. Louisiana* to decide a federal constitutional issue akin to the issue raised by Mr. Burton. The Court was presented with the question of "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.[58] The Court definitively 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."[59] As the Court noted, "a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her",[60] 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*."[61]

In sum, *McCoy* directs that "[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."[62] Significantly, the United States Supreme

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[56] *Nixon*, 543 U.S. at 187 (citing *Strickland*, 466 U.S. at 688; *Taylor*, 484 U.S. at 417-18).

[57] *Gonzalez*, 553 U.S. at 250 (citing *Nixon*, 543 U.S. at 187).

[58] *McCoy*, 584 U.S. __, ___ (2018) (slip op., at 5) (citing *Cooke v. State*, 977 A.2d 803, 842-846 (Del. 2009)).

[59] *Id.* at 2.

[60] *Id.* at 6.

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

[62] *Id.* at 7 (citing U.S. const. VI; ABA Model Rule of Professional Conduct 1.2(a) (2016)). Conversely, the United States Supreme Court has 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.

Court concluded that a violation of this constitutional principle results in a structural error for which no demonstration of prejudice is required.[63] The holding of *McCoy* is entirely consistent with clearly established federal law which has long-held that in regard to the objectives of the representation, an attorney "must both consult with the defendant and obtain consent to the recommended course of action."[64] Likewise, *McCoy* only emphasizes that which has been long-established–that although counsel may be able to better make such fundamental strategic choices, the defendant retains full autonomy to make these decisions because he or she alone experiences the consequences of them.[65]

In Mr. Burton's case, the state courts wholly failed to address *McCoy* and the precedent upon which it is based,[66] and in doing so, ignored clearly established federal law in concluding that Mr. Burton received constitutionally effective assistance of counsel whose actions did not infringe on Mr. Burton's Sixth and Fourteenth Amendment rights to the effective assistance of counsel, a fair trial, to meaningfully oppose the prosecution's case, and to make fundamental decisions concerning his case, particularly his decision to plead guilty or not guilty. Had the state courts not overlooked *McCoy v. Louisiana*, it would been clear to them that an unconstitutional violation of a defendant's autonomy constitutes a structural error not subject to *Strickland's* prejudice requirement. Thus, in finding that petitioner's ineffective assistance of counsel claim was properly denied for failure to demonstrate *Strickland* prejudice, the Delaware Supreme Court disregarded the United States Supreme Court's holding in *McCoy* that when a defendant's constitutionally guaranteed right of autonomy has been violated, such error is structural in nature and not subject to *Strickland's*

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[63] *McCoy*, 584 U.S. __, __ (2018) (slip op., at 11-12).

[64] *Nixon*, 543 U.S. at 187.

[65] *See Faretta*, 422 U.S. at 819-20; *Boykin*, 395 U.S. at 243; *Duncan*, 391 U.S. at 149; *Brookhart*, 384 U.S. at 7-8; *Pointer*, 380 U.S. at 403 (1965); *Malloy*, 378 U.S. at 6.

[66] Ex. B, at 4-5; Ex. C, at 8-13.

prejudice requirement.[67]

However, even though Mr. Burton had no obligation to, he did in fact sufficiently demonstrate *Strickland* prejudice, and the state courts' conclusion that Mr. Burton was not prejudiced by defense counsel's stipulation to the prosecution's evidence results from an unreasonable application of the *Strickland* standard to the facts of the case.

In *Strickland v. Washington*, the United States Supreme Court set forth the two part analysis to govern all claims of ineffective assistance of counsel.[68] "First, the defendant must show that counsel's performance was deficient."[69] In other words, the defendant must "show[] that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment."[70] The defendant must overcome the presumption that "under the circumstances, the challenged action might be considered sound trial strategy."[71] Under the second prong of the *Strickland* analysis, "the defendant must show that the deficient performance prejudiced the defense."[72] This prong "requires [a] showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[73] In other words, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[74] A reasonable probability exists when there "is a probability sufficient to undermine confidence in the outcome."[75]

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[67] *McCoy*, 584 U.S. __, __ (2018) (slip op., at 11-12).
[68] *Strickland*, 466 U.S. at 687.
[69] *Id*.
[70] *Id*.
[71] *Id*. at 689 (citing *Michael v. Louisiana*, 350 U.S. 91, 101 (1955)).
[72] *Id*. at 687.
[73] *Strickland*, 466 U.S. at 687.
[74] *Id*. at 694
[75] *Id*.

However, when assessing an ineffective assistance of counsel claim under AEDPA, the United States Supreme Court recognized that:

> The pivotal question is whether the state court's application of *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard. Were that the inquiry, the analysis would be no different than if, for example this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), an *unreasonable* application of federal law is different from an *incorrect* application of federal law. A state court must be granted deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.[76]

In finding no prejudice on the basis of overwhelming evidence,[77] the state courts unreasonably applied the *Strickland* standard to the facts of this case. The courts failed to appreciate the fact that because defense counsel's stipulation included consent to rely upon the lengthy record made at the suppression hearing for purposes of trial, numerous pages of factual testimony that would have been otherwise inadmissible at trial, such as the fact that 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, were in fact admitted. As such, 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. Additionally, when the OCME misconduct was disclosed by the State, Mr. Burton was denied a new trial and/or re-testing of the alleged drug evidence, because defense counsel had stipulated to the drug evidence and the chain of custody. Accordingly, petitioner was clearly prejudiced by his attorney's actions, regardless of how allegedly overwhelming the evidence

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[76] *Harrington v. Richter*, 562 U.S. 86, 101 (2011).
[77] Ex. B, at 5; Ex. C, at 12.

against him was.

Nevertheless, Mr. Burton was entitled to relief even in the absence of a showing of prejudice as the complained of structural error requires no showing of prejudice, and Mr. Burtons's constitutional rights were further violated when the state courts denied him relief on the basis of an erroneously applied legal standard.

As the state courts unreasonably concluded that Mr. Burton was not prejudiced by defense counsel's stipulation to the prosecution's evidence, while failing to address whether defense counsel's objectively unreasonable stipulation to the State's evidence without Mr. Burton's consent and in light of Mr. Burton's plea of not guilty infringed on Mr. Burton's constitutional right to a fair trial, to meaningfully oppose the prosecution's case and to make fundamental decisions concerning his case, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, the state courts unreasonably applied and/or wholly overlooked clearly established federal law. Accordingly, petitioner's convictions must be vacated and the case remanded for a new trial.

II. THE STATE COURTS ERRONEOUSLY CONCLUDED THAT THE STATE'S *BRADY* VIOLATION DID NOT ENTITLE MR. BURTON TO A NEW TRIAL OR POSTCONVICTION RELIEF.[78]

A. This claim may be considered by this Court.

At the Superior Court level, the court found Mr. Burton's *Brady* claim to be procedurally barred from postconviction review under Delaware Rule of Criminal Procedure 61(i)(4) as a former

[78] As Mr. Burton first raised a *Brady* claim related to the State's untimely disclosure of information regarding the OCME's misconduct on direct appeal following the denial of his motion for a new trial, both Mr. Burton's direct appeal *Brady* claim and postconviction *Brady* claim, the latter of which was broader in scope than the first, are incorporated within this singular claim.

adjudication.[79] However, after applying a "miscarriage of justice" exception, the Superior Court nevertheless considered the merits of Mr. Burton's claim, ultimately denying it.[80] On appeal, the Delaware Supreme Court concluded that Mr. Burton's *Brady* claim was in fact barred as a former adjudication, concluding that the miscarriage of justice exception was erroneously applied by the lower court and finding Mr. Burton's *Brady* claim to have already been raised and ruled upon in Mr. Burton's November 2015 motion for a new trial, the denial of which had been previously upheld by the Delaware Supreme Court on direct appeal.[81]

Accordingly, because Mr. Burton twice raised a *Brady* claim alleging that the State had failed to timely provide information regarding the OCME's misconduct, thereby entitling him to a new trial, at both the Superior Court and Supreme Court levels—once on direct appeal following conviction,[82] and once during postconviction proceedings[83]—Mr. Burton has exhausted all of his state court remedies in relation to this claim.

B. The State violated its obligations under *Brady v. Maryland* by failing to timely disclose critical impeachment and exculpatory information regarding the OCME's misconduct.

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's work product. The State's failure to do so deprived Mr. Burton of information that he needed prior to trial in order to

[79] Ex. C, at 3-4.
[80] Ex. C, at 4-5, 8.
[81] Ex. B, at 3-4.
[82] Ex. D, at 1; Ex. E.
[83] Ex. B, at 1-4; Ex. C, at 2-8.

make effective use of the information.

In *Brady v. Maryland*, the United States Supreme Court pronounced that the "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."[84] As a result, a prosecutor must disclose all materially exculpatory and impeachment information to a defendant.[85] A prosecutor is obligated to provide the defense with this information in sufficient amount of time to allow the defense to make effective use of it.[86] If, however, a prosecutor suppresses favorable exculpatory or impeachment evidence and that suppression results in prejudice to a defendant, then the prosecutor has violated their *Brady* obligations.[87]

A *Brady* violation "occurs when the government fails to disclose evidence materially favorable to the accused, including both impeachment evidence and exculpatory evidence."[88] To establish a *Brady* violation, a petitioner must demonstrate that: "(1) the evidence at issue was favorable to the accused, either because it was exculpatory or it had impeachment value; (2) the prosecution suppressed the evidence, either willfully or inadvertently; and (3) the evidence was

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

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

[86] *Miller v. United States*, 14 A.3d 1094, 1111 (D.C. 2011) (citing *Lindsey v. United States*, 911 A.3d 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); *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); *United States v. Pollack*, 534 F.2d 964, 973 (D.C. 1976).

[87] *Strickler v. Greene,* 527 U.S. 263, 281-82 (1999).

[88] *Johnson v. United States*, 759 F.Supp. 2d 534, 539 (D.Del. 2011) (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)).

material."[89] Materiality requires a showing of a "reasonable probability of a different result."[90] "A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial."[91] Thus, "[w]hen . . . the court is presented with procedurally defaulted *Brady* claims, a movant demonstrates prejudice by satisfying the third component of the *Brady* standard, namely by showing that the evidence was material for *Brady* purposes."[92]

In the present case, the State violated *Brady* when it failed to timely provide Mr. Burton with information regarding the OCME scandal. The State's failure deprived Mr. Burton of critical information he needed and was entitled to well in advance of trial so as to make effective use of this information. This information included the systemic operational failings of the OCME that directly resulted in the termination and prosecution of three OCME employees and the questioning of a fourth, as well as the continuing incidents of misconduct by OCME employees that the State failed to disclose despite having an ongoing duty to do so.[93]

The value of this information was made apparent to the state courts through Mr. Joseph Bono, who opined that the OCME's violation of forensic quality standards cast doubt on the integrity of the chain of custody and the testing of all evidence stored in the OCME's drug vault. Mr. Bono also opined that:

had the accrediting body been aware of the severity of the evidence handling

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[89] *Id.* (citing *Strickler*, 527 U.S. at 281-82; *Lambert v. Blackwell* 387 F.3d 210, 252 (3d Cir. 2004)).

[90] *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

[91] *Kyles*, 514 U.S. at 434.

[92] *Johnson* 759 F.Supp. 2d at 539 (citing *Banks v. Dretke*, 540 U.S. 668, 691 (2004)).

[93] *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).

> violations within the OCME drug analysis laboratory, the 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 given a specified time-frame to [correct] the violations.

Additionally, it is apparent that the State suppressed this critical information. While this Court and the Delaware Supreme Court have concluded that the State has repeatedly asserted there was no knowledge of the problems at the OCME prior to January of 2014,[94] the State was still responsible for failing to disclose the *Brady* information,[95] as the knowledge of *Brady* materials by another member of the prosecution team may be imputed upon a prosecutor.[96] At least one federal court has held that for purposes of *Brady*, a drug lab chemist was a member of the prosecution team.[97] Nevertheless, regardless of whether OCME employees are considered a member of the prosecution team, Mr. Burton presented the state courts with affidavits from former OCME employees who described law enforcement's prior knowledge of the problems at the OCME. As such, the State was imputed with law enforcement's knowledge of the problems at the OCME.[98]

There is also reason to believe that some members of the Attorney General's Office were aware of the *Brady* information relating to the problems at the OCME due to their interactions with various police departments and members of the OCME in the course of prosecuting thousands of

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[94] *Taylor v. Johnson*, 2017 WL 2646111, at *5 (D.Del. June 19, 2017); *Harmon v. Johnson*, 2016 WL 183899, at *4 (D.Del. Jan. 14, 2016); *Banks v. State*, 2015 WL 8481972, at *1 (Del. Dec. 9, 2015); *Bunting v. State*, 2015 WL 2147188, at *3 (Del. May 5, 2015); *Brown v. State*, 108 A.3d 1201,1204 (Del. 2015).

[95] *See Kyles*, 514 U.S. at 437-38; *Arizona v. Youngblood*, 488 U.S. 51, 55 (1988) (quoting *Brady*, 373 U.S. at 87).

[96] *Giglio*, 405 U.S. at 154; *United States v. Risha*, 445 F.3d 298, 303-04 (3d Cir. 2006); *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).

[97] *United States v. Hampton*, 109 F.Supp. 3d 431, 440 (D.Mass. 2015).

[98] *Youngblood v. West Virginia*, 547 U.S. 867 (2006); *Smith v. Cain*, 132 S.Ct. 627, 629-30 (2012); *Johnson v. Folino*, 705 F.3d 117, 129 (3d Cir. 2013).

cases between 2008 and 2014 that would have required collective discussions regarding forensic testing. If even one member of the Attorney General's office had knowledge of the problems at the OCME, this knowledge is imputed upon the entire office.[99] Thus, it is clear that the State suppressed *Brady* information, regardless of whether the State had direct knowledge of the OCME scandal.

Mr. Burton presented sufficient evidence to the state courts to establish a strong inference that the evidence in his case had been tampered with, thereby satisfying the prejudice requirement of the *Brady* test. As noted above, an off-white chunky substance and green plant-like substance were found in Mr. Burton's bedroom. 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. However, none of the substances tested by the OCME had the same weight as what was reported by law enforcement. The difference in the weight of the suspected cocaine was 0.55 grams. The difference in the weight of the suspected marijuana was 0.07 grams. Mr. Bajwa's report did not indicate a 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

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[99] *Mastracchio v. Vorse*, 274 F.3d 509, 600 (1st Cir. 2001); *Smith v. Sec'y of New Mexico Dep't of Corr.*, 50 F.3d 801, 824 (10th Cir. 1995).

suspected drugs in Mr. Burton's case.[100] 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;[101] however, the fact that Mr. Bajwa's misconduct occurred 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 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." 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 defense counsel's cross-examination of Mr. Bajwa would have altered the outcome of the trial.[102]

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

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[100] Mr. Bajwa's testing in *Dollard* was conducted on September 10, 2012. The testing in Mr. Burton's case was performed on May 8, 2013.

[101] 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. Mr. Bajwa testified consistently with his report at trial and noted that there were no signs of tampering. Dollard was found guilty of aggravated possession of cocaine and other related charges. 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. The case was remanded to the Superior Court, at which time the substance was retested by an independent lab. 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.

[102] *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.").

Dollard case.[103] The impeachment evidence would have directly countered the presumption that the drug testing was performed correctly and the report's findings accurate.[104] 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.[105] 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. 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.[106]

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, defense counsel would clearly not have stipulated to the State's facts, as he would have had a basis

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

[104] *See* 10 *Del. C.* § 4330.

[105] 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).

[106] *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.").

for challenging the chain of custody and the testing performed by Mr. Bajwa.

In light of the aforementioned, the evidence of OCME misconduct was material and by failing to disclose this evidence to Mr. Burton prior to his trial, the State was in clear violation of its *Brady* obligations. As such, petitioner's conviction must be vacated and the case remanded for a new trial.

III. THE STATE COURTS UNREASONABLY APPLIED CLEARLY ESTABLISHED FEDERAL LAW IN CONCLUDING THAT THE EVIDENCE SEIZED DURING THE WARRANTLESS ADMINISTRATIVE SEARCH OF MR. BURTON'S RESIDENCE MET FEDERAL CONSTITUTIONAL REQUIREMENTS.

A. This claim may be considered by this Court.

Petitioner unsuccessfully argued on direct appeal that the Superior Court erred by denying Mr. Burton's pre-trial motion to suppress evidence seized during a warrantless administrative search of Mr. Burton's residence.[107] Accordingly, Petitioner has exhausted all of his state court remedies in relation to this claim.

B. The state courts erroneously concluded that the warrantless administrative search of Mr. Burton's residence complied with all federal constitutional requirements.

The Fourth Amendment to the United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ."[108] "Evidence obtained pursuant to a warrantless search that does not meet an exception to the warrant requirement must be suppressed as 'fruit of the poisonous tree.'"[109] "A probationer's home,

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[107] Ex. D, at 1.

[108] U.S. Const. amend. IV.

[109] *United States v. Cottman*, 497 F. Supp.2d 598, 602 (D. Del. 2007) (citing *United States v. Brown*, 448 F.3d 239, 244 (2006) (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)).

like anyone else's, is protected by the Fourth Amendment's requirement that searches be `reasonable.'"[110]

The United States Supreme Court has held that a warrantless administrative search of a probationer's residence requires the probation officer to have 'reasonable suspicion' or 'reasonable grounds' for the search.[111] In the case of *Griffin v. Wisconsin*,[112] the Supreme Court held that a warrantless search of a probationer's home does not violate the probationer's Fourth Amendment rights when carried out pursuant to a specific regulation of the probation department that authorized warrantless searches of probationers' residences based upon reasonable suspicion that a residence contained contraband, or evidence of probation violations and which itself satisfied the demands of the Fourth Amendment's reasonableness requirements.

In regard to defining "reasonable suspicion", federal law clearly establishes that "reasonable suspicion exists where the 'totality of the circumstances' indicates that the probation officer had a 'particularized and objective basis' for suspecting legal wrongdoing."[113] In Mr. Burton's case, probation officers relied on information provided by a confidential informant to authorize the administrative search, yet failed to independently assess the reliability of the confidential informant and failed to independently corroborate the confidential informant's allegation of illegal activity, specifically, that an individual named "David" was selling crack cocaine from a residence that turned out to be Mr. Burton's residence. Instead, the probation officers simply relied upon the assertion from a fellow probation officer that the confidential informant was past, proven and reliable without

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[110] *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).
[111] *Id.* at 872-73.
[112] *Id.* at 873.
[113] *United States v. Arizu*, 534 U.S 266, 273 (2002).

inquiring as to the basis for that characterization.

The Superior Court denied Mr. Burton's motion to suppress, finding that the probation officers had "reasonable grounds" to search Mr. Burton's residence;[114] however, in reaching this conclusion, the court relied on information produced at a hearing on the motion to suppress that had not been presented to the probation officer who authorized the administrative search, in contravention of federal law.[115] The record shows that the only information relayed to the officer who authorized the search was that a probation officer had received a tip from a past, proven and reliable informant that a black male, whom this individual knew by the name of "David", was on probation, was a sex offender, lived at 1232 North Thatcher Street in a room at the top of the stairs, and was selling crack cocaine from this residence.

Federal law also establishes that an informant's "'veracity,' 'reliability' and 'basis of knowledge' are all highly relevant in determining the value of his report."[116] Where, as here, the officer authorizing the warrantless search did not speak with the informant, did not independently assess his reliability[117] and did not independently corroborate the alleged concealed criminal activity—selling crack cocaine from the residence at North Thatcher Street—the officer had no basis upon which he could have had a "particularized and objective basis for suspecting legal wrongdoing."[118] As such, the state courts unreasonably applied federal case law in finding the

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[114] Ex. F, at 3; affirmed by the Delaware Supreme Court on direct appeal, Ex. D., at 1.

[115] *See Florida v. J.L.*, 529 U.S. 266, 271 (2000) ("The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search.").

[116] *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983).

[117] *See United States. v. Waterman*, 549 F. Supp.2d 593, 598 (D. Del. 2008) ("In order for an informant's tip to be the basis for reasonable suspicion, the tip must be reliable both in its assertion of illegality and in its tendency to identify a determinate person.") (citing *Florida v. J.L.*, 529 U.S. 266, 272 (2000); *United States v. Valentine*, 232 F.3d 350, 354 (3d Cir. 2000)).

[118] *Arizu*, 534 U.S at 273.

above-described information sufficient to establish the "reasonable grounds" or "reasonable suspicion" that the Fourth Amendment requires to perform a constitutional warrantless administrative search.

As the state courts' conclusion that the warrantless administrative search of Mr. Burton's residence complied with all constitutional requirements was the result of an unreasonable application of clearly established federal law, petitioner's convictions must be vacated, the evidence obtained from the warrantless administrative search of Mr. Burton's residence suppressed as "fruit of the poisonous tree",[119] and the case remanded for a new trial.

[119] *United States v. Cottman*, 497 F. Supp.2d 598, 602 (D. Del. 2007) (citing *United States v. Brown*, 448 F.3d 239, 244 (2006) (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)).

PRAYER FOR RELIEF

Having shown that the Delaware courts unreasonably applied and/or plainly ignored clearly established federal law to the facts of Petitioner's case, Petitioner's claims must be reviewed on their merits. Based on the arguments made above and on the basis of the arguments and factual record developed in the state court, Petitioner respectfully requests that this Court grant him a writ of habeas corpus so that he may be discharged from his unconstitutional confinement and restraint. Alternatively, Petitioner respectfully requests that this Court allow for full briefing on his claims. As such, Mr. Burton requests that this Court allow the Parties to provide a status report for the filing deadlines for Petitioner's Opening Brief in Support of his Petition for Writ of Habeas Corpus, the State's Answer, and Petitioner's Reply.

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Counsel for William Burton

Date: December 24, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WILLIAM BURTON,	:	
Petitioner,	:	
	:	
v.	:	**No. 1:19-cv-01475-MN**
	:	
CLAIRE DEMATTEIS, Commissioner,	:	
Delaware Department of Corrections	:	
Respondent,	:	
	:	
ROBERT MAY, Warden,	:	
James T. Vaughn Correctional Center	:	
Respondent.	:	

OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254

Christopher S. Koyste
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Date: May 14, 2021

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NATURE AND STAGE OF PROCEEDINGS

On March 18, 2013, Mr. William Burton was charged by indictment with one count of drug dealing cocaine, one count of aggravated possession of cocaine, one count of Possession of Drug Paraphernalia, and two counts of Possession of Marijuana. Habeas Appendix at 1 (hereinafter referenced as "HA_").

On June 3, 2013, Trial Counsel filed motion to suppress, challenging the search and seizure of the alleged drug evidence. HA2. A hearing on the motion to suppress was held on August 16, 2013 and on August 21, 2013. HA2-3. On September 9, 2013, Mr. Burton's motion to suppress was denied. HA3.

A stipulated bench trial was held on September 24, 2013, and Mr. Burton was found guilty of all counts. HA4. On December 13, 2013, Mr. Burton was sentenced to life in prison pursuant to Delaware's habitual offender statute. HA4.

On December 30, 2013, Mr. Burton timely appealed his sentence to the Delaware Supreme Court. HA4. In January 2014, while Mr. Burton's appeal was pending, it was discovered during a trial in the Superior Court of Delaware that alleged drug evidence that had been stored at Delaware's Office of the Chief Medical Examiner (hereinafter referred to as "OCME") was missing and had been replaced with blood pressure pills. HA249. In February of 2014, the Delaware State Police (hereinafter referred to as "DSP") closed the OCME and began an investigation into the OCME's operation. HA252. It was also publicly disclosed that from 2010 into early 2014, that employees of the OCME were stealing and/or tampering with drug evidence being stored at the OCME. HA249-52; HA277-82. On June 19, 2014, Delaware's Department of Justice (hereinafter referred to as "DOJ" or "State") published its preliminary findings report revealing 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." HA247-48.

In light of the aforementioned, Mr. Burton's appeal was stayed, and the case was remanded to the Delaware Superior Court for record development on this issue. HA6. Trial Counsel filed a motion for a new trial and/or re-testing of the suspected drug evidence in the Superior Court. HA7. Following the Superior Court's denial of the requested relief, Mr. Burton's direct appeal resumed, and on June 8, 2016, the Delaware Supreme Court affirmed the judgment of the Superior Court. HA9; HA624-33; HA891-92.

On August 11, 2016, Mr. Burton timely filed a *pro se* Rule 61 Motion for Postconviction Relief in the Delaware Superior Court. HA9. Undersigned counsel was appointed on June 23, 2017 to represent Mr. Burton during his state postconviction proceedings. HA10-11.

On August 17, 2017, Mr. Burton, through Counsel, filed an Amended Rule 61 Motion alleging ineffective assistance of counsel and that the State failed to timely disclose *Brady* information relating to the reliability issues of the OCME, prior to trial. HA11.

On April 30, 2018, the Superior Court dismissed Mr. Burton's Amended Rule 61 Motion. HA12. Mr. Burton timely appealed the Superior Court's dismissal to the Delaware Supreme Court on May 30, 2018. HA12. On December 26, 2018, the Delaware Supreme Court affirmed the Superior Court's denial of Mr. Burton's Amended Motion for Postconviction Relief. HA12.

On December 24, 2019, Mr. Burton, through Counsel, filed an amended petition for a Writ of Habeas Corpus in this Court. This is his Opening Brief in support of that Petition.

TIMELINESS

Pursuant to 28 U.S.C. § 2244(d)(1), "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). This one year period of limitation begins to run from the latest of:

> (A) the date on which the state-court judgment pursuant to which he is in custody becomes final;
> (B) the date on which an unconstitutional impediment to filing the application is removed;
> (C) the date on which the Supreme Court recognizes a new constitutional right asserted in the application (so long as the right is retroactively applicable to cases on collateral review); and
> (D) "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

McAleese v. Brennan, 483 F.3d 206, 212 (3d Cir. 2007) (quoting 28 U.S.C. § 2244(d)(1)). This one year period of limitations is tolled when there is "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending...." 28 U.S.C. § 2244(d)(2). A properly filed application for state post-conviction review means "one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998). Additionally, "a properly filed state post-conviction motion will only toll the federal habeas limitations period if the post-conviction motion itself is filed within the federal one-year filing period." *Gibbs v. Carroll*, C.A. No. 03-0634-JJF, at 5-6 (D.Del. June 17, 2004) (citing *Price v. Taylor*, 2002 WL 31107363, at *2 (D.Del. Sept. 23, 2002)) (attached hereto as Exhibit A).

In the present matter, Mr. Burton was found guilty on September 24, 2013 and was sentenced on December 13, 2013. HA4. In order to appeal his conviction, Mr. Burton had 30 days from December 13, 2013 to file a notice of appeal with the Delaware Supreme Court, pursuant to

Delaware Supreme Court Rule 6(a)(iii). Del. Supr. Ct. R. 6(a)(iii). Mr. Burton timely filed his notice of appeal with the Delaware Supreme Court on December 30, 2013. HA4. On June 8, 2016, the Delaware Supreme Court affirmed Mr. Burtons conviction. HA9. Thereafter, Mr. Burton had 90 days to file a petition for writ of certiorari to the United States Supreme Court before the one year period of limitations for the filing of a § 2254 petition began to run. 28 U.S.C. § 2244(d)(1)(A). As Mr. Burton did not file a petition for writ of certiorari, the one year period of limitations for the filing of a § 2254 petition began to run on September 6, 2016. 28 U.S.C. § 2244(d)(1)(A).

On August 11, 2016, Mr. Burton timely filed a *pro se* Rule 61 Motion for Postconviction Relief in the Delaware Superior Court, thereby tolling the one year period of limitation. 28 U.S.C. § 2244(d)(2); Del. Super. Ct. Crim. R. 61(i)(1); HA9. On April 30, 2018, the Delaware Superior Court denied Mr. Burton's Amended Motion for Postconviction Relief. HA12.

Mr. Burton timely filed a notice of appeal to the Delaware Supreme Court on May 30, 2018. HA12. On December 26, 2018, the Delaware Supreme Court denied Mr. Burton's appeal. HA12. Thus, the one year period of limitations for the filing of a § 2254 petition began to run on December 26, 2018, with all 365 das of the one period of limitations remaining. As Mr. Burton timely filed his *pro se* 2254 habeas petition on August 7, 2019, these proceedings are timely.

SUMMARY OF ARGUMENT

1. The Delaware State Courts ignored clearly established federal law when it concluded that Mr. Burton received constitutionally effective assistance of counsel whose actions did not infringe upon Mr. Burton's Sixth and Fourteenth Amendment rights to the effective assistance of counsel, a fair trial, to meaningfully oppose the prosecution's case, and to make fundamental decisions concerning his case. In doing so, the Delaware State Court incorrectly concluded that Mr. Burton was not entitled to postconviction relief due to his failure to demonstrate prejudice, even though no prejudice is required for the structural error that resulted from the unconstitutional violation of Mr. Burton's autonomy.

2. Mr. Burton is entitled to habeas relief as the State failed to timely provide Mr. Burton with critical exculpatory and impeachment materials relating to the reliability of the OCME's employees and their work product that he was entitled to have well in advance of his trial.

3. The Delaware State Courts unreasonably applied clearly established federal law when it concluded that there was sufficient information to establish "reasonable grounds" or "reasonable suspicion" for law enforcement to perform a warrantless administrative search of Mr. Burton's residence.

STATEMENT OF FACTS

I. Mr. Burton's arrest and the OCME's testing of alleged controlled substances.

On January 31, 2013, Detective Leary received a phone call from an individual he identified as "a past-proven and reliable informant. HA21. The informant advised that a black male, who he knew only as "David," was selling crack cocaine out of his residence at 1232 North Thatcher Street. HA21. The informant also advised that "David" was on probation as a sex offender. HA21. Detective Leary was advised by SBO Collins of Probation and Parole that an individual by the name of William David Burton resided at that address and was on Level II probation. HA21. At that point, Detective Leary sent of a photo of William David Burton to the informant, via text message, who responded that this was the individual he/she knew as David. HA21.

SBO Collins held a telephone conference with his supervisor who approved an administrative search of Mr. Burton's residence. HA22. 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. HA22.

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. HA22-23. The clear plastic bag containing a white powder substance and the two small Ziploc bags containing a green plant-like substance was submitted to the Office of the Chief Medical Examiner on March 4, 2013 for testing. HA30.

The suspected drug evidence was weighed and tested by forensic chemist Irshad Bajwa.

According to Mr. Bajwa's report, the white powder tested positive for cocaine and weighed 28.45 grams, while the plant materials tested positive for cannabis and weighed 0.93 grams. HA30. Mr. Bajwa's report, dated May 15, 2013, revealed that the suspected drug evidence was tested by the OCME on May 8, 2013. HA30; HA34; HA35; HA36.

II. Mr. Burton's pretrial, trial, and appellate proceedings.

Prior to trial, Trial Counsel challenged the constitutionality of the administrative search of Mr. Burton's residence and filed a motion to suppress all evidence seized as a result of the search. HA37-61. Trial Counsel argued that Mr. Burton's rights under the Fourth Amendment to the United States Constitution and Article I, § 6 of the Delaware Constitution were violated by Probation and Parole's administrative search of his residence, as officers failed to independently determine the reliability of the confidential informant whose information was relied upon in authorizing the search and failed to independently corroborate the alleged concealed criminal activity. HA39-42. Following a two-day hearing, the motion to suppress was denied. HA121-29. The Superior Court concluded that the "officers had reasonable grounds to search Burton's residence" and therefore "all evidence seized pursuant to that search was lawful and met statutory and constitutional requirements." HA126.

On September 24, 2013, Mr. Burton signed a stipulation of waiver of jury trial and engaged in the following colloquy with the Trial Court:

> THE COURT: Okay. Mr. Burton, I'm informed that you desire to waive your right to a jury trial. Is that correct?
> THE DEFENDANT: Yes.
> THE COURT: Before accepting your waiver, there are a number of questions I'm going to ask you to ensure that it's a valid waiver. If you do not understand any of the questions at any time and you wish to interrupt the proceedings to consult further with your attorney, please say so.

Can you tell me what your full name is?
THE DEFENDANT: William David Burton.
THE COURT: And how old are you?
THE DEFENDANT: 57 years old.
THE COURT: Okay. And how far did you go in school?
THE DEFENDANT: 12th grade, Your Honor.
THE COURT: Okay. Have you taken any drugs, medicine, or any alcoholic beverages with the last 24 hours?
THE DEFENDANT: Just my diabetic medication.
THE COURT: Okay. Do you understand that you're entitled to a trial by jury on the charges filed against you?
THE DEFENDANT: Yes.
THE COURT: Do you further understand that you would have the opportunity to take part along with your lawyer in the selection of the jurors?
THE DEFENDANT: Yes.
THE COURT: Do you understand that a jury trial means that you would be tried by a jury consisting of 12 people and all 12 jurors must agree on your guilt or innocence or level of guilt?
THE DEFENDANT: Yes.
THE COURT: Do you understand that if I approve your waiver of a jury trial the Court alone, and that would be me, would try the case and determine your innocence or guilt or level of guilt?
THE DEFENDANT: Yes.
THE COURT: Have you discussed this decision with your lawyer?
THE DEFENDANT: yes.
THE COURT: Has he discussed with you the advantages and disadvantages of a jury trial?
THE DEFENDANT: Yes.
THE COURT: Do you want to discuss the issue further with your attorney?
THE DEFENDANT: No.
THE COURT: Although your attorney may advise you, the final decision is yours. Do you understand that?
THE DEFENDANT: Yes.
THE COURT: What is your decision?
THE DEFENDANT: To waive.

HA130; HA132-33.

Thereafter, the Trial Court concluded that Mr. Burton's waiver of his right to a trial by jury was knowingly, intelligently and voluntarily made. HA133. Trial Counsel advised the Trial Court that a "pretty thorough record" had been made during the suppression hearing that they were willing

to rely on that for purposes of appealing the Trial Court's suppression decision. HA132. Trial Counsel additionally advised that for purpose of trial, the defense was willing to rely on that record, as well as the record that the State "will make with respect to where the drugs were found and what they were and how much was found." HA132. As such, Trial Counsel conceded that 28.45 grams of cocaine and 0.93 grams of marijuana were found in Mr. Burton's bedroom, and in his jacket also located in his bedroom, at the address Probation and Parole identified as Mr. Burton's residence and which Mr. Burton acknowledged was his place of residence.

As evidenced in the transcript, the Trial Court's colloquy with Mr. Burton did not include a discussion of Mr. Burton's consent to a stipulated bench trial nor did the Trial Court ascertain whether Mr. Burton understood that Trial Counsel was conceding the weight and identity of the State's drug evidence and that the evidence had been found in his residence, and more specifically, in his jacket. HA132-33.

An exceptionally short bench trial followed,[1] during which the State called only one witness. Detective Leary 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. HA134-35. Trial Counsel asked only a few simple questions on cross-examination, all pertaining to whether Mr. Burton had access to a microwave, which he would have needed if he were cooking cocaine as the witness believed him to be. HA135. No opening or closing arguments were given by either party. Mr. Burton was quickly found guilty of all counts by the Trial Judge. Mr. Burton received a life sentence pursuant to Delaware's habitual offender statute, 11 *Del. C.* § 4214(b). HA136; HA138; HA140; HA142.

[1] The entire trial portion of the transcript spans only ten pages.

Mr. Burton timely appealed his conviction to the Delaware Supreme Court. HA150. On January 14, 2014, while Mr. Burton's appeal was pending, it was discovered during the trial in *State v. Walker* that alleged drug evidence, which had been sealed in an evidence envelope and stored at the OCME, was missing and had been replaced with blood pressure pills. HA249-50. During the *Walker* trial, an "evidence envelope was presented to the investigating officer who observed that the original seal on the envelope was intact, that the left side of the envelope had a seal indicating that a chemist from the OCME had opened the package, and that there were no overt signs of tampering to the exterior packaging." HA249. Despite there being "no overt signs of tampering" it was discovered that the suspected drug evidence contained in the envelope was missing and had been replaced with blood pressure pills. *Id.* A closer inspection of the evidence envelope revealed "a small cut . . . concealed beneath a folded flap of OCME evidence tape." HA249-50. As a result the DSP shut down the OCME and launched a criminal investigation on February 20, 2014. HA252. Additionally, the DOJ publicly disclosed that from 2010 into early 2014, employees at the OCME's crime lab were stealing and/or tampering with drug evidence being stored at the lab. HA249-50; HA277-82.

On June 19, 2014, the DOJ published a preliminary findings report in which the DOJ disclosed 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." HA247-82. According to the DOJ, the security in the lab and drug evidence vault was severely lacking, as there were no established criteria for providing and revoking employee access to the vault and the vault door was often left propped open. HA258-61. Additionally, everyone in the lab had access to the combinations for the OCME courier lock boxes

used to transport suspected drug evidence from law enforcement agencies to the OCME. Furthermore, the digital media used to store security footage was kept unsecured, and OCME employees were aware that there was no long-term storage for the security footage. HA257-58; HA260-61.

Additionally, the DOJ's report detailed how the OCME used inadequate software to track the chain of custody of suspected drug evidence. This software created unreliable chain of custody reports, an issue that was further exasperated by the fact that the OCME employees were failing to log evidence into the computer system when the evidence was received. HA267-68.

The DOJ's preliminary report also described the OCME drug lab's questionable management and hiring practices. More specifically, the report detailed how OCME drug lab supervisor, Caroline Honse, failed to maintain any policies or procedures for the lab and repeatedly changed the way she wanted things done. HA264-65; HA270-71. The report similarly described that Ms. Aretha Bailey, amidst allegations of theft from her former employer, was hired by the OCME as a secretary and then moved to a position in the Forensic Evidence Specialist Unit within a few days of being hired. HA262.

From August 19, 2014 to August 21, 2014, the New Castle County Superior Court conducted an evidentiary hearing in an effort to determine what effect, if any, the OCME's misconduct would have on drug cases scheduled for trial. During these hearings, witness testimony was presented that described the questionable work habits of Ms. Honse and Ms. Bailey. Witnesses testified that Ms. Honse kept boxes of drug evidence, some of which were very old, in her non-secured office, and that she would purportedly pull drug evidence from the vault for training purposes. HA269; HA307-08; HA319. Witnesses also testified that Ms. Bailey kept her own box in the drug vault and was able

to quickly locate evidence in the drug vault that others could not. HA323-27. It was also revealed that Robin Quinn, who took over as the drug lab supervisor after Ms. Honse retired, stripped Ms. Bailey of her FES duties and revoked her access to the drug vault. Ms. Bailey left OCME employment shortly thereafter but was never charged with any crimes. HA264.

Testimony was also presented during these hearings about different colored evidence tape found at the OCME. HA311-15; HA325-26. This was significant as the color of the tape was used to assist in tracking the number of times an envelope was legitimately opened and resealed. Each agency had its own color evidence tape and when an individual in the chain of custody legitimately opened an evidence envelope he/she was required to do so at a different spot than where it had been previously opened and resealed. HA311-15; HA235-26.

It was also disclosed during these hearings that the DSP discovered several cases where the evidence had been compromised through illegitimate entry underneath legitimately placed evidence tape by resealing the envelope with new evidence tape of the same color. HA443-44**.** Furthermore, it was revealed that the DSP located 705 unaccounted-for pieces of drug evidence in the vault. HA268.**.**

As a result of the reliability issues involving the OCME, three OCME employees were suspended and ultimately resigned or were terminated from employment. HA276-77. Lab manager Farnam Daneshgar was suspended and later chose to retire, rather than go before a merits panel, as a result of his misconduct. HA719. Mr. Daneshgar was initially employed by the OCME from 1987 to 1990. HA717. During this term of employment, Mr. Daneshgar was suspended for "dry-labbing" a blood sample, an instance of misconduct that he admitted to. *Id.* Mr. Daneshgar returned to the OCME in 1995 where he remained until his suspension and retirement in 2014. *Id.* During the

OCME investigation, witnesses informed law enforcement that Mr. Daneshgar had engaged in dry-labbing. HA276.

As a result of the DOJ's investigation, Mr. Daneshgar became the subject of criminal prosecution and was indicted by a grand jury for Possession of Marijuana, Possession of Drug Paraphernalia, and two counts of Falsifying Business Records. *Id.* However, on February 19, 2015, the day trial was scheduled to begin, the DOJ *nolle prossed* the two counts of Falsifying Business Records. HA502; HA508-09. The DOJ explained that the charges were *nolle prossed* because there was an "unlikelihood of conviction" as the DOJ was unable to "identify any written policies at the former Office of the Chief Medical Examiner that [the DOJ could] rely on to prove [its] case. Moreover, any witnesses [the DOJ] would call with regard to any written policies [would] all testify in a manner that would indemnify themselves of any personal digression from the policies that were in place at the time." HA503. The witnesses referred to by the DOJ included most of the OCME's lab employees. HA498-00.

Forensic Evidence Specialist James Woodson was terminated shortly after the investigation began. Mr. Woodson was hired by the OCME as a Forensic Evidence Specialist in 2010 after leaving employment with the New Castle City Police Department amidst allegations of theft. HA263; HA276. During his employment with the OCME, Mr. Woodson, on at least one occasion, discussed with Ms. Bailey how easy it would be to steal drugs from the lab due to the systemic failures. HA309.

Around the time of his termination from the OCME, Mr. Woodson was indicted by a grand jury for Trafficking Cocaine, Tampering with Physical Evidence, Official Misconduct, and Unlawful Dissemination of Criminal History Record Information. HA276-77. However, on May 18, 2015,

Mr. Woodson was permitted to plead guilty to unlawful dissemination of criminal history and to plead no contest to official misconduct. HA697.

Additionally, Chief Medical Examiner Dr. Richard Callery was permitted to plead no contest to two counts of official misconduct after an investigation revealed that during his tenure as Chief Medical Examiner, Dr. Callery also worked as a contract pathologist in Rhode Island and Chester County, Pennsylvania while also operating a side business as a defense expert witness. HA169; HA739-40. Ultimately, Dr. Callery was sentenced to one year in prison. HA617-18.

In light of the aforementioned, Mr. Burton's appeal was stayed to allow him to move for a new trial in the Superior Court. HA6. Based on this newly disclosed evidence of OCME misconduct, which had occurred while the suspected drug evidence in Mr. Burton's case was being stored and tested at the OCME, Mr. Burton filed a motion for a new trial. HA7. Mr. Burton's motion for a new trial was denied by the Superior Court, predominantly because Trial Counsel had conceded the identity and weight of the alleged drug evidence, as well as the chain of custody, through the stipulated bench trial. HA9. Specifically, the Superior Court found that by "knowingly, intelligently, and voluntarily agree[ing] to a stipulated bench trial instead of a jury trial," Mr. Burton waived his right to test the chain of custody of the drug evidence, because he had "stipulated that the drug evidence entered by the State was, in fact, illegal drugs." HA631.

The Superior Court's decision was affirmed on appeal for the reasons articulated in the Superior Court's November 30, 2015 denial order, and Mr. Burton's challenge to the legality of the administrative search of Mr. Burton's residence was likewise rejected by the Delaware Supreme Court for the reasons articulated by the Superior Court in its September 9, 2013 order denying the motion to suppress. HA891-92.

III. Corruption at the OCME continued to grow and evolve.

Since the DOJ's preliminary report and the evidentiary hearings, evidence of materials problems at the OCME and instances of employee misconduct were discovered overtime and made public. In April of 2015, the State disclosed that Forensic Chemist Patricia Phillips had been suspended and terminated from the OCME after three incidents of mishandling evidence. Specifically, in October of 2014, a bag of heroin went missing from evidence Ms. Phillips was responsible for testing. HA341-42. When questioned, Ms. Phillips initially indicated that she searched "everywhere" for the bag, including her lab coat, but then later informed Wilmington Police that she found the missing bag in her lab coat. HA341-42. When speaking with her supervisor about the incident, Ms. Phillips advised that she considered "slip[ping the bag] back into one of the laboratory generated bags unnoticed by WPD." HA342. She also stated that "she did not 'see what the big deal' was regarding one missing bag of heroin out of 2834 bags of heroin." HA343.

The corrective action form documenting Ms. Phillips' misconduct, noted that Ms. Phillips scored the lowest possible rating for the categories of "[c]ontinues to demonstrate the required job skills and knowledge" and "uses resources available in an effective manner." HA343.

Forensic Chemist Irshad Bajwa was placed on administrative leave and later terminated after drug evidence he certified as cocaine was retested and found to contain no illegal substances. HA346-06. Specifically, in a trial in 2012, Mr. Bajwa claimed that he tested two tightly wrapped "bricks" of a substance, weighing 2 kilograms, and that they tested positive for cocaine. He also testified that he "made sure there [wa]s no tampering, any kind of hole or anything" and that he followed standard operating procedures when performing his analysis. HA359-60. The defendant in that case was ultimately convicted of multiple drug offenses. HA347.

During the defendant's postconviction proceedings, the Superior Court ordered retesting of the drug evidence by an independent lab even though the defendant had not shown any link between the OCME's misconduct and his case and had admitted at trial that the substances were illegal. HA393-95; HA397. Subsequent testing revealed that the two "bricks" were not cocaine nor contained any other illegal drugs. HA403-05.

Forensic Chemist Bipin Mody also resigned after it was revealed that he failed to abide by OCME policies and procedures while also failing to timely perform the analysis of suspected drug evidence. HA813-15; HA816-90. Information the DOJ erroneously concluded was not *Brady* in nature. HA813-15.

Forensic Chemist Theresa Moore, although no evidence of misconduct has been produced by the State, was on the list of potential witnesses in Mr. Daneshgar's case who the State admitted had credibility issues. HA499; HA503.

To supplement the DOJ's investigation, Habeas Counsel and his staff interviewed two former OCME employees. On February 17, 2016, Counsel and his staff interviewed Farnam Daneshgar who described various problematic practices employed by the OCME which included leaving the drug vault and intake office open and unattended and leaving drug evidence unattended in the lab during employee breaks. HA717-18. Mr. Daneshgar also described how law enforcement would instruct the OCME to test suspected drug evidence even though there were discrepancies between the actual weight of the drug evidence and what was reported by law enforcement. HA718.

Counsel's staff also interviewed Confidential Source 1 (hereinafter referred to as "CS1") who was employed as a Forensic Evidence Specialist from 2006 to 2010, who described numerous problems at the OCME. HA698-03. Of particular note, CS1 provided email communications which

described law enforcement's awareness of problems at the OCME prior to 2012. HA708-10; HA714-16. Specifically, one email chain described a meeting between the OCME and the New Castle County Police Department to discuss packaging and chain of custody concerns while another email chain described how a large amount of evidence was missing from the OCME's drug vault. HA708-10; HA714-16.

Counsel also retained the expert services of Joseph Bono, an independent Forensic Science Consultant and a former laboratory director of the United States Secret Service Laboratory, Forensic Services Division, the Drug Enforcement Administration Special Testing and Research Laboratory, the DEA Mid-Atlantic Laboratory, and a former Quality Manager of the nine-forensic science laboratories in the DEA Office of Forensic Science, to author a report concerning the misconduct and reliability issues at the OCME. HA721. In Mr. Bono's February 26, 2016 report, Mr. Bono referenced specific problems at the OCME, described how the OCME violated forensic standards, and rendered opinions as to how each problem affected the reliability of the chain of custody and the integrity of the evidence tested. HA721-30.

On March 13, 2016, Mr. Bono authored an additional report. HA763. In this report, Mr. Bono noted the OCME's failure to comply with accreditation and testing standard as well as its failure to report its problems to the accrediting body and/or appropriate legal counsel. HA766-76. As a result, Mr. Bono opined that "the OCME drug laboratory d[id] 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." HA776.

IV. Mr. Burton's state postconviction proceedings.

Mr. Burton sought postconviction relief on August 11, 2016 through the filing of a *pro se* motion for postconviction relief. HA9. Mr. Burton's Amended Motion for Postconviction Relief was filed on August 17, 2017 and raised two claims: 1) that the State of Delaware violated *Brady v. Maryland* by failing to timely disclose evidence of misconduct at the OCME; and 2) that Mr. Burton's trial attorney was constitutionally ineffective for stipulating to the State's evidence without Mr. Burton's consent and that this ineffectiveness deprived Mr. Burton of his due process right to a fair trial, to meaningfully oppose the State's case and to make fundamental decisions concerning his case, pursuant to both the United States and state constitutions. HA11. Following an affidavit from Trial Counsel,[2] a response from the State, and a reply from Mr. Burton, the Superior Court denied both of Mr. Burton's postconviction claims on April 30, 2018. HA12.

Mr. Burton timely appealed the denial of his Amended Motion for Postconviction Relief to the Delaware Supreme Court. HA12. Following briefing from Mr. Burton and the State, the Delaware Supreme Court issued an opinion on December 26, 2018, denying Mr. Burton's appeal and affirming the judgment of the Superior Court as to both of Mr. Burton's postconviction claims. HA12. The Delaware Supreme Court denied Mr. Burton's ineffective assistance of counsel claim

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[2] Defense counsel's November 27, 2017 affidavit indicated that he had no independent recollection of discussing the stipulation with Mr. Burton nor did his records confirm that such a discussion took place. HA984-85. Rather, defense counsel could state no more than "[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 based upon his database entry from September 23, 2013, he had "discussed plea offer and prospects for appeal for suppression issue" with Mr. Burton at the prison. HA984. Defense counsel additionally asserted that "it would have been [his] practice" to explain to a client how a stipulated bench trial would be conducted and therefore, assumed that he "probably conducted some explanation as to how the trial would proceed before [the trial judge]." HA985.

after determining that Mr. Burton had not demonstrated prejudice under *Strickland v. Washington.* HA1146-47. However, the Court's December 26, 2018 opinion did not address Mr. Burton's constitutional claim that his attorney's ineffectiveness deprived him of a fair trial and a meaningful opportunity to oppose the State's case, as well as overrode his decision to plead not guilty, and indicated a materials misunderstanding and unreasonable determination of the key facts underlying Mr. Burton's claim.

I. THE STATE COURTS UNREASONABLY APPLIED THE FACTS IN MR. BURTONS' CASE TO THE CLEARLY ESTABLISHED FEDERAL LAW OF *STRICKLAND V. WASHINGTON* AND ITS PROGENY AND ERRONEOUSLY FAILED TO APPLY THE CLEARLY ESTABLISHED FEDERAL LAW OF *MCCOY V. LOUISIANA*.

A. This claim is ripe for consideration by this Court.

Mr. Burton argued on appeal, during his postconviction proceedings, that the Superior Court erred by denying Mr. Burton's postconviction 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. HA968-79; HA1074-84. As the Delaware Supreme Court rejected Mr. Burton's argument, Mr. Burton has exhausted all of his state court remedies in relation to this claim.HA1034; HA1147.

B. The State Courts unreasonably applied the *Strickland* standard to the facts of Mr. Burton's case and failed to consider the clearly established federal law of *McCoy v. Louisiana*.

As argued to the State Courts, Mr. Burton asserts that Trial Counsel provided ineffective assistance of counsel, in violation of Mr. Burton's Sixth and Fourteenth Amendment rights to a fair trial and to meaningful opposition of the prosecution's case, by stipulating to the State's evidence without Mr. Burton's consent and despite Mr. Burton's entering a plea of not guilty. HA968-79; HA1074-84. However, the Delaware Superior determined that Mr. Burton consented to the stipulated bench trial by waiving his right to a jury trial;[3] the Delaware Supreme Court made no express factual

[3] The Superior Court stated "[c]ounsel avers that as a matter of practice the decision to agree to a bench trial would have been clearly discussed with Defendant and that the consequences of doing so would be evaluated." HA1033. The court also concluded that based on his colloquy with the court, Mr. Burton's "decision to waive a trial by jury was knowing,

finding on this issue. HA1147. Nevertheless, both State Courts concluded that Mr. Burton was not prejudiced by Trial Counsel's stipulation to the prosecution's evidence. HA1034; HA1147. These conclusion are objectively unreasonable as they are refuted by both the factual records and a reasonable application of the *Strickland* standard and such conclusion ignore clearly established federal law.

Although Mr. Burton voluntarily, knowingly and intelligently waived his right to a jury trial and consented to a bench trial, he did not waive his right to contest the State's evidence, as he did not agree to a *stipulated* bench trial. HA130; HA132-33. As the transcript of the colloquy confirms, Mr. Burton engaged in a discussion with the Superior Court to determine whether he was knowingly, intelligently and voluntarily consenting to a bench trial; there was no mention of a stipulated bench trial in which the State's evidence would not be contested. HA132-33. Rather, Trial Counsel made the decision to not hold the State to its constitutional burden of proving every element of the charged offenses beyond a reasonable doubt. HA132. There is no rational basis to assume that because Mr. Burton consented to a bench trial by waiving his right to a jury trial, he also waived his right to meaningfully oppose the State's evidence and/or his right to a fair trial. Nor have the State Courts pointed to any legal authority that would support this assumption.

Mr. Burton 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 charged. Based upon the offenses with which he was charged and the statutory elements required to be proven beyond a reasonable doubt, Trial Counsel's decision to stipulate to the State's evidence conceded all elements of the State's case but for possession and

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intelligent, and voluntary" and "made strategically with the advice of counsel." HA1033-34.

possession with intent to manufacture or distribute. However, by failing to cross-examine the State's witness on his opinion that the weight of the cocaine did not indicate personal use, Trial Counsel similarly offered no opposition to the State's evidence of possession with the intent to manufacture of distribute.

Although Trial Counsel never admitted Mr. Burton was guilty of the charged offenses, through his actions and non actions, Trial Counsel: 1) conceded Mr. Burton's guilt without obtaining his "fully informed and publicly acknowledged consent", thereby overriding Mr. Burton's Sixth Amendment right to decide whether to plead guilty or not guilty; 2) waived Mr. Burton's Sixth Amendment right to meaningfully oppose the State's case; 3) denied Mr. Burton his Fourteenth Amendment due process right to a fair trial; and 4) deprived Mr. Burton of his Sixth Amendment right to the effective assistance of counsel. 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"); *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988); *United States v. Cronic*, 466 U.S 648, 659-62 (1984); *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)) ("[T]he right to counsel is the right to effective assistance of counsel."); *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966). Mr. Burton never wanted or expected Trial Counsel to relieve the State of its constitutional burden to prove each element of the offenses charged beyond a reasonable doubt, and Trial Counsel violated Mr. Burton's constitutional right by overriding the objectives of the defense as decided by Mr. Burton. *McCoy v. Louisiana*, 584 U.S. __, __ (2018) (slip op., at 7, 9); *see also Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Faretta v. California*, 422 U.S. 806, 819-20 (1975); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Brookhart*, 384 U.S. at 7-8; *Pointer v.*

Texas, 380 U.S. 400, 403 (1965); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

The United States Supreme Court has long held that defense attorneys have the authority to manage the day-to-day conduct of the defense and "has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." *New York v. Hill*, 528 U.S. 110, 114-15 (2000); *Taylor*, 484 U.S. at 418; *Wainwright v. Sykes*, 433 U.S. 72, 93, 97 (1977) (Burger, C.J., concurring). However, it is also well-settled that under the United States Constitution, some decisions are solely left to the defendant, such as whether to exercise or waive basic trial and appellate rights, because they are so personal to the defendant "that they cannot be made for the defendant by a surrogate." *Nixon*, 543 U.S. at 187. As United States Supreme Court precedent clearly establishes, a criminal defendant has "ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal", and such fundamental decisions cannot be waived by counsel "without the fully informed and publicly acknowledged consent of the client." *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *see also Nixon*, 543 U.S. at 187; *Taylor*, 484 U.S. at 417-18; *Wainwright*, 433 U.S. at 93 n.1; *Brookhart*, 384 U.S. at 7-8. As such, even though defense counsel is not required to obtain the defendant's consent to "every tactical decision", "some basic trial choices are so important that an attorney must seek the client's consent in order to waive the right." *Nixon*, 543 U.S. at 187 (citing *Strickland*, 466 U.S. at 688; *Taylor*, 484 U.S. at 417-18); *Gonzalez v. United States*, 553 U.S. 242, 250 (2008) (citing *Nixon*, 543 U.S. at 187).

In *McCoy v. Louisiana*, the United States Supreme Court was asked to decide a constitutional issue akin to what is being raised by Mr. Burton. The United States Supreme was presented with the question of "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. *McCoy*, 584 U.S. __, __ (2018) (slip op., at 5) (citing *Cooke v. State*, 977 A.2d 803, 842-46 (Del. 2009)). The Court definitively held 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." *Id*. at 2. As the Court noted, "a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her", 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." *Id*. at 6; *Id*. at 7 (citing *Weaver v. Massachusetts*, 582 U.S. __, __ (2017) (slip op., at 6); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165 (2000)).

The decision in *McCoy* directs that "[w]hen a client expressly asserts that the objection 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." *McCoy*, 584 U.S. __, __ (2018) (slip op., at 7) (citing U.S. Const. VI; ABA Model Rule of Professional Conduct 1.2(a) (2016)). Conversely, the United States Supreme Court has 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. Significantly, the United States Supreme concluded that a violation of this constitutional principle results in a structural error for which no demonstration of prejudice is required. *Id.* at 11-12. The holding in *McCoy* is entirely consistent with clearly established federal law which has long-held that in regard to the objectives of representation, an attorney "must both consult with the defendant and obtain consent to the recommended courts of action." *Nixon*, 543 U.S. at 187. Likewise, *McCoy* only emphasizes that which has been long-

established–that although counsel may be able to better make such fundamental strategic choices, the defendant retains full autonomy to make these decisions because he or she alone experiences the consequences of them. *See Faretta*, 422 U.S. at 819-20; *Boykin*, 395 U.S. at 243; *Duncan*, 391 U.S. at 149; *Brookhart*, 384 U.S. at 7-8; *Pointer*, 380 U.S. at 403; *Malloy*, 378 U.S. at 6.

In the present matter, the State Courts wholly failed to address *McCoy* and the precedent upon which it is based. HA1026-27; HA1030-35.**.** In doing so, the State Courts ignored clearly established federal law in concluding that Mr. Burton received constitutionally effective assistance of counsel whose action did not infringe on Mr. Burton's Sixth and Fourteenth Amendment rights to the effective assistance of counsel, a fair trial, to meaningfully oppose the prosecution's case, and to make fundamental decisions concerning his case, particularly his decision to plead guilty or not guilty. Had the State Court not overlooked the United States Supreme Court's decision in *McCoy v. Louisiana*, it would have been clear to them that an unconstitutional violation of a defendant's autonomy constitutes a structural error for which no *Strickland* prejudice is required to be shown. Thus, in finding that Mr. Burton's ineffective assistance of counsel claim was properly denied for failure to demonstrate prejudice, the Delaware Supreme Court disregarded the holding in *McCoy* that when a defendant's constitutionally guaranteed right to autonomy is violated, such an error is structural in nature and not subject to *Strickland*'s prejudice requirement. *McCoy*, 584 U.S. __, __ (2018) (slip op., at 11-12).

C. Although not required, Mr. Burton sufficiently demonstrated that prejudice resulted from Trial Counsel's ineffective assistance of counsel.

Even if Mr. Burton had an obligation to demonstrate prejudice, Mr. Burton sufficiently demonstrated *Strickland* prejudice, and the State Courts' conclusion that Mr. Burton was not

prejudiced by Trial Counsel's stipulation to the State's evidence results from an unreasonable application of the *Strickland* standard to the facts of the case.

In *Strickland v. Washington*, the United States Supreme Court set forth the two part analysis to govern all claims of ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. "First, the defendant must show that counsel's performance was deficient." *Id*. In other words, the defendant must "show[] that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment." *Id*. The defendant must overcome the presumption that "under the circumstances, the challenged action might be considered sound trial strategy." *Id*. at 689 (citing *Michael v. Louisiana*, 350 U.S. 91, 1010 (1955)).

Under the second prong of the *Strickland* analysis, "the defendant must show that the deficient performance prejudiced the defense." *Id*. at 687. This prong "requires [a] showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. In other words, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. A reasonable probability exits when there "is a probability sufficient to undermine confidence in the outcome." *Id*.

However, when assessing ineffective assistance of counsel claims under AEDPA, the United States Supreme Court recognized that:

> The pivotal question is whether the state court's application of *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard. Were that the inquiry, the analysis would be no different than if, for example this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), an *unreasonable* application of federal law is different

> form an *incorrect* application of federal law. A state court must be granted deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.

Harrington v. Richter, 562 U.S. 86, 101 (2011).

By finding that there was no prejudice due to overwhelming evidence, the State Courts unreasonably applied the *Strickland* standard to the facts of Mr. Burton's case. HA1147; HA1034. The State Courts failed to appreciate the fact that because Trial Counsel's stipulation included Trial Counsel's consent to rely upon the lengthy record made at the suppression hearing for purposes of trial, numerous pages of factual testimony that would have been otherwise inadmissible at trial, such as the fact that Mr. Burton was on probation and that he was identified by a confidential informant alleging that Mr. Burton was selling crack cocaine from his residence, were in fact admitted. HA90-91; HA130; HA132-33. As such, unless the State took 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. *Del. C.* § 4752(1) (2012) Except as authorized by this chapter, any person who: (1) Manufactures, delivers, or possesses with the intent to manufacture or deliver a controlled substance in a Tier 4 quantity . . . shall be guilty of a class B felony."); 16 *Del. C.* § 4752(3) (2012) ("Except as authorized by this chapter, any person who . . . (3) Possesses a controlled substance in a Tier 5 quantity . . . shall be guilty of a class B felony."); 16 *Del. C.* § 4764(b) (2012) ("Any person who knowingly or intentionally possesses, uses, or consumes a controlled substance or a counterfeit controlled substance classified in § 4714(d)(19) of this title, except as otherwise authorized by this chapter, shall be guilty of an unclassified misdemeanor and be fined not more than $575 and imprisoned not more than 3 months."); HA1. Additionally, when the OCME misconduct was

disclosed by the State, Mr. Burton was denied a new trial and/or re-testing of the alleged drug evidence, because Trial Counsel had stipulated to the drug evidence and the chain of custody. HA130; HA132-33; HA631; HA891 HA1029; HA1146-47. Accordingly, petitioner was clearly prejudiced by his attorney's actions, regardless of how allegedly overwhelming the evidence against him was.

Nevertheless, Mr. Burton was entitled to relief even in the absence of a showing of prejudice as the complained of structural error requires no showing of prejudice, and Mr. Burtons's constitutional rights were further violated when the state courts denied him relief on the basis of an erroneously applied legal standard.

As the state courts unreasonably concluded that Mr. Burton was not prejudiced by defense counsel's stipulation to the prosecution's evidence, while failing to address whether defense counsel's objectively unreasonable stipulation to the State's evidence without Mr. Burton's consent and in light of Mr. Burton's plea of not guilty infringed on Mr. Burton's constitutional right to a fair trial, to meaningfully oppose the prosecution's case and to make fundamental decisions concerning his case, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, the state courts unreasonably applied and/or wholly overlooked clearly established federal law.

Accordingly, petitioner's convictions must be vacated and the case remanded for a new trial.

II. THE STATE COURTS UNREASONABLY CONCLUDED THAT THE STATE'S *BRADY* VIOLATION DID NOT ENTITLE MR. BURTON TO A NEW TRIAL OR POSTCONVICTION RELIEF.

A. Mr. Burton's *Brady* claim is ripe for consideration by this Court.

At the Superior Court level, the Superior Court found Mr. Burton's *Brady* claim to be procedurally barred from postconviction review under Delaware Rule of Criminal Procedure 61(i)(4) as a former adjudication. HA1025-26. However, after applying a "miscarriage of justice" exception, the Superior Court nevertheless considered the merits of Mr. Burton's claim, ultimately denying it. HA1026-27; HA1030. On appeal, the Delaware Supreme Court concluded that Mr. Burton's *Brady* claim was in fact barred as a former adjudication, concluding that the miscarriage of justice exception was erroneously applied by the lower court and finding Mr. Burton's *Brady* claim to have already been raised and ruled upon in Mr. Burton's November 2015 motion for new trial, the denial of which had been previously upheld by the Delaware Supreme Court on direct appeal. HA1145-46.

Accordingly, because Mr. Burton twice raised a *Brady* claim alleging that the State had failed to timely provide information regarding the OCME's misconduct, thereby entitling him to a new trial, at both the Superior Court and Supreme Court level—once on direct appeal following conviction, and once during his state postconviction proceedings—Mr. Burton has exhausted all of his state court remedies in relation to this claim. HA1143-46; HA1024-30; HA891; HA624-33.

B. The State violated its obligations under *Brady v. Maryland* by failing to timely provide Petitioner with exculpatory and impeachment information regarding the OCME's misconduct which affected the reliability of its work product and the credibility of its employees.

Pursuant to *Brady v. Maryland*, the "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." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Thus, "[i]n order to comply with *Brady* . . . 'the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf'" and to disclose any and all materially exculpatory and impeachment information to a criminal defendant. *Brady*, 373 U.S. at 87; *see also Strickler v. Greene* 527 U.S. 263, 280 (1999) (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976)); *United States v. Bagley*, 474 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Johnson v. Folino*, 705 F.3d 117, 128 (3d Cir. 2013) (quoting *Strickler*, 527 U.S. at 281); *United States v. Reyeros*, 537 F.3d 270, 281 (3d Cir. 2008) (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)); *United States v. Thornton*, 1 F.3d 149, 158 (3d Cir. 1993); John C. Thomure, Jr., *Kyles v. Whitley: An Opportunity Lost?: An Examination of the Rule of Discovery Concerning the Disclosure of Impeachment Material Contained in Personnel Files of Testifying Government Agents in Federal Criminal Cases*, 83 Marq. L.Rev. 547, 550 (2000) (noting that "prosecutors have an ongoing duty to learn of 'any favorable evidence known to others acting on the government's behalf in the case, including the police.'") (quoting *Kyles*, 514 U.S. at 437); Lis Wiehl, *Keeping the Files on File Keepers: When Prosecutors are Forced to Turn Over the Personnel Files of Agents to Defense Lawyers*, 72 Wash. L.Rev. 73, 104 n.130 (1997); Cynthia L. Corcoran, Note, *Prosecutors Must Disclose Exculpatory Information when the Net Effect of the Suppressed Evidence Makes it Reasonably Probable that Disclosure would have Produced a Different Result*, 26 Seton Hall L.Rev. 832 (1996). Furthermore, this disclosure must be made in a sufficient amount of time to allow the defense to make effective use of it. *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. 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); *United States v. Pollack*, 534 F.2d 964, 973 (D.C. 1976). However, if the prosecutor suppresses favorable exculpatory or impeachment evidence and the defendant is prejudiced by this suppression, the prosecution has violated their *Brady* obligations. *Strickler*, 527 U.S. at 281-82. However, if the prosecutor suppresses favorable exculpatory or impeachment evidence and the defendant is prejudiced by this suppression, the prosecution has violated their *Brady* obligations. *Id.*

In the present case, Mr. Burton went to trial on September 24, 2013. HA4. However, prior to trial, the State failed to disclose to Mr. Burton the existence of and the details surrounding the systemic operational failings of the OCME which resulted in the termination/resignation and prosecution of Chief Medical Examiner Richard Callery, Forensic Evidence Specialist James Woodson, and Forensic Chemist Farnam Daneshgar as well as the questioning of Forensic Evidence Specialist/secretary Aretha Bailey. The State also failed to disclose, despite having an ongoing duty to disclose *Brady* materials, to Mr. Burton the misconduct of Forensic Chemist Irshad Bajwa, who was the chemist in this case, Forensic Chemist Bipin Mody, and Forensic Chemist Patricia Phillips which resulted in their termination/resignation from the OCME. *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (noting that "the duty to disclose is ongoing. . . ."); *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) (citing ABA Code of Professional Responsibility § EC 7-13 (1969)); *Barnes v. United States*, 760 A.2d 556, 562 (D.C. 2000); *Brown v. State* 117 A.3d 568, 575-76 (Del. 2015); American Bar Association Project on Standards for Criminal Justice, Prosecution and Defense Function § 3.11 (Approved Draft 1971); HA30; HA341-44; HA346-06; HA813-90. Similarly, the State failed to disclose to Mr. Burton that most, if not all, employees of the OCME had credibility

issues to the extent that the State was not willing to use any employee as a potential witness in the criminal prosecution of Farnam Daneshgar. HA499, HA503.

The materiality of this undisclosed *Brady* information is made apaprent through the reports and opinions rendered by Joseph Bono, an independent Forensic Science Consultant who was retained by Mr. Burton's postconviction counsel.[4] In Mr. Bono's February 26, 2016 report, Mr. Bono opined that the OCME's practices violated forensic quality standards which in turn diminshed the integrity of the chain of custody of evidence stored at the OCME and the testing of evidence by the OCME. HA721-38. These practices included failing to record entry into the drug vault, the propping open of the drug vault door, the deactivation of the silent alarm, having non-qualified individuals perform the drug analysis, the failure to perform annual audits, and the improper testing and storage of drug evidence. *Id*.

In his March 13, 2016 report, Mr. Bono further opined that the OCME failed to comply with accreditation and testing standards as it failed to notify the accrediting body and/or appropriate legal counsel of ongoing deficiencies, failed to conduct annual audits, failed to conduct a root cause analysis, failed to limit access to the OCME's data entry system, and failed to limit access to the evidence vault to specific times and personnel. HA766-67; HA769-70; HA773-76. These failures by the OCME, Mr. Bono asserted, could have resulted in the OCME's accreditation being suspended or being placed on probation. HA767. Mr. Bono further concluded that "there [were] serious concerns related to the veracity and reliability of any scientific results reported by the laboratory, and

[4] Prior to becoming a Forensic Science Consultant, Mr. Bono served as the laboratory director for the United States Secret Service Laboratory, Forensic Services Division, for the Drug Enforcement Administration Special Testing and Research Laboratory, for the DEA Mid-Atlantic Laboratory, as well as served as a Quality Manager for nine-forensic science laboratories in the DEA Office of Forensic Science. HA721.

scientific integrity of any of the evidence stored in the OCME evidence vault" and "that the OCME drug laboratory [did] not meet, the requirements for reliability and integrity required by accrediting bodies and that serious violations challeng[ed] the laboratory's own accreditation." HA776. Thus, "any conclusions derived from an examination of the evidence in [Mr. Burton's] case raise serious questions concerning the results reported by the forensic chemist." *Id.*

Although the materiality of the above noted *Brady* materials are clear on the record, the State suppressed this information by failing to disclose it to Mr. Burton prior to his trial. And while this Court and the Delaware Supreme Court have concluded that the State has repeatedly asserted there was no knowledge of the problems at the OCME prior to January of 2014, these holdings are contradicted by the factual record and controlling federal precedent. *Taylor v. Johnson*, 2017 WL 2646111, at *5 (D.Del. June 19, 2017); *Harmon v. Johnson*, 2016 WL 183899, at *4 (D. Del. Jan. 14, 2016); *Banks v. State*, 2015 WL 8481972, at *1 (Del. Dec. 9, 2015); *Bunting v. State*, 2015 WL 2147188, at *3 (Del. May 5, 2015); *Brown v. State*, 108 A.3d 1201, 1204 (Del. 2015). This is because it is a well recognized principle of law that a prosecutor must seek out and learn of any favorable information known to parties acting on its behalf, which includes law enforcement and that the State's duty to disclose *Brady* information is not limited to those materials the State had first hand knowledge of as the knowledge of *Brady* materials by any member of the prosecution team is imputed upon the prosecutor. *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (quoting *Kyles* 514 U.S. at 438); *Kyles*, 514 U.S. at 437; *Giglio*, 405 U.S. at 154; *Strohl v. Grace*, 354 Fed. Appx. 650, 654 (3d Cir. 2009) (citing *Reyeros*, 537 F.3d at 281); *United States v. Risha*, 445 F.3d 298, 303 (3d Cir. 2006); *United States v. Perdomo*, 929 F.2d 967, 970-71 (3d Cir. 1991); *United States v. Kattar*, 840 F.2d 118, 127 (1st Cir. 1988); *Carey v. Duckworth*, 738 F.2d 875, 877-78 (7th

Cir. 1984); *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391-92 (7th Cir. 1984); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980); *United States v. Barkett*, 530 F.2d 189 (8th Cir. 1976); *United States v. Brooks* 966 F.2d 1500, 1503 (D.C. Cir. 1992); *see also* ABA Standards for Criminal Justice, *Standards Relating to Discovery and Procedure Before Trial*, 11.4.3(a) ("The obligation of the prosecuting attorney . . . under these standards extend to material and information in the possession or control of members of the attorney's staff and any others who either regularly report to or, with reference to the particular case, have reported to the attorney's office."); *Bennet L. Gershman*, Litigating Brady v. Maryland: Games Prosecutors Play, 57 Case W.Res. L.Rev. 531, 556 (2007) ("However, if a prosecutor is faced with a specific request for *Brady* evidence and knows or should know that the evidence exists, he cannot bury his head in the sand.").

In Mr. Burton's case, it is apparent that the OCME was a member of the prosecution team for the purposes of *Brady*. This is because the OCME partnered with the State and Delaware Law Enforcement in the prosecution of drug cases in Delaware which included Mr. Burton's. This partnership is demonstrated in the OCME's mission statement[5] and evidentiary guidelines which outline how 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." HA15. Those same evidentiary guidelines also describe the specific procedures that law enforcement are supposed to follow in order for evidence to be submitted for forensic analysis and the procedures for procuring the testimony of a forensic chemist for trial. HA18. Additionally, those

[5] The mission statement reads "[t]he OCME evidentiary guidelines are dedicated to all past, present, and future public servants who dedicate their careers to provide the State of Delaware with the highest degree of law enforcement, forensic science, and medical-legal death investigation services. . . ." HA15.

guidelines expressly note that each Delaware law enforcement agency is allotted two lock boxes for transferring evidence through the OCME's courier service. HA19.

This partnership is further illustrated by the joint effort of the OCME and the State to obtain federal grant monies. HA13. More specifically, former Chief Medical Examiner Richard Callery and the late Attorney General Beau Biden jointly signed a memorandum of understanding in 2007 to obtain the Paul Coverdale Forensic Science Improvement Grant, a grant that provides "funding to crime laboratories and medical examiners' offices to improve the quality, timeliness, and credibility of forensic science or medical examiner services." *Id.* Within the memorandum of understanding, the Delaware DOJ certified that it would investigate any "allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results. . . ." *Id.* Furthermore, the OCME's eligibility for the Coverdale Grant was dependent on the fact that it was a "[f]orensic laborator[y] operated by units of state or local government. . . ." HA213. Thus, it is apparent that the OCME was an essential component of the prosecution team as it actively "participat[ed] in the investigation and prosecution of [the] criminal case against" Mr. Burton. Memorandum from David W. Ogden, Dep. Attorney General, on Guidance for Prosecutor Regarding Criminal Discovery 165 (Jan. 4, 2010); *see also Smith v. Cain*, 132 S.Ct. 627, 629-30 (2012); *Youngblood*, 547 U.S. at 868-70; *Kyles*, 514 U.S. at 437-38; *Ritchie*, 480 U.S. at 61. Therefore, contrary to this Court's prior rulings in *Taylor* and *Harmon*, the State must be imputed with the OCME's knowledge of its own misconduct.

However, even if the OCME is not considered a member of the prosecution team, the State may nevertheless be imputed with knowledge of the misconduct and reliability issues of the OCME through Delaware law enforcement. This is evident as undersigned Counsel and his staff

interviewed two former employees of the OCME, both of which confirmed that Delaware law enforcement was aware of chain of custody and packaging concerns as far back as 2007. Specifically, former Forensic Chemist Farnam Daneshgar described how during his employment with the OCME he had thousands of cases in which the weight and/or quantity of a controlled substance reported by law enforcement was drastically different from the weight and/or quantity calculated by the analyzing chemist. HA718. Mr. Daneshgar indicated that when this occurred, he would telephone the corresponding law enforcement agency and advise them of the discrepancy. Mr. Daneshgar further noted that consistently he was instructed by law enforcement to still perform the analysis, despite the known discrepancy. *Id*.

The repeated instances of weight and/or quantity discrepancies were confirmed by another former OCME employee who was employed by the OCME from 2006 to 2010. HA698; HA702. This former employee, CS1, who wished to remain anonymous prior to any evidentiary hearings taking place, described that when discrepancies were discovered, former unit supervisor, Caroline Honse, as well as the corresponding agency's evidence detection unit officer would be alerted to the discrepancy. It would then be Ms. Honse's direction as to whether the evidence would need to be returned to and resubmitted by the law enforcement agency. HA702. CS1 also provided email correspondence that further demonstrated law enforcement's knowledge of the chain of custody and packaging concerns. Specifically, an email chain from July of 2007 described how the OCME DNA unit and the New Castle County Police Department were scheduled to have a meeting to discuss packaging and chain of custody concerns and noted that a member of the Department of Health and Social Services, who was attending the meeting, had "seen many bad NCCPD examples." HA708-10. Another email chain from March of 2010 described how the OCME's Forensic Quality

Assurance Manager was unable to locate fifty pieces of evidence that the Delaware State Police were requesting to be returned. HA714-15.

While CS1 and Mr. Daneshgar never stated and the emails do not expressly indicate that Delaware law enforcement was aware that OCME employees were stealing and/or tampering with controlled substances stored at the OCME, it is clear from the interviews and emails that Delaware law enforcement had knowledge, as far back as 2007, of serious red flags that were indicative of the now-known misconduct at the OCME. HA698-20. As Delaware law enforcement is clearly a member of the prosecution team, the State is imputed with said knowledge. *United States v. Hampton*, 109 F.Supp. 3d 431, 440 (D.Mass. 2015); *Commonwealth v. Scott*, 5 N.E.3d 530, 543 (Mass. 2014); *Commonwealth v. Martin*, 696 N.E.2d 904, 909 (Mass. 1998); *Commonwealth v. Woodward*, 694 N.E.2d 1277, 1292 (Mass. 1998). Thus, the State's failure to disclose this information to Mr. Burton prior to his trial, constitutes suppression of favorable *Brady* information.

Habeas Counsel respectfully asserts that it would also be reasonable to believe that it is likely that at least some of the ranking members of the DOJ were aware of the *Brady* information due to their countless interactions with various law enforcement agencies and OCME employees in the thousands of cases that were prosecuted between 2008 and 2014. This is a rational conclusion in light of the DOJ's actions in *State v. Coverdale* and *State v. Clayton* in which the DOJ incorrectly determined that Forensic Chemist Bipin Mody's personnel file contained no *Brady* material, a determination that was expressly rejected by the Delaware Superior Court. HA813-15.

As the DOJ erroneously represented in *Coverdale* and *Clayton* that Mr. Mody's personnel file did not contain *Brady* information, it is reasonable to conclude, based upon the evidence represented in Mr. Burton's filings, that the DOJ had knowledge of the misconduct prior to 2014 and

yet made the erroneous determination that this information was not *Brady*. Thus, contrary to this Court's holdings in *Taylor* and *Harmon*, the State suppressed *Brady* information by failing to timely disclose the OCME's misconduct and reliability issues to Mr. Burton prior to his trial.

Furthermore, it is evident that the State's failure to timely disclose exculpatory and impeachment information regarding the OCME's employees and the reliability of their work product deprived Mr. Burton of critical information he needed and was entitled to possess well in advance of trial in order to make effective use of that information. *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); *Johnston*, 784 F.2d at 425; *Mitchell*, 777 F.2d at 256; *Higgs*, 713 F.2d at 44; *Pollack*, 534 F.2d at 973. This included the systemic operational failings of the OCME which directly resulted in the termination and prosecution of three OCME employees and the questioning of a fourth. Similarly, the State failed to disclose continuing incidents of misconduct by OCME employees despite having an ongoing duty to do so. *Ritchie*, 480 U.S. at 60; *Imbler*, 424 U.S. at 427 n.25; *Barnes*, 760 A.2d at 562; *Brown*, 117 A.3d at 575-76; HA341-44; HA346-06; HA813-90.

This deprivation was detrimental to Mr. Burton's defense as Mr. Bajwa's testimony and lab report were essential to the State's case as Mr. Bajwa's report and testimony contained his conclusion that the alleged cocaine and marijuana recovered from Mr. Burton's residence was in fact cocaine and marijuana. However, the OCME's employees had been suspected of fraud and/or stealing evidence, the credibility of Mr. Bajwa was clearly suspect, and there were glaring discrepancies in weight between what was seized from Mr. Burton's residence and what was allegedly analyzed by the OCME and admitted at trial. All of this information "would have provided valuable ammunition for perforating" the credibility of Mr. Bajwa and his work product and

ultimately would have significantly hindered the State's ability to convict Mr. Burton of drug dealing cocaine, aggravated possession of cocaine, possession of marijuana. *Ferrara*, 456 F.3d at 296; 16 *Del. C.* § 4752(1) (2012) Except as authorized by this chapter, any person who: (1) Manufactures, delivers, or possesses with the intent to manufacture or deliver a controlled substance in a Tier 4 quantity . . . shall be guilty of a class B felony."); 16 *Del. C.* § 4752(3) (2012) ("Except as authorized by this chapter, any person who . . . (3) Possesses a controlled substance in a Tier 5 quantity . . . shall be guilty of a class B felony."); 16 *Del. C.* § 4764(b) (2012) ("Any person who knowingly or intentionally possesses, uses, or consumes a controlled substance or a counterfeit controlled substance classified in § 4714(d)(19) of this title, except as otherwise authorized by this chapter, shall be guilty of an unclassified misdemeanor and be fined not more than $575 and imprisoned not more than 3 months."); HA1. As such, had the State complied with its *Brady* obligations and disclosed the *Brady* materials relating to the OCME, there is more than a reasonable probability of a different outcome.

Furthermore, 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 expert witnesses, like Mr. Bono, and the issuance of subpoenas in order to introduce relevant testimony in relation to the many deficiencies affecting the reliability of the OCME's work product and its employees. However, as the State failed to turn over this critical information to Mr. Burton, prior to his jury trial, Mr. Burton was denied the opportunity to take such actions. Thus, Mr. Burton clearly suffered prejudice from the State's failure to timely disclose *Brady* materials and this Court must find that the DOJ was in clear violation of its *Brady* obligations. *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);

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. Therefore, Mr. Burton is entitled to habeas relief.

C. This Court's prior OCME 2254 habeas corpus decisions do not bar relief in this matter.

Furthermore, Mr. Burton asserts that this Court's prior OCME 2254 habeas corpus decisions do not bar relief in this matter. A review of this Court's OCME 2254 decisions leads Mr. Burton to conclude that there are no prior decisions in opposition to Mr. Burton's *Brady* claim described above. This is because, unlike Mr. Burton, the criminal defendants in most of this Court's prior 2254 OCME decisions accepted guilty pleas rather than proceeding to trial. And the very few cases in which the defendant went to trial, those cases were dismissed on procedural grounds. *Williams v. Phelps*, C.A. No. 1:17-cv-01491-MN (D.Del. Feb. 16, 2021) (attached hereto as Exhibit B) ("Accordingly, the Court will deny the instant Petitions as procedurally barred from federal habeas review."); *Brown v. DeMatteis*, C.A. No. 1:17-cv-00727-LPS (D.Del. Nov. 30, 2020) (attached hereto as Exhibit C) (same); *Miller v. DeMatteis*, C.A. No. 1:17-cv-01197-MN (D.Del. Sep. 4, 2020) (attached hereto as Exhibit D) (same); *Brown v. DeMatteis*, C.A. No. 1:17-cv-00726-CFC (D.Del. Sep. 3, 2020) (attached hereto as Exhibit E) (same); *Manuel v. DeMatteis*, C.A. No. 1:16-cv-00871-RGA (D.Del. Sep. 18, 2019) (attached hereto as Exhibit F) ("Accordingly, the Court will deny the instant Petition as time-barred."). Thus, this Court's prior OCME habeas decisions do not preclude Mr. Burton from obtaining the relief requested.

D. An evidentiary hearing in the District Court is needed as the State Courts erroneously denied the Petitioner's ability to further develop the factual record in relation to his *Brady* claim.

Although Mr. Burton asserts that he has met his burden of proof by presenting sufficient

factual evidence which demonstrates that State violated *Brady* in this matter, should this Court find otherwise and/or require additional information to determine the extent of the Brady violation, this Court must have an evidentiary hearing to complete the factual record. This is because the State Courts concluded that no further expansion of the factual record was necessary and erroneously denied Mr. Burton's request for an evidentiary hearing. HA955-59; HA1023-35; HA1085; HA1142; HA1143-48. As such, Mr. Burton respectfully requests that this Court hold an evidentiary hearing, perhaps with the remaining OCME trial habeas cases,[6] to allow Mr. Burton to present witnesses and evidence concerning his *Brady* claim should this Court find that Mr. Burton has not already sufficiently demonstrated the State's *Brady* violation in this case.

Due Process required the State Courts to hold an evidentiary hearing as Mr. Burton's *Brady* claim required a forum for Mr. Burton to have a meaningful opportunity to present witnesses and evidence. U.S. Const. amend. XIV; *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009) (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987)) (noting that "the question is whether consideration of Osborne's claim within the framework of the State's procedures for postconviction relief 'offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'"). Additionally, Federal Courts have repeatedly recognized that an evidentiary hearing must be granted when:

1) the state court postconviction proceedings do not afford a defendant a full and fair

[6] To date, Mr. Burton is aware of two other pending OCME trial habeas cases pending in this Court; Parker v. Phelps, et al., C.A. No. 1:18-cv-00612-LPS and Brown v. Phelps, et al., C.A. No. 1:18-cv-00911-RGA. Should this Court find that an evidentiary hearing is needed, Mr. Burton proposes that an evidentiary hearing be scheduled with those other two cases and that the evidentiary hearing be assigned to a magistrate judge in order to preserve this Court's resources.

hearing on his/her postconviction claims;
2) the factual record was inadequate to make a proper legal determination on a petitioner's claims; and
3) the petitioner was denied further opportunity to investigate his/her claim.

Townsend v. Sain, 372 U.S. 293, 313 (1963); *Lee v. Glunt*, 667 F.3d 297, 406-08 (3d Cir. 2012); *Williams v. Ryan*, 623 F.3d 1258, 1268 (9th Cir. 2010); *Marshall v. Hendricks*, 307 F.3d 36, 117 (3d Cir. 2002); *Newell v. Hanks*, 283 F.3d 827, 838 (7th Cir. 2002); *Greer v. Mitchell*, 264 F.3d 663, 669 (6th Cir. 2001); *United States v. Johnson*, 256 F.3d 895, 898 (9th Cir. 2001); *Valverde v. Stinson*, 224 F.3d 129, 135 (3d Cir. 2000); *Gaither v. United States*, 759 A.2d 655, 657 (D.C. 2000); *Farley v. United States*, 694 A.2d 887, 890 (D.C. 1997).

In Mr. Burton's state postconviction proceedings, the State Court denied him any and all ability to further develop the factual record. This included Mr. Burton's specific request for an evidentiary hearing in order to question members of the DOJ and former employees of the OCME about their knowledge of the problems at the OCME and whether any communications took place during which the problems at the OCME were discussed. HA955; HA957. The State Court also denied Mr. Burton the ability to investigate and compel testimony in relation to the credibility issues of Mr. Bajwa, who was responsible for the analysis of the alleged drug evidence in this case. HA956-57

As the State Courts denied Mr. Burton's ability to fully investigate his *Brady* claim and refused to have a full and fair hearing in relation to his claim, the State Courts failed to provide Mr. Burton with the adequate fact-finding procedures needed to create an adequate factual record for the State Courts to rule upon Mr. Burton's *Brady* claim. HA955-59; HA1023-35; HA1085; HA1142; HA1143-48. Therefore, Due Process mandates that this Court hold an evidentiary hearing to allow

for the creation of a complete record in relation to Mr. Burton's *Brady* claim in the event that this Court finds that Mr. Burton has not already met his burden of factually demonstrating the *Brady* violation in this case. *Osborne*, 557 U.S. at 69; *Townsend*, 372 U.S. at 313; *Lee*, 667 F.3d at 406-08; *Williams*, 623 F.3d at 1268; *Marshall*, 307 F.3d at 117; *Newell*, 283 F.3d at 838; *Greer*, 264 F.3d at 669; *Johnson*, 256 F.3d at 898; *Valverde*, 224 F.3d at 135; *Gaither*, 759 A.2d at 657; *Farley*, 694 A.2d at 890.

III. THE STATE COURTS UNREASONABLY APPLIED CLEARLY ESTABLISHED FEDERAL LAW IN CONCLUDING THAT THE EVIDENCE SEIZED DURING THE WARRANTLESS ADMINISTRATIVE SEARCH OF MR. BURTON'S RESIDENCE MET FEDERAL CONSTITUTIONAL REQUIREMENTS.

A. This claim is ripe for consideration by this Court.

Petitioner unsuccessfully argued on direct appeal that the Superior Court erred by denying Mr. Burton's pre-trial motion to suppress evidence seized during a warrantless administrative search of Mr. Burton's residence. HA38-43; HA123; HA647-56 HA891. Accordingly, Mr. Burton has exhausted all of his state court remedies in relation to this claim.

B. The State Courts erroneously concluded that the warrantless administrative search of Mr. Burton's residence complied with all federal constitutional requirements.

The Fourth Amendment to the United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. Const. amend. IV. "Evidence obtained pursuant to a warranteless search that does not meet an exception to the warrant requirement must be suppressed as 'fruit of the poisonous tree.'" *United States v. Cottman*, 497 F.Supp. 2d 598, 602 (D.Del. 2007) (citing *United States v. Brown*, 448 F.3d 239, 244 (3d Cir. 2006) (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963))). "A probationer's home like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

The United States Supreme Court has held that a warrantless administrative search of a probationer's residence requires the probation officer to have "reasonable suspicion" or "reasonable grounds" for the search. *Id*. at 872-73. In the case of *Griffin v. Wisconsin*, the Supreme Court held that a warrantless search of a probationer's home does not violate the probationer's Fourth

Amendment rights when carried out pursuant to a specific regulation of the probation department that authorized warrantless searches of probationers' residences based upon reasonable suspicion that a residence contained contraband, or evidence of probation violations and which itself satisfied the demands of the Fourth Amendment's reasonableness requirements. *Id*. at 873.

In regard to defining "reasonable suspicion", federal law clearly establishes that "reasonable suspicion exists where the 'totality of the circumstances' indicates that the probation officer had a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arizu*, 534 U.S. 266, 273 (2002). In the present matter, probation officers relied on information provided by a confidential informant to authorize the administrative search, yet failed to independently assess the reliability of the confidential informant and failed to independently corroborate the confidential informant's allegation of illegal activity, specifically, that an individual named "David" was selling crack cocaine from a residence that turned out to be Mr. Burton's residence. HA21-22; HA45. The probation officers, instead, merely relied upon the assertion from a fellow probation officer that the confidential informant was past, proven and reliable without inquiring as to the basis for that characterization. HA21-22; HA45.

The Superior Court denied Mr. Burton's motion to suppress, finding that the probation officers had "reasonable grounds" to search Mr. Burton's residence; however, in reaching this conclusion, the Superior Court relied on information produced at a hearing on the motion to suppress that had not been presented to the probation officer who authorized the administrative search, in contravention of federal law. *See Florida v. J.L.*, 529 U.S. 266, 271 (2000) ("the reasonableness of official suspicion must be measured by what the officers knew before they conducted their search."); HA123; HA891 (affirming the Delaware Superior Court's holding). The record in Mr.

Burton's cause established that the only information relayed to the probation officer who authorized the search was that a probation officer received a tip from a past, proven and reliable informant that a black male, whom this individual knew by the name of "David", was on probation, was a sex offender, lived at 1232 North Thatcher Street in a room at the top of the stairs, and was selling crack cocaine from his residence. HA21-22; HA45.

Federal law also establishes that an informant's "'veracity,' 'reliability' and 'basis of knowledge' are all highly relevant in determining the value of his report." *Illinois v. Gates*, 462 U.S. 213, 230-32 (1983). Where, as here, the probation officer authorizing the warrantless search did not speak with the informant, did not independently assess his reliability and did not independently corroborate the alleged concealed criminal activity—selling crack cocaine from the residence at North Thatcher Street—the officer had no basis upon which he could have had a "particularized and objective basis for suspecting legal wrongdoing." *Arizu*, 534 U.S. at 273; *see United States v. Waterman*, 549 F.Supp. 2d 593, 598 (D.Del. 2008) (citing *J.L.*, 529 U.S. at 272; *United States v. Valentine*, 232 F.3d 350, 354 (3d Cir. 2000)) ("In order for an informant's tip to be the basis for reasonable suspicion, the tip must be reliable both in its assertion of illegality and in its tendency to identify a determinate person."); HA21-22; HA45. As such, the State Courts unreasonably applied clearly established federal law when it found that the above described information sufficient to establish the "reasonable grounds" or "reasonable suspicion" that the Fourth Amendment requires to perform a constitutional warrantless administrative search.

As the State Courts' conclusion that the warrantless administrative search of Mr. Burton's residence complied with all constitutional requirements was the result of an unreasonable application of clearly established federal law, Mr. Burton's convictions must be vacated, the evidence obtained

from the warrantless administrative search of Mr. Burton's residence suppressed as "fruit of the poisonous tree", and the case remanded for a new trial. *Cottman*, 497 F.Supp.2d at 602 (citing *Brown*, 448 F.3d at 244 (citing *Wong Sun*, 371 U.S. at 487-88)).

CONCLUSION

Based on the arguments made above regarding the merits of his postconviction claims, Mr. Burton respectfully requests that this Court grant him a writ of habeas corpus so that he may be discharged from his unconstitutional confinement and restraint. This Court is compelled to recognize that Mr. Burton's motion for postconviction relief "must be viewed as an inevitable result of the disclosure of [the OCME's] misconduct." *Bridgeman v. Dist. Attorney for the Suffolk Dist.*, 30 N.E.3d 806, 816 (Mass. 2015). Furthermore, this Court must also find Mr. Burton's conviction was the result of the Delaware State Court's failure to apply clearly established federal law when it upheld Trial Counsel's decision to stipulate to the State's evidence without Mr. Burton's consent, thereby overriding Mr. Burton's constitutional right to plead not guilty, to oppose the State's evidence, to effective assistance of counsel, and to a fair trial. As such, Mr. Burton's conviction must be vacated and the DOJ must be precluded from further prosecution of Mr. Burton. *See Han Tak Lee v. Tennis*, 2016 U.S. Dist. LEXIS 891, *21 (M.D.Pa. Jan. 5, 2016). In the alternative, this Court, under the circumstances, may resentence Mr. Burton to time-served. *See Dickerson v. Vaughn*, 90 F.3d 87, 92 (3d Cir. 1996). Lastly, although Mr. Burton asserts that he has met his burden of proof by presenting sufficient factual evidence which demonstrates that State violated *Brady* in this matter, should this Court find otherwise and/or require additional information to determine the extent of the Brady violation, this Court must have an evidentiary hearing to complete the factual record.

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Counsel for William Burton

Date: May 14, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WILLIAM BURTON,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civil Action No. 19-1475-MN
	:	
ROBERT MAY, Warden,	:	
and **ATTORNEY GENERAL OF**	:	
THE STATE OF DELAWARE,	:	
	:	
Respondents.	:	

ANSWER

Pursuant to Rule 5 of the Rules Governing Section 2254 Actions, 28 U.S.C. foll. § 2254, respondents state the following in response to the petition for a writ of habeas corpus:

Procedural History

On March 18, 2013, a New Castle County grand jury indicted William Burton ("Burton") for drug dealing, aggravated possession of cocaine, two counts of illegal possession of marijuana, and possession of drug paraphernalia. D.I. 17-1 at 1 of 12, Crim. D.I. 2.[1] On June 3, 2013, Burton filed a motion to suppress. D.I. 17-1 at 2 of 12, Crim. D.I. 7. After a hearing, the Superior Court denied Burton's suppression motion. Crim. D.I. 16; *State v. Burton*, 2013 WL 4852342, at *4 (Del. Super. Ct. Sept. 9, 2013). Burton waived his right to a jury trial and agreed to a stipulated bench trial, which began on September 24, 2013. D.I. 17-1 at 4 of 12, Crim. D.I. 19, 20; D.I. 17-12 at 59-62 of 193. On the same day, the Superior Court judge found Burton guilty of all charges. D.I. 17-1 at 4 of 12, Crim. D.I. 20. On December 11, 2013, the State filed a motion to declare Burton a habitual offender pursuant to 11 *Del. C.* § 4214(b), which the court granted. D.I. 17-1 at

[1] "Crim. D.I.__" refers to item numbers on the Superior Court Criminal Docket in *State v. William Burton*, I.D. No. 1301022871. *See* D.I. 17-1.

4 of 12, Crim. D.I. 21, 22. On December 13, 2013, the Superior Court sentenced Burton as a habitual offender to an aggregate life term plus two years. D.I. 17-1 at 4 of 12, Crim. D.I. 23; D.I. 17-12 at 72-75 of 193. Burton appealed.

On April 30, 2014, while his appeal was pending in the Delaware Supreme Court, the Public Defender's Office filed a motion for postconviction relief on Burton's behalf pursuant to Superior Court Criminal Rule 61 ("Rule 61") based upon misconduct at the Office of the Chief Medical Examiner ("OCME"). D.I. 17-1 at 5 of 12, Crim. D.I. 33. The Delaware Supreme Court granted Burton's request to stay his appeal and remanded the case to the Superior Court for Burton to file motions to supplement the record and for a new trial. D.I. 17-12 at 78 of 193. On January 30, 2015, Burton moved for a new trial in the Superior Court. D.I. 17-1 at 7 of 12, Crim. D.I. 39. The State responded to the motion on March 27, 2015, and Burton filed a reply on April 17, 2015. D.I. 17-1 at 7 of 12, Crim. D.I. 43, 44. Burton and the State filed supplements on July 8, 2015 and August 10, 2015, respectively. D.I. 17-1 at 8-9 of 12, Crim. D.I. 47, 48. On December 1, 2015, the Superior Court denied Burton's motion. D.I. 17-1 at 9 of 12, Crim. D.I. 49; *State v. Burton*, Del. Super. Ct., ID No. 1301022871, Op. & Order, Scott, J. (Nov. 30, 2015); D.I. 17-13 at 138-147 of 250. Burton appealed. On June 8, 2016, the Delaware Supreme Court affirmed Burton's convictions and the Superior Court's denial of his motion for a new trial. *Burton v. State*, 2016 WL 3381847, at *1 (Del. Jun. 8, 2016).

On August 11, 2016, Burton, acting *pro se*, filed a motion for postconviction relief pursuant to Rule 61. D.I. 17-1 at 9 of 12, Crim. D.I. 53. On September 27, 2016, the Superior Court denied Burton's April 2014 postconviction motion. D.I. 17-1 at 9-10 of 12, Crim. D.I. 57. On October 21, 2016, at Burton's request, the Superior Court appointed counsel to assist Burton in postconviction. D.I. 17-1 at 9, 10 of 12, Crim. D.I. 54, 58. On August 17, 2017, appointed counsel

filed an amended motion for postconviction relief and memorandum of law. D.I. 17-1 at 11 of 12, Crim. D.I. 63, 64. On December 4, 2017, Burton's trial counsel submitted an affidavit addressing Burton's postconviction claim of ineffective assistance of counsel. D.I. 17-1 at 11 of 12, Crim. D.I. 70. On January 29, 2018, the State responded to Burton's postconviction motion, to which Burton filed a reply on March 1, 2018. D.I. 17-1 at 12 of 12, Crim. D.I. 72, 73. On April 30, 2018, the Superior Court denied Burton's postconviction motion. *State v. Burton*, 2018 WL 2077325, at *5 (Del. Super. Ct. Apr. 30, 2018). Burton appealed and the Delaware Supreme Court affirmed the lower court's decision denying relief on April 11, 2018. *Burton v. State*, 2018 WL 1768652 (Del. Apr. 11, 2018).

Burton filed the instant habeas petition on August 7, 2019. D.I. 2 at 15 of 15. He filed an amended petition on December 24, 2019. D.I. 8. Thereafter, the parties agreed to a stipulated briefing schedule, after which the State filed the State Court Record. D.I. 15, 16, 17, 18, & 19. Burton filed his opening brief in support of his petition on May 14, 2021. D.I. 22. This is the State's Answer to Burton's claims.

Facts

The Crime and the Search

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. D.I. 17-12 at 41 of 193. 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." D.I. 17-12 at 42 of 193. 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. D.I. 17-12 at 41-42 of 193.

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 records. D.I. 17-12 at 42 of 193. P.O. Collins confirmed that William David Burton, a Level II probationer and registered sex offender, lived at 1232 North Thatcher Street. *Id*. Detective Leary then sent a photograph of Burton to the informant *via* text. *Id*. After viewing the photo, the informant confirmed that the person he knew as "David" was Burton. *Id*.

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. *Id*. 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. D.I. 17-12 at 46 of

193; D.I. 17-16 at 4 of 12. At the conclusion of this conference, P.O. Watson authorized P.O. Collins to conduct an administrative search of Burton's residence. D.I. 17-16 at 6 of 12.

At approximately 8 p.m. on January 31, 2013, members of the Wilmington Safe Streets Unit and Probation and Parole went to Burton's residence to conduct the pre-approved administrative search. D.I. 17-12 at 42-43 of 193. While conducting surveillance of the residence, the officers observed Burton and another man enter the residence. D.I. 17-16 at 9 of 12. P.O. Collins and P.O. Bryan Vettori knocked on the door, which was answered by Burton's co-defendant, Bernard Guy ("Guy"). *Id*. When the officers entered the residence, they saw Burton walking from the upstairs bathroom to his bedroom on the second floor. D.I. 17-12 at 62-63 of 193. Guy, however, told the officers Burton was not there and threatened to have his dog attack them. D.I. 17-16 at 10-11 of 12. Guy was placed in handcuffs, and, when officers conducted a pat-down, they discovered 17 bags of heroin on his person. D.I. 17-12 at 22, 43 of 193; D.I. 17-16 at 3, 5, 11 of 12.

The officers then searched Burton's room. There, they 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. D.I. 17-12 at 63 of 193. 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. *Id*. The white and green substances tested positive for cocaine (preliminary weight of 29 grams) and marijuana (preliminary weight of 1 gram), respectively. D.I. 17-12 at 25-26 of 193. Burton was present during the search, and when P.O. Collins told Burton that he had seen him coming from the bathroom, Burton told him that he had "flushed all his cocaine." D.I. 17-16 at 3 of 12.

The Stipulated Bench Trial

On September 24, 2013, Burton waived his right to a jury trial and elected to have a stipulated bench trial. D.I. 17-28 at 51 of 92. In so doing, he executed a written "Stipulation of Waiver of Jury," and the Superior Court conducted a colloquy with him. D.I. 17-28 at 49-51 of 92. Prior to the colloquy, trial counsel informed the court that he had met with Burton on two occasions and had discussed with him the nature of a stipulated trial "in that in this case it's our belief that the suppression issue is really the most important issue . . . and that there was a pretty thorough record made before [the judge] that we're willing to rely upon for suppression purposes." D.I. 17-28 at 51 of 92. The court then explained to Burton his jury trial rights and made sure he understood them, confirmed that he had discussed the waiver with his attorney, and asked Burton if he wished to discuss the issue further with his counsel. D.I. 17-28 at 52 of 92. Burton responded, "No." *Id*. The court found that Burton's waiver of his right to a jury trial was knowing, intelligent, and voluntary. *Id.*

At his stipulated trial, the State admitted into evidence, without objection, the Controlled Substances Laboratory Report prepared by a forensic chemist with the OCME, which confirmed that the substances found in Burton's room were cocaine and marijuana. D.I. 17-28 at 17, 53 of 92. Burton did not raise any objections to the chain of custody or the results of the Controlled Substances Laboratory Report. D.I. 17-28 at 53 of 92.

Criminal Investigation of the OCME[2]

In February 2014, the Delaware State Police ("DSP") and the Department of Justice

[2] The facts in this subsection are quoted from *Ira Brown v. State*, 108 A.3d 1201, 1204-05 (Del. 2015).

("DOJ") began an investigation into criminal misconduct occurring in the Controlled Substances Unit of the OCME. The investigation revealed that some drug evidence sent to the OCME for testing had been stolen by OCME employees in some cases and was unaccounted for in other cases. Oversight of the lab had been lacking, and security procedures had not been followed. One employee was accused of "dry labbing" (or declaring a test result without actually conducting a test of the evidence) in several cases. . . . Three OCME employees [were] suspended (two of those employees [were] criminally indicted), and the Chief Medical Examiner [was] fired.

There is no evidence to suggest that OCME employees tampered with drug evidence by adding known controlled 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. Rather, the employees who stole the evidence did so because it in fact consisted of illegal narcotics that they could resell or take for personal use.

Legal Principles Governing Petition

A state petitioner seeking habeas relief must exhaust all remedies available in the state courts. 28 U.S.C. § 2254(b); *Rose v. Lundy*, 455 U.S. 509, 510, (1982). The purpose of the exhaustion doctrine is "to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). A claim is exhausted if it has been fairly presented to the state's highest court. *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

Once a state's highest court adjudicates a federal habeas claim on the merits, the federal court must review the claim under the deferential standard contained in 28 U.S.C. § 2254(d). Pursuant to 28 U.S.C. § 2254(d), federal habeas relief may only be granted if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal

law, as determined by the Supreme Court of the United States," or the state court's decision was an unreasonable determination of the facts based on the evidence adduced in the trial. 28 U.S.C. § 2254(d)(1) & (2). *See also Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). A claim has been "adjudicated on the merits" for the purposes of section 2254(d) if the state court decision finally resolves the claim on the basis of its substance, rather than on a procedural or some other ground. *Thomas v. Horn*, 570 F.3d 105, 115 (3d Cir. 2009). The deferential standard of section 2254(d) applies even "when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied" because "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 98-99 (2011). *See also Johnson v. Williams*, 568 U.S. 289, 293 (2013) (holding that when a state court rules against a defendant and issues an opinion that addresses some issues but does not expressly address defendant's federal claim, a federal habeas court must presume, subject to rebuttal, that the claim was adjudicated on the merits).

In determining whether the state court reasonably applied clearly established federal law, this Court does not look at the decision of the state courts to see whether it would have reached the same result in the first instance. Instead, this Court must determine what argument supported, or could have supported, the state court's decision and then determine whether it is possible that fair-minded jurists could disagree that those arguments are inconsistent with a prior decision of the United States Supreme Court. *Harrington v. Richter*, 562 U.S. at 101-02. This standard is difficult for a petitioner to meet, and it was meant to be. *Id*. at 102. "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

A federal court must presume that the state court's determinations of factual issues are correct. 28 U.S.C. § 2254(e)(1). This presumption of correctness applies to both explicit and implicit findings of fact, and a petitioner must present clear and convincing evidence to the contrary to rebut the presumption. *Id.*; *Campbell v. Vaughn*, 209 F.3d 280, 286 (3d Cir. 2000); *Mayes–El v. Cockrell*, 537 U.S. 322, 341 (2003) (stating that the clear and convincing standard in § 2254(e)(1) applies to factual issues, whereas the unreasonable application standard of § 2254(d)(2) applies to factual decisions).

Discussion

In his timely filed petition for federal habeas relief, Burton argues that the Delaware courts erred in denying relief on the following claims: (1) trial counsel was ineffective for stipulating to the State's evidence (D.I. 8 at 19-27 of 39; D.I. 22 at 27-35 of 56); (2) the State failed to disclose evidence of OCME misconduct prior to Burton's trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). (D.I. 8 at 27-35 of 39; D.I. 22 at 36-50 of 56); and (3) the administrative search of Burton's residence violated the Fourth Amendment (D.I. 8 at 35-38 of 39; D.I. 22 at 51-54 of 56). Burton is not entitled to habeas relief on any of his claims.

CLAIM 1 – Ineffective Assistance of Trial Counsel

Burton claims his trial counsel was ineffective because he stipulated to the State's evidence without 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." D.I. 8 at 19 of 39; D.I. 22 at 27 of 56. In his amended motion for postconviction relief filed in the Delaware Superior Court, Burton essentially made the same argument, asserting that when he waived his right to a jury trial, he did not know that trial counsel also intended to stipulate to the State's evidence. D.I. 17-25 at 72 of 86. He denied that trial counsel ever discussed the stipulation

with him and asserted that he had wanted counsel to challenge the State's forensic evidence. *Id.* Burton claimed that, in stipulating to the State's evidence, trial counsel conceded most of the elements for the counts on which he was convicted, did not put the prosecution's case to a meaningful adversarial test, and permitted the inclusion of evidence that would have otherwise been inadmissible, all of which deprived him of his constitutional right to make fundamental decisions in his case. D.I. 17-25 at 73-75 of 86. Burton further alleged that he received no benefit in exchange for the stipulation, and trial counsel thus did not have a sound trial strategy for agreeing to it. D.I. 17-25 at 78-79 of 86. Burton also claimed that his counsel's failure to subject the State's case to meaningful adversarial testing amounted to structural error, or, in the alternative, he was prejudiced by trial counsel's stipulation to the evidence because counsel waived his right, without his knowledge, to meaningfully oppose the State's case against him or to later challenge the drug evidence after the issues at the OCME were revealed. D.I. 17-25 at 79-81 of 86.

The Superior Court denied Burton's claim, finding that trial counsel's "decision to rely on the record developed at the suppression hearing in order to preserve that issue for appeal by proceeding with a bench trial is a strategic one." *State v. Burton*, 2018 WL 2077325, at *4 (Del. Super. Ct. Apr. 30, 2018). The court noted that trial counsel stated that he would have discussed the decision to agree to a bench trial and the consequences of doing so with Burton, and that information about the OCME scandal was not known until after Burton's trial. *Id*. Thus, viewing counsel's actions from his perspective at the time, his decision to agree to the stipulated bench trial was reasonable. *Id*. Moreover, the court noted it had conducted a colloquy with Burton and found that his decision to waive his right to a jury trial was made knowingly, intelligently, and voluntarily. *Id.* And the decision was strategically made after Burton and his attorney discussed it. *Id*. The court also held that Burton did not show prejudice from trial counsel's actions, noting

Burton "failed to offer any evidence that a more favorable outcome was substantially likely but for the ineffective assistance of counsel." *Id*.

On appeal, Burton made the same claim, but he also cited a United States Supreme Court case, *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), which was decided after the Superior Court denied his postconviction relief motion.[3] *See* D.I. 22 at 29-32 of 56. The Delaware Supreme Court affirmed the Superior Court's decision, finding:

> [A]s the Superior Court correctly decided, [Burton] cannot show prejudice by counsel's alleged errors. As the Superior Court held, it is unlikely trial counsel would have achieved anything by contesting the drug evidence. Burton knowingly, intelligently, and voluntarily agreed to stipulate to the State's drug evidence. The evidence of Burton's guilt was also overwhelming. Burton confessed to flushing cocaine down the toilet, and the drugs were seized from his room while he was present.

Burton, 2018 WL 6824636.

Burton contends that the state courts unreasonably applied the facts in his case to the clearly established federal law of *Strickland v. Washington*, 466 U.S. 668 (1984), and erroneously failed to apply the clearly established federal law of *McCoy* and *Strickland*. D.I. 22 at 27 of 56. Burton has exhausted this claim; nonetheless, it is unavailing.

The clearly established federal law that governs ineffective assistance of counsel claims is the standard enunciated by *Strickland*, 466 U.S. 668, and its progeny. *See Wiggins v. Smith*, 539 U.S. 510 (2003). In *Strickland*, the United States Supreme Court articulated a two-part test for evaluating an ineffective assistance of counsel claim. First, a petitioner must demonstrate that counsel's performance at trial or on appeal fell below "an objective standard of reasonableness."

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[3] In *McCoy*, the United States Supreme Court found structural error based on a violation of the defendant's right to autonomy when the defendant's trial counsel conceded guilt to three murders during the guilt phase of trial, over the defendant's vociferous insistence that he had not engaged in the charged acts and his adamant opposition to any concession of guilt. *McCoy*, 138 S. Ct. at 1505.

Strickland, 466 U.S. at 688. In evaluating whether counsel performed reasonably, a court "must be highly deferential." *Id*. at 689. Therefore, a petitioner "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id*. (quotation omitted). Second, a petitioner must illustrate that counsel's ineffective performance caused prejudice. *See id*. at 687. The Third Circuit has stated that prejudice occurs where "there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." *Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996) (citing *Strickland*, 466 U.S. at 668). *See also Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

When the claim concerns ineffective assistance of counsel, AEDPA's review is "doubly deferential." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Burt v. Titlow*, 571 U.S. 12, 22 (2013) (quoting *Strickland*, 466 U.S. at 690 (internal quotation marks omitted)). In such circumstances, federal courts are to afford "both the state court and the defense attorney the benefit of the doubt." *Burt*, 571 U.S. at 15).

Here, the Delaware courts correctly applied *Strickland* to the facts of Burton's case.[4] And the courts' findings of fact were supported by the record. Burton argued in the state courts that his counsel was ineffective for stipulating to the State's evidence without his consent and that his counsel's decision to do so could not have been strategic. The Delaware courts disagreed and found trial counsel's decision to stipulate to the evidence strategic and that Burton had not shown

[4] To the extent the Delaware Supreme Court relied on the Superior Court's reasoning, federal courts look to the last explained state court judgment on the claim. *See Johnson v. Pinchak*, 392 F.3d 551, 557 (3d Cir. 2004) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 801-02, 805 (1991) (holding a federal court should look to the "last *explained* state-court judgment on the ... claim" to determine whether it "fairly appears to rest primarily on federal law" or instead relies upon a state procedural bar to deny relief)).

prejudice. In so finding, the Delaware Supreme Court noted that Burton had knowingly, intelligently, and voluntarily consented to the stipulation. Burton claims the courts erred because they did not make explicit factual findings to support the conclusion that he consented to the stipulation and because their conclusion that he did so contradicts clearly established federal law in *McCoy*. Burton's arguments fail.

The Delaware Supreme Court explicitly noted that Burton consented to the stipulation, and it is evident from the Superior Court's reasoning that it implicitly did so. "Implicit factual findings are presumed correct under [28 U.S.C.] § 2254(e)(1) to the same extent as express factual findings." *Taylor v. Horn*, 504 F.3d 416, 433 (3d Cir. 2007) (citing *Campbell v. Vaughn,* 209 F.3d 280 285-86 (3rd Cir.2000); *accord Howell v. Superintendent Rockview SCI*, 939 F.3d 260, 266, n.3 (3d Cir. 2019). The Delaware courts' finding that Burton consented to the stipulation was supported by the record. It is Burton's burden to present clear and convincing evidence to rebut the presumption of correctness regarding those factual findings, and he has not done so. And contrary to Burton's argument, the state courts' decisions did not contradict nor unreasonably apply clearly established United States Supreme Court precedent.

The Delaware Courts' Finding that Burton Consented to the Stipulation is Supported by the Record.

On the day scheduled for trial, Burton's counsel advised the Superior Court that Burton had elected to waive his right to a jury trial. D.I. 17-12 at 61 of 193. Burton executed a waiver of jury trial form. D.I. 17-12 at 59, 61 of 193. Trial counsel advised that Burton made this decision after meeting with him on two occasions and discussing the nature of a stipulated bench trial. D.I. 17-12 at 61 of 193. Counsel said that he and Burton believed that whether the evidence should have been suppressed was the most important issue in his case. *Id*. Counsel advised that Burton would rely on the "pretty thorough record" made in the Superior Court regarding the suppression

issue. *Id*. The court then engaged in a colloquy with Burton. D.I. 17-12 at 61-62 of 193. Burton said he had consulted with his trial counsel regarding his decision and did not wish to discuss it any further with him. D.I. 17-12 at 62 of 193. Burton acknowledged that the final decision belonged to him. *Id*. Burton confirmed his decision, which the court found to be knowing, intelligent, and voluntary. *Id*. At trial, the State admitted into evidence, without objection, the OCME's lab report, which confirmed that the substances found in Burton's room were cocaine and marijuana. D.I. 17-12 at 33, 63 of 193.

Further, in his affidavit responding to Burton's ineffective assistance of counsel claim, trial counsel denied that he stipulated to the State's evidence without Burton's knowledge or consent:

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

D.I. 17-14 at 175-76 of 234.

The record reflects that Burton understood that he was waiving his right to a jury trial and stipulating to the State's drug evidence. At no time during the colloquy did Burton indicate that he did not understand the stipulation, counsel had misinformed him, or counsel had misstated Burton's decision. Nor did he argue on direct appeal that his stipulation to the State's evidence was involuntary. Burton's bald assertions that, in hindsight, he did not consent to his attorney's

stipulation to the State's evidence are not sufficient to rebut the presumption of correctness applied to the Delaware courts' factual findings. *Cf. Campbell v. Vaughn*, 209 F.3d 280, 291 (3d Cir. 2000) (finding that because a reasonable fact-finder could discount petitioner's testimony and credit trial counsel's, the state court did not make an unreasonable determination of the facts in light of the evidence presented when it implicitly reached that conclusion); *United States v. Williams*, 403 F. App'x 707, 708 (3d Cir. 2010) (noting there was no evidence in the record that the defendant dissented from his counsel's stipulation to the admissibility of the laboratory evidence before or during trial); *see Vickers v. Superintendent Graterford SCI*, 858 F.3d 841, 850 n.9 (3d Cir. 2017) (noting credibility findings are presumed correct absent clear and convincing evidence to the contrary).

The Delaware Courts' Finding that Burton Consented to the Stipulation Does Not Contradict nor Unreasonably Apply Clearly Established Federal Law.

Burton is incorrect that the clearly established federal law applicable to his case is the United States Supreme Court's jurisprudence on the violation of a defendant's autonomy under *McCoy* as opposed to its precedent governing ineffective assistance of counsel claims under *Strickland* and its progeny. The United States Supreme Court has held that while an attorney "has a duty to consult with a client regarding 'important decisions,' including questions of overarching defense strategy," "[t]hat obligation does not require counsel to obtain a defendant's consent to 'every tactical decision.'" *Fla. v. Nixon*, 543 U.S. 175, 187-88 (2004) (quoting *Strickland*, 466 U.S. at 688; *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988)). Some decisions, including whether to plead guilty, waive a jury, testify on one's behalf, or take an appeal, must be made by the defendant himself. *Id*. (citing *Jones v. Barnes,* 463 U.S. 745, 751 (1983); *Wainwright v. Sykes,* 433 U.S. 72, 93, n. 1 (1977)). For those decisions, "an attorney must both consult with the defendant and obtain consent to the recommended course of action." *Id.*

Here, Burton waived his right to a jury and to challenge much of the State's case when he stipulated to the evidence presented at the suppression hearing and to the admission of the OCME report. His attorney was required to obtain his consent to waive his right to a jury trial, which the record shows he clearly did. Burton does not allege that his waiver was involuntary. Nor has Burton raised a freestanding claim that his consent to the stipulation to the State's evidence was not knowing, intelligent, and voluntary. Instead, he argues that trial counsel provided ineffective assistance by consenting to such a broad stipulation and that the attorney's consent constitutes structural error.[5]

The Third Circuit has consistently pointed out that there is no constitutional requirement for a court to conduct a colloquy with a defendant before accepting his attorney's representation that he wishes to waive his right to a jury trial. *See Pirela v. Horn*, 710 F. App'x 66, 77 n.8 (3d Cir. 2017) ("[T]here is no constitutional requirement to conduct a [jury trial] waiver colloquy." (citing *United States v. Lilly*, 536 F.3d 190, 194 (3d Cir. 2008); *United States v. Anderson*, 704 F.2d 117, 119 (3d Cir. 1983)). Thus, even with respect to Burton's waiver of his right to a jury trial, the Delaware courts would not have unreasonably applied federal law had they upheld the voluntariness of Burton's waiver, even though no colloquy had been conducted, as long as there was sufficient evidence in the record that it was voluntary. Such is the case with Burton's consent to the stipulation.

[5] In *Eichinger v. Wetzel*, the District Court for the Eastern District of Pennsylvania pointed out that any issue regarding the voluntariness of a waiver of rights is independent of a claim about trial counsel's ineffectiveness. 2019 WL 248977, at *11 (Jan. 16, 2019). *Cf. Lafler v. Cooper*, 566 U.S. 156, 173 (2012) ("An inquiry into whether the rejection of a plea is knowing and voluntary, however, is not the correct means by which to address a claim of ineffective assistance of counsel.").

Moreover, Respondents are not aware of any United States Supreme Court precedent that requires a colloquy before a defendant agrees to a stipulated bench trial. Indeed, the Third Circuit has recognized that "defense counsel has the ultimate authority to decide issues concerning 'what evidence should be introduced [and] what stipulations should be made[,]" *United States v. Benoit*, 545 F. App'x 171, 174 (3d Cir. 2013) (quoting *Gov't of Virgin Islands v. Weatherwax,* 77 F.3d 1425, 1434 (3d Cir.1996) (omitting internal quotation marks and citation)), and that, for example, "the Confrontation Clause does not require the defendant to personally waive his confrontation rights," *United States v. Williams*, 403 F. App'x 707, 708 (3d Cir. 2010). *See also McCoy*, 138 S. Ct. at 1508 ("Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.'" (quoting *Gonzalez v. United States,* 553 U.S. 242, 248 (2008))). Furthermore, although, the United States Supreme Court has held that "a defendant's tacit acquiescence in the decision to plead [guilty] is insufficient to render the plea valid," *Nixon*, 543 U.S. at 187-88 (citing *Boykin v. Alabama*, 395 U.S. 238, 245 (1969)), it has not held that a factual situation "materially indistinguishable" from the one at issue in Burton's case is tantamount to a guilty plea.[6] *Cf. Brown v. Coleman*, 2013 WL 3967558, at *10 (W.D. Pa. Aug. 1, 2013) ("Petitioner's stipulated non-jury trial was not the equivalent of a guilty plea.").

The United States Supreme Court has consistently held that "it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal

[6] "A state-court decision is 'contrary to' clearly established federal law if the state court . . . (2) confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a [different] result.'" *Lambert v. Blackwell*, 387 F.3d 210, 234 (3d Cir. 2004) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000))).

rule that has not been squarely established by [it]." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (internal quotations omitted). *See Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, . . . it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law." (internal quotations omitted)). Thus, even if an argument could be made that *McCoy* should retroactively apply to Burton's case, it is distinguishable and, thus, does not constitute "clearly established Federal law" that would dictate a different conclusion than the one reached by the Delaware courts. During McCoy's trial, his attorney conceded that McCoy had committed the murders for which he was on trial. 138 S. Ct. at 1506-07. McCoy objected and testified on his own behalf that he was innocent. *Id.* The United States Supreme Court held that when an attorney concedes guilt over his client's express objection, it amounts to structural error.[7] *Id.* at 1511.

Here, not only did trial counsel not concede Burton's guilt, but also Burton never voiced any opposition to his attorney's decision to stipulate to the State's evidence. *Cf. United States v. Wilson*, 960 F.3d 136, 144 (3d Cir. 2020) (distinguishing *McCoy* because there was no evidence that the defendant either objected to the stipulation or demanded that counsel not concede the element of the crime). In contrast, the *McCoy* Court noted that McCoy "opposed [his attorney's] assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court." *McCoy*, 138 S. Ct. at 1509. In fact, the Court distinguished McCoy's case from a prior one in which a defendant had remained silent while his attorney engaged in a guilt-phase concession strategy:

> In *Florida v. Nixon,* 543 U.S. 175 [] (2004), this Court considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial "when [the] defendant, informed by counsel, neither consents nor objects," *id.,* at

[7] It should also be noted that *McCoy* addressed a defendant's Sixth Amendment right to autonomy, not his Sixth Amendment right to effective assistance of counsel. *Id.* at 1150-51.

> 178 []. In that case, defense counsel had several times explained to the defendant a proposed guilt-phase concession strategy, but the defendant was unresponsive. *Id.,* at 186 []. We held that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, *id.,* at 181 [], "[no] blanket rule demand[s] the defendant's explicit consent" to implementation of that strategy, *id.,* at 192[].

Id. at 1505.

Such was the case here. The record established that trial counsel represented to the Superior Court, in Burton's presence, that he had met with Burton on two occasions and discussed with him the nature of a stipulated trial and that, for the purpose of trial, they were going to rely on the record from the suppression hearing, "plus the additional record the State [would] make with respect to where the drugs were found and what they were and how much was found." D.I. 17-12 at 55 of 193. Burton remained silent, at no point protesting counsel's stipulation to the evidence. In sum, the state courts' holding that trial counsel was not ineffective because Burton consented to the stipulation to the evidence was not contrary to clearly established federal law.

Burton Did Not Establish Prejudice.

As noted by the Delaware courts, the evidence against Burton was overwhelming. *See Burton*, 2018 WL 2077325, at *5; *Burton*, 2018 WL 6824636, at *2. "Burton confessed to flushing cocaine down the toilet, and the drugs were seized from his room while he was present." *Burton*, 2018 WL 6824636, at *2; *see* D.I. 17-12 at 63 of 193; D.I. 17-16 at 3 of 12. In the face of this overwhelming evidence, Burton gained a benefit from agreeing to a stipulated trial instead of entering a guilty plea: he would be able to appeal the Superior Court's denial of his motion to suppress. On the other hand, Burton cannot show that the result would have been any different had he gone through with a full trial. Even if trial counsel had objected to the State's evidence, his objections would have only concerned the weight, not admissibility, of that evidence. *See Brown v. State*, 117 A.3d 568, 579-80 (Del. 2015) ("[W]hen there is no clear abuse of discretion,

any breaks in the chain of custody go only to the weight, not the admissibility, of the evidence"). And trial counsel would not have known about any issues at the OCME at that time. The Delaware courts applied the correct standard in analyzing Burton's claim. *See Burton*, 2018 WL 2077325, at *4 (concluding that Burton had not "offer[ed] any evidence that a more favorable outcome was substantially likely but for the ineffective assistance of counsel."); *Burton*, 2018 WL 6824636, at *2 (applying *Strickland* prejudice prong). *Cf. Brown*, 2013 WL 3967558, at *10 (finding petitioner failed to show prejudice from claim that counsel failed to fully inform him of ramifications of stipulated non-jury trial because there was little question that the result of a jury trial would have been different).

CLAIM 2 – *Brady*

In his motion for a new trial, filed while his case was on remand from his direct appeal, Burton argued the State violated *Brady v. Maryland* because it had failed to disclose material impeachment evidence of government misconduct at the OCME. D.I. 17-29 at 8 of 81. The Superior Court denied the motion, finding that Burton had failed to meet his burden for granting a new trial under Superior Court Criminal Rule 33 and that he had waived the right to challenge his conviction based on the drug evidence because he knowingly, intelligently, and voluntarily agreed to a stipulated bench trial, in which he did not challenge that the seized substance was illegal drugs. D.I. 17-29 at 49 of 81. The court did not explicitly address whether or not the State's failure to disclose the OCME misconduct amounted to a *Brady* violation. But it pointed out that, based on the standard established by the Delaware Superior Court's decision in *State v. Irwin*, 2014 WL 6734821 (Nov. 17, 2014) ("*Irwin*"), had Burton known about the OCME misconduct before his trial, he would not have been permitted to use that evidence to challenge the investigation at trial. D.I. 17-29 at 50-51 of 81. On appeal, the Delaware Supreme Court affirmed "on the basis of the Superior Court's decision[]." *Burton*, 2016 WL 3381847.

In his amended motion for postconviction relief, Burton again argued that the State's failure to disclose the evidence violated *Brady*. D.I. 17-25 at 34-70 of 86. The claim was essentially the same as the one he raised in his motion for a new trial, except he included evidence of additional violations that had come to light since the filing of Burton's motion for a new trial, along with the report of a Forensic Science Consultant he had retained. D.I. 17-25 at 45-48 of 86. Burton also provided emails from 2007 and 2010, which, he asserted, proved that there were police officers who would have been aware of problems at the OCME prior to 2014. D.I. 17-25 at 52 of 86.

The Superior Court found Burton's *Brady* claim procedurally barred, but held that it met the criteria for the Rule 61(i)(5) exception to the procedural bar and denied it on the merits. *Burton*, 2018 WL 2077325, at *2-3. On appeal, the Delaware Supreme Court found that the Superior Court had applied the wrong version of Rule 61. *Burton*, 2018 WL 6824636, at *1-2. It held that the claim was procedurally barred as formerly adjudicated under Rule 61(i)(4), and it did not meet the criterial for the Rule 61(i)(5) exception under the correct version of the rule. *Id.*

Burton makes essentially the same claim in his habeas petition that he made in his amended motion for postconviction relief. *See* D.I. 22 at 36-47 of 56. His claim is exhausted,[8] but it is nonetheless unavailing.

The due process clause of the Fourteenth Amendment mandates that the State must disclose evidence favorable to an accused "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. "[T]he duty to disclose [*Brady*] evidence is applicable even though there has been no request by the accused . . . and . . . the duty encompasses impeachment evidence as well as exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Thus, the State's obligation under *Brady* to disclose exculpatory evidence includes evidence that the defense might use to impeach a government witness by showing bias or interest. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *accord Giglio v. United States*, 405 U.S. 150 (1972). The three components of a *Brady* violation are: 1) the evidence must be favorable to the accused because it is exculpatory or

[8] Although, the Delaware Supreme Court found Burton's claim procedurally barred under Rule 61(i)(4), this Court has held that, for the purposes of federal habeas review, "the fact that a claim was formerly adjudicated means that it was decided on the merits and should be reviewed under the deferential AEDPA standard contained in § 2244(d)(1)." *Brown v. Metzger*, 2019 WL 1237389, at *7 (D. Del. Mar. 25, 2019) (citing *Trice v. Pierce*, 2016 WL 2771123, at *4 n.4 (D. Del. May 13, 2016).

impeaching; 2) the evidence was suppressed by the State (either willfully or inadvertently); and 3) there must be prejudice to the defendant as a result. *Strickler*, 527 U.S. at 281-82. "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* at 280 (quoting *Bagley*, 473 U.S. at 682).

Here, the Superior Court's decision on Burton's *Brady* claim was very narrow. The court analyzed the issue under Superior Court Criminal Rule 33 and found that, were he granted a new trial, Burton would not be able to meet the standard under *Irwin* for the admission of evidence about the OCME investigation; "[he] [] 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." *State v. Burton*, Del. Super., ID No. 1301022871, Scott, J. (Nov. 30, 2015) (D.I. 17-6 at 52 of 53). Therefore, the interests of justice did not require a new trial. *Id.*

This Court has noted that in *Irwin*, "the Superior Court crafted a procedure for efficiently and logically addressing the majority of the Rule 61 motions." *Morris v. Dematteis*, 2021 WL 1174594, at *4 (D. Del. Mar. 29, 2021). That procedure established a bright line test "that must be crossed before allowing questioning regarding the [OCME] investigation," *Irwin*, 2014 WL 6734821, at *12:

> [I]f a case was sent to the OCME drug lab for testing, the defense will be free to question the State's witnesses or to present evidence regarding the OCME investigation only if there is either evidence of tampering of the packaging submitted by the police or a discrepancy in weight, volume or contents from that described by the seizing officer. If evidence of tampering is not present and there is no discrepancy, the OCME investigation is not relevant under Delaware Rule of Evidence 402 or at least would be misleading and unfair under Rule 403. In such cases, therefore, evidence of the investigation should not be introduced.

Id. The Delaware Superior Court applied that bright line test to the facts of Burton's case and determined that he did not meet the standard for admission of evidence of the OCME investigation

as an impeachment tool. The court's factual finding is entitled to a presumption of correctness, and Burton has not presented clear and convincing evidence to rebut that presumption.

When he was arrested, Burton told the officers that he had "flushed all his cocaine" prior to officers seeing him exit the bathroom in his residence. D.I. 17-7 at 19 of 216. At trial, Detective Leary testified that when he searched Burton's room, he recovered three plastic bags – one containing 28.45 grams of cocaine and two bags containing marijuana. D.I. 17-7 at 103 of 216. The substances that officers found in Burton's room field tested positive for cocaine and marijuana. D.I. 17-7 at 80 of 216. Detective Leary also collected drug paraphernalia associated with the preparation of cocaine for later sale. D.I. 17-7 at 103-04 of 216. The Controlled Substances Laboratory Report confirmed that the substances recovered from Burton's room were indeed cocaine and marijuana. D.I. 17-7 at 203 of 216.[9] At trial, Burton stipulated to the chain of custody and the admission of the drugs, tacitly acknowledging that the substances found in his room were illegal drugs. D.I. 17-7 at 103 of 216. In a supplement to his motion for a new trial, Burton conceded that "[he was] unable to provide the [Superior] 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."[10] D.I. 17-29 at 43 of 81.

The additional evidence that Burton alleged in his postconviction motion and in his habeas petition does not contradict the Superior Court's conclusion that Burton's case did not meet the bright line *Irwin* standard. Most of the evidence that Burton has provided is unrelated to his case, and the emails do not show that law enforcement knew about OCME misconduct. The emails that

[9] The date of the lab report is May 15, 2013. D.I. 17-28 at 17 of 92.

[10] According to the police report, the marijuana had a preliminary weight of 1 gram and the cocaine, a preliminary weight of 29 grams. D.I. 17-28 at 15-16 of 92. The lab report results were .93 grams for the marijuana and 28.45 grams for the cocaine. D.I. 17-28 at 17 of 92.

described a meeting between the police and the OCME involved the OCME's DNA unit and seemed to concern how the police had been packaging DNA samples. *See* D.I. 17-13 at 182-84 of 250; D.I. 22-7 at 24-25 of 206. Other emails detail a former employee assisting OCME personnel in locating evidence from completed cases (mostly from 2008) to return to the police. *See* D.I. 17-13 at 188-89 of 250; D.I. 22-7 at 30-31 of 206. None of the emails demonstrate that OCME employees were planting drugs to falsify test results, or that law enforcement was aware of systemic and potentially criminal problems at the OCME before 2014. As the Delaware Supreme Court has found: "[T]here is no evidence that the OCME staff 'planted' evidence to wrongly obtain convictions. Rather, the employees who stole the evidence did so because it in fact consisted of illegal narcotics that they could resell or take for personal use." *Brown v. State*, 117 A.3d 568, 581 (Del. 2015) (distinguishing Dollard case) (internal quotation and citation omitted). Moreover, the incidents involving Bajwa, Bipin Mody, and Patricia Phillips occurred after Burton's trial.[11]

Furthermore, the Superior Court's conclusion that Burton had not met the standard for granting a new trial under Rule 33 was not contradictory to, nor an unreasonable application of, clearly established federal law regarding *Brady*. Under Superior Court Criminal Rule 33, a new trial is warranted if: "(1) The new evidence is of such a nature that it would have probably changed the result if presented to the jury; (2) The evidence was newly discovered; and (3) The evidence must not be merely cumulative or impeaching." *Brown*, 117 A.3d at 580. As this Court has noted,

[11] The issue of the drugs' authenticity in Dollard's case did not arise until 2014, and Bajwa was placed on administrative leave in October 2015 for reasons unrelated to that case. *See* D.I. 17-13 at 4-6, 136 of 250. Mr. Mody was placed on administrative leave in January 2016 and his superiors noted problems with his performance beginning in 2015. *See* D.I. 17-14 at 3-5, 7-17 of 234. The events leading to Ms. Phillips' suspension and resignation began in October 2014. *See Brown*, 117 A.3d at 575; D.I. 17-12 at 189-92 of 193.

analysis of the prejudice component of a motion for a new trial under Rule 33 is analogous to the materiality analysis for a *Brady* violation. *Brown*, 2019 WL 12373829, at *7 (citations omitted); *see Strickler*, 527 U.S. at 281 (noting favorable evidence "is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (internal quotations and citations omitted)); *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017) (noting petitioners are entitled to a new trial for a *Brady* violation "only if they establish the prejudice necessary to satisfy the 'materiality' inquiry" (internal quotations and citation omitted)). Thus, the Superior Court's denial of Burton's motion for a new trial, and the Delaware Supreme Court's affirmation of that denial, were not contrary to clearly established federal law. *See Fahy v. Horn,* 516 F.3d 169, 196 (3d Cir.2008) (noting Pennsylvania Supreme Court's decision was not "contrary to" clearly established Federal law because it appropriately relied on its own state court cases, which articulated the proper standard). Burton cannot establish prejudice under *Brady*. Because the evidence against Burton was overwhelming, and he would not have been able to use evidence from the OCME investigation to impeach the drug test results in his case, he was unable to show that, had the evidence been disclosed prior to trial, the result of the proceeding would have been different.

In sum, the Delaware courts' decisions denying Burton's *Brady* claim neither contradicted nor unreasonably applied, clearly established federal law. And the courts did not unreasonably determine the facts in denying the claim.

Claim 3 – Fourth Amendment Suppression Issue

As noted above, prior to trial, Burton filed a motion to suppress, in which he argued that Probation and Parole's administrative search of his residence violated the Fourth Amendment. D.I. 17-28 at 43 of 92. After holding an evidentiary hearing, the Superior Court denied the motion.

D.I. 17-28 at 40-48 of 92, Crim. DI 13, 14, & 16. On direct appeal, Burton argued the Superior Court erred in denying the motion to suppress. D.I. 17-6 at 14-23 of 53. The Delaware Supreme Court affirmed the lower court's decision on the basis of the Superior Court's written opinion. *Burton*, 2016 WL 3381847 (citing *Burton*, 2013 WL 4852342).

Burton claims the Delaware courts unreasonably applied clearly established federal law in finding that Probation and Parole did not violate the Fourth Amendment when they conducted the administrative search of Burton's residence. D.I. 22 at 51-54 of 56. His claim is exhausted, but it fails because Fourth Amendment claims are generally not cognizable in habeas review. The United States Supreme Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976), precludes a federal habeas court from considering a claim that the State obtained evidence as the result of an illegal arrest or search regardless of whether the habeas petitioner actually filed a motion to suppress in state court, so long as the state courts have given the petitioner a full and fair opportunity to litigate the claim. *Id*. at 494. In determining whether a petitioner has had a full and fair opportunity to litigate his Fourth Amendment claim, the only question is whether the state makes available a mechanism for the suppression of evidence seized in or tainted by an unlawful search or seizure. *See United States ex rel. Petillo v. New Jersey*, 562 F.2d 903, 906 (3d Cir. 1977). Delaware created that mechanism with Superior Court Criminal Rule 41. *See Deputy v. Taylor*, 19 F.3d 1485, 1491 (3d Cir. 1994); *Mason v. State*, 534 A.2d 242, 253 (Del. 1987). Thus, "the 'full and fair' hearing requirement is satisfied if the state courts provided the petitioner with a pre-trial suppression hearing and the Fourth Amendment claim was considered on appeal." *Stewart v. Phelps*, 2010 WL 2710531, at *2 (D. Del. July 8, 2010) (citing *United States ex rel. Hickey v. Jeffes,* 571 F.2d 762, 766 (3d Cir.1978); *United States ex rel. Petillo v. New Jersey,* 562 F.2d 903, 906–07 (3d Cir.1977)). The only way a petitioner can avoid the bar to consideration of such claims

is to demonstrate that the state system contains a structural defect that prevented full and fair litigation. *Id.* (citing *Marshall v. Hendricks,* 307 F.3d 36, 82 (3d Cir.2002)). *See also Wright v. State*, 82 F. Supp. 3d 558, 567 (D. Del. 2015); *Yelardy v. Pierce*, 2014 WL 1339390, at *2-3 (D. Del. Mar. 31, 2014). Burton has not done so. He merely argues that the State court decisions were incorrectly decided, which does not overcome *Stone's* reach. *See Stewart*, 2010 WL 2710531, at *3 ("The 'full and fair opportunity to litigate' provided in *Stone* only guarantees the right to present a Fourth Amendment claim, not the right to a correct result." (citing *Marshall*, 307 F.3d at 82)).

In sum, Burton was afforded a full and fair opportunity to litigate his Fourth Amendment claim. The Superior Court considered and denied his suppression motion after holding an evidentiary hearing, during which Burton was able to cross-examine the State's witnesses and present witnesses of his own, and Burton raised his Fourth Amendment claim on direct appeal, which the Delaware Supreme Court found to have been meritless. Burton's Fourth Amendment claim is therefore not cognizable in this proceeding. *Cf. Albert v. May*, 2020 WL 6742881, at *2 (D. Del. Nov. 16, 2020) (finding record clearly demonstrated petitioner was afforded a full and fair opportunity to litigate his Fourth Amendment claim in the Delaware courts and noting "[t]he fact that Petitioner disagrees with these decisions and the reasoning utilized by the state courts is insufficient to overcome the *Stone* bar.").

Evidentiary Hearing

Burton has also requested an evidentiary hearing. D.I. 22 at 47-50 of 56. However, under *Cullen v. Pinholster*, his claims must be resolved upon the existing State court record. 563 U.S. at 181 (holding "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits" (*quoted in Brown v. Wenerowicz*, 663 F.3d 619, 628 (3d Cir. 2011))). To the extent Burton seeks to supplement the State court record, he has failed to

make the requisite showing under section 2254(e)(2) to justify a hearing. *See* 28 U.S.C. § 2254(e)(2).

Records

Copies of the documents submitted in Burton's appeal and postconviction proceedings, which include copies of the trial and suppression hearing transcripts, are being provided with the State Court Records. In the event that this Court directs the production of any transcript not provided, respondents cannot state with specificity when such transcript would be available. However, respondents reasonably anticipate that such production would take 90 days from the issuance of any such order by this Court.

Conclusion

For the foregoing reasons, the petition for a writ of habeas corpus should be denied.

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July 12, 2021

CERTIFICATE OF SERVICE

I, Kathryn J. Garrison, Esq., hereby certify that, on July 12, 2021, I electronically filed the foregoing Answering Brief to a habeas petition with the Clerk of Court using CM/ECF which will send notification of such filing to the following registered participant:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WILLIAM BURTON,	:	
Petitioner,	:	
	:	
v.	:	**No. 1:19-cv-01475-MN**
	:	
CLAIRE DEMATTEIS, Commissioner,	:	
Delaware Department of Corrections	:	
Respondent,	:	
	:	
ROBERT MAY, Warden,	:	
James T. Vaughn Correctional Center	:	
Respondent.	:	

REPLY TO THE RESPONDENTS' ANSWER TO THE OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254

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I. The record establishes that Mr. Burton did not consent to a stipulated bench trial, that he did not waive his right to contest the State's case, and that Mr. Burton suffered prejudice.

In response to Mr. Burton's ineffective assistance of trial counsel claim, the Respondents assert that the "Delaware Courts correctly applied *Strickland* to the facts of Mr. Burton's case", that the Delaware Court's findings of fact are supported by the record and that Mr. Burton has failed to establish prejudice. The Respondents' July 12, 2021 Answer at 12-20, hereinafter referenced as "Answer at _.". Each of the Respondents' assertions are incorrect and will be addressed below in turn.

A. The record does not support a finding that Mr. Burton consented to a stipulated bench trial.

The Respondents assert that the State Courts did not unreasonably apply the facts of Mr. Burton's case to the clearly established federal law of *Strickland* and its progeny as the record supports the conclusion that Mr. Burton consented to a stipulated bench trial. Answer at 14-15. In support of this assertion, the Respondents note that Trial Counsel, before the colloquy, stated the he met with Mr. Burton and discussed the "nature of a stipulated trial" and "that for purposes of a trial today, we'll rely upon [suppression hearing] record, plus additional record that the State will make with respect to where the drugs were found and what they were and how much was found." Answer at 13-14 (citing HA132). However, contrary to the Respondents' assertion, the Delaware Superior Court's colloquy clearly refutes the conclusion that Mr. Burton consented to a stipulated bench trial.

Despite Trial Counsel's statements, the transcript of the colloquy with Mr. Burton clearly demonstrates that Mr. Burton voluntarily, knowingly and intelligently waived his right and consented to a bench trial, not to a *stipulated* bench trial. HA130; HA132-33. As articulated in the Opening Brief, the following colloquy with Mr. Burton took place on September 24, 2013:

> THE COURT: Okay. Mr. Burton, I'm informed that you desire to waive your right to a jury trial. Is that correct?
> THE DEFENDANT: Yes.
> THE COURT: Before accepting your waiver, there are a number of questions I'm going to ask you to ensure that it's a valid waiver. If you do not understand any of

the questions at any time and you wish to interrupt the proceedings to consult further with your attorney, please say so.
Can you tell me what your full name is?
THE DEFENDANT: William David Burton.
THE COURT: And how old are you?
THE DEFENDANT: 57 years old.
THE COURT: Okay. And how far did you go in school?
THE DEFENDANT: 12th grade, Your Honor.
THE COURT: Okay. Have you taken any drugs, medicine, or any alcoholic beverages with the last 24 hours?
THE DEFENDANT: Just my diabetic medication.
THE COURT: Okay. Do you understand that you're entitled to a trial by jury on the charges filed against you?
THE DEFENDANT: Yes.
THE COURT: Do you further understand that you would have the opportunity to take part along with your lawyer in the selection of the jurors?
THE DEFENDANT: Yes.
THE COURT: Do you understand that a jury trial means that you would be tried by a jury consisting of 12 people and all 12 jurors must agree on your guilt or innocence or level of guilt?
THE DEFENDANT: Yes.
THE COURT: Do you understand that if I approve your waiver of a jury trial the Court alone, and that would be me, would try the case and determine your innocence or guilt or level of guilt?
THE DEFENDANT: Yes.
THE COURT: Have you discussed this decision with your lawyer?
THE DEFENDANT: yes.
THE COURT: Has he discussed with you the advantages and disadvantages of a jury trial?
THE DEFENDANT: Yes.
THE COURT: Do you want to discuss the issue further with your attorney?
THE DEFENDANT: No.
THE COURT: Although your attorney may advise you, the final decision is yours. Do you understand that?
THE DEFENDANT: Yes.
THE COURT: What is your decision?
THE DEFENDANT: To waive.

William Burton's May 14, 2021 Opening Brief in support of Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 at 7-8 (citing HA130; HA132-33) (hereinafter referenced as "Opening at _."); *id*. at 21 (citing HA130; HA132-33).

The above colloquy demonstrates that the Superior Court engaged Mr. Burton in a discussion to determine if Mr. Burton was knowingly, intelligently and voluntarily consenting to a bench trial. However, there is absolutely no discussion with Burton, during the colloquy, about whether or not he consented to a stipulated bench trial during which Trial Counsel would not subject the State's

evidence to any meaningful adversarial testing. HA132-33. Thus, the record does not support the conclusion that Mr. Burton agreed to a stipulated bench trial and there is no rational basis to assume that because Mr. Burton consented to a bench trial he also waived his right to contest the State's evidence, especially in light of Mr. Burton's refusal to plead guilty. HA132. Therefore, the Respondents assertion that the record supports the Delaware Courts finding that Mr. Burton consented to a stipulated bench trial has no merit and this Court must agree with the claim being raised by Mr. Burton.

B. Mr. Burton never waived his right to contest the State's evidence and Trial Counsel's actions and non-actions conceded Mr. Burton's guilt.

The Respondents additionally assert that the Delaware Courts did not unreasonably apply clearly established federal law to the facts in Mr. Burton's case because the record establishes that Mr. Burton "waived his right to a jury trial and to challenge much of the State's case when he stipulated to the evidence presented at the suppression hearing and to the admission of the OCME report." Answer at 16. In support of this assertion, the Respondents note that Mr. Burton "never voiced any opposition to his attorney's decision to stipulate to the State's evidence." Answer at 18 (citing *United States v. Wilson*, 960 F.3d 136, 144 (3d Cir. 2020)). Although the Respondents are correct that no opposition was raised during the bench trial, Mr. Burton never waived his right to contest the State's evidence as he asserted his due process right to have the State prove beyond a reasonable doubt each and every element of the charged offenses. *In re Winship*, 397 U.S. 258, 363-64 (1970); *see also Holland v. United States*, 348 U.S. 121, 138 (1954) (stating that the United States Constitution requires proof of a criminal charge beyond a reasonable doubt). Thus, the Respondents assertion has no merit.

As argued in the Opening Brief, it is well-settled under the United States Constitution that a criminal defendant has "ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take and appeal", and these fundamental decisions cannot be waived by counsel "without the fully informed and publicly acknowledged consent of the client." *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *see also*

Florida v. Nixon, 543 U.S. 175, 187 (2004); *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988); *Wainwright v. Sykes*, 433 U.S. 72, 93, n.1 (1977); *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966); Opening at 23. In the present matter, there was simply no "publicly acknowledged consent" by Mr. Burton to a stipulated bench trial. Instead, Mr. Burton refused to plead guilty and asserted his due process right to have the State prove beyond a reasonable doubt each and every element of the charged offenses. *Winship*, 397 U.S. at 363-64; *Holland*, 348 U.S. at 138; HA132. However, Trial Counsel undermined Mr. Burton's right to maintain his innocence when agreed to stipulate to the State's evidence and failed to cross-examine the State's witnesses. HA132; HA135. Additionally, as argued above, the Delaware Superior Court's colloquy only addressed Mr. Burton's decision to waive his right to a jury, not whether he consented to a stipulated trial during which Trial Counsel would not subject the State's evidence to any meaningful adversarial testing. HA132-33. Furthermore, Mr. Burton has maintained throughout his postconviction proceedings in the Delaware State Court and in this Court that he never wanted nor expected Trial Counsel to relieve the State of its constitutional burden to prove each element of the offenses charged beyond a reasonable doubt, thereby overriding the objective of the defense decided by Mr. Burton. *McCoy v. Louisiana*, 138 S.Ct. 1500, 1505 (2018); *see also Nixon*, 543 U.S. at 187; *Faretta v. California*, 422 U.S. 806, 819-20 (1975); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Brookhart*, 384 U.S. at 7-8; *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964); HA896; HA969; HA972; HA1016; HA017-18; HA1077; HA1080; HA1136-37; Opening at 22. Thus, the record does not support the Respondents' assertion that Mr. Burton waived his right to challenge the State's case. Answer at 16.

The Respondents also incorrectly assert that Trial Counsel did not concede Mr. Burton's guilt. Answer at 16. Although Trial Counsel never admitted that Mr. Burton was guilty of the charged offenses, he essentially conceded guilt through his actions and non actions. As argued in the Opening Brief, Trial Counsel's decision to stipulate to the State's evidence conceded all elements of the offenses with the exception of possession and possession with intent to manufacture or distribute. However, as Trial Counsel chose to not cross-examine the State's witness on his opinion

that the weight of the cocaine was not indicative of personal use, Trial Counsel offered no opposition to the State's evidence, thereby conceding those elements. Opening at 21-22. Thus, the Respondents assertion that Trial Counsel did not concede guilty has no merit.

Furthermore, the Respondents citation and reference to the Third Circuit Court of Appeals decision in *United States v. Wilson* is misplaced as Trial Counsel in Mr. Burton's case did not merely concede a jurisdictional element. Answer at 18. In *Wilson*, the defendant alleged that trial counsel "violated his right to put on the defense of his choice by stipulating that both Wells Fargo branches were federally insured banks", thereby conceding a jurisdictional element of the bank robbery charge. *Wilson*, 960 F.3d at 142. The Third Circuit disagreed finding that the defendant's case was not akin to *McCoy v. Louisiana* as the attorney in *McCoy* conceded factual guilt, not a jurisdictional element. *Id*. at 144. In particluar, the Third Circuit held that:

> . . . whether to contest or concede a jurisdictional element is a tactical decision reserved for counsel, not defendants. This is why *McCoy* distinguished counsel's concession of factual guilt from a "strategic" decision "to concede an element of a charged offense." Here, counsel made the latter choice. And by conceding jurisdiction, counsel has not "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing."

Id (internal citations omitted).

As described above and unlike the attorney in *Wilson*, Mr. Burton's trial counsel did not just concede a jurisdictional element of the offense. Instead, Trial Counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing" when stipulated to the State's evidence and presenting no opposition to the State's witness' opinion that the weight of the cocaine was not indicative of personal use, thus conceding all of the element of the charged offense. *Id*. (quoting *United States v. Cronic*, 466 U.S. 648, 659 (1984)); Opening at 21-22. Therefore, *Wilson* does not provide any meaningful support for the Respondents' arguments as Mr. Burton's case is clearly distinguishable from *Wilson.*

C. The Respondents incorrectly assert that Mr. Burton suffered no prejudice from Trial Counsel's ineffectiveness.

The Respondents further assert that Mr. Burton's ineffective assistance of counsel claim must

fail as Mr. Burton did not suffer any prejudice due to overwhelming evidence. The Respondents argument is unpersuasive. The Respondents simply fail to consider that Trial Counsel's consent to suppression hearing record rendered numerous pages of otherwise inadmissible factual testimony admissible against Mr. Burton. This included the fact that Mr. Burton was on probation and that he was identified by a confidential informant who alleged that Mr. Burton was selling crack cocaine from his residence. HA90-91; HA130; HA132-33; HA1034; HA1147. As such, absent Trial Counsel's consent, the State would have been put in the unusual situation in which the State would have to reveal the identity of the confidential informant and call him/her to testify in order for the State to rely on those facts to prove the elements of possession and intent to manufacture or distribute. 16 *Del. C.* § 4752(1) (2012) ("Except as authorized by this chapter, any person who: (1) Manufactures, delivers, or possesses with the intent to manufacture or deliver a controlled substance in a Tier 4 quantity . . . shall be guilty of a class B felony."); 16 *Del. C.* § 4752(3) (2012) ("Except as authorized by this chapter, any person who . . . (3) Possesses a controlled substance in a Tier 5 quantity . . . shall be guilty of a class B felony."); 16 *Del. C.* § 4764(b) (2012) ("Any person who knowingly or intentionally possesses, uses, or consumes a controlled substance . . . shall be guilty of an unclassified misdemeanor and be fined not more than $575 and imprisoned not more than 3 months."); HA1.

Furthermore, the Respondents assertion does not address the fact that Mr. Burton was denied a new trial and/or re-testing of the alleged drug evidence, once the misconduct at the OCME was discovered, due to Trial Counsel stipulating to the drug evidence and the chain of custody. HA130; HA132-33; HA631; HA891; HA1029; HA1146-47. Thus, contrary to the Respondents' assertion, Mr. Burton was prejudiced by Trial Counsel's ineffectiveness regardless of how allegedly overwhelming the evidence was against Mr. Burton.

II. The Respondents' argument that Mr. Burton would not have been able to introduce evidence regarding the OCME investigation is factually and legally inaccurate and should not be entitled to the rebuttable presumption of correctness. Additionally, as the Respondents incorrectly assert that Mr. Burton would not be permitted to introduce evidence regarding the OCME investigation, the Respondents fail to consider pertinent and relevant information as to the prejudice suffered by Mr. Burton.

The Respondents assert that the Delaware State Courts' "decisions denying Burton's *Brady* claim neither contradicted nor unreasonably applied, clearly established federal law. And the courts did not unreasonably determine the facts in denying the claim." Answer at 26. In support, the Respondents argue that "[t]he . . . evidence that Burton alleged . . . does not contradict the Superior Court's conclusion that Burton's case did not meet the bright line *Irwin* standard." Answer at 24. However, the Respondents' argument fails as the record clearly establishes that there was a weight discrepancy which would have allowed Mr. Burton to question witnesses and present evidence regarding the OCME investigation as required in *Irwin*.

As noted in the answer, the Delaware Superior Court in *Irwin* "crafted a procedure for efficiently and logically addressing the majority of Rule 61 motions" and established the bright line rule that "the defense will be free to question the State's witnesses or to present evidence regarding the OCME investigation only if there is either evidence or tampering of the packaging submitted by the police or a discrepancy in weight, volume or contents from that described by the seizing officer." *Morris v. Dematteis*, 2021 WL 1174594, at *4 (D.Del. Mar. 29, 2021); *State v. Irwin*, 2014 WL 6734821, at *12 (Del. Super. Ct. Nov. 17, 2014). And in this case, the record demonstrates a discrepancy in weight between what was seized by law enforcement and what was tested by the OCME. The preliminary weights obtained by Detective Leary was 29.0 grams for the white powder substance and 1.0 gram for the green plant-like substance. HA22-23. The OCME lab report authored by Mr. Bajwa, reported the white powder testing positive for cocaine and weighing 28.45 grams and the plant material testing positive for cannabis and weighing 0.93 grams. HA30. Thus, there was over half a gram difference between the reported weights of the white powder and 0.07 gram difference between the reported weights for the plant substance, thereby meeting the weight discrepancy requirement set forth in *Irwin*. *Irwin*, 2014 WL 6734821, at *12. Therefore, contrary

to the Respondents' assertion, Mr. Burton has presented sufficient information to rebut the presumption of correctness that Delaware State Courts correctly determined that Mr. Burton "would not be able to meet the standard under *Irwin* for the admission of evidence about the OCME investigation. . . ." Answer at 23-24.

The Respondents additionally, and incorrectly assert that Mr. Burton "cannot establish prejudice under *Brady*. . . [as] the evidence against Burton was overwhelming, and he would not have been able to use evidence from the OCME investigation to impeach the drug test results in his case. . . ." Answer at 26. This assertion similarly has no merit.

As described above, the Respondents incorrectly assert that Mr. Burton would not have been able to meet the bright line rule set forth in *Irwin* to allow Trial Counsel to question witnesses and present evidence regarding the OCME investigation. As such, the Respondents do not factor in the impact the evidence of the OCME's systemic operational failings and employee misconduct would have had upon the jury. HA341-44, HA346-06, HA813-90.

As argued in the Opening Brief, Mr. Bajwa's testimony and lab report were essential to the State's case as Mr. Bajwa's report and testimony contained the conclusion that the alleged cocaine and marijuana recovered from Mr. Burton's residence was in fact cocaine and marijuana. Opening at 38-39. However, the fact that OCME employees were suspected of fraud and/or stealing evidence, Mr. Bajwa's credibility was suspect after evidence he certified as cocaine was found to contain no illegal substance, and there was discrepancies between the weights recorded by law enforcement and the weights recorded by the OCME. As such, there was "valuable ammunition" to attack Mr. Bajwa's credibility, his work product, and his ultimate conclusion that the substances seized from Mr. Burton's residence was cocaine and marijuana. *Ferrara v. United States*, 456 F.3d 278, 296 (1st Cir. 2006). Thus, there was sufficient information to significantly hinder the State's ability to convict Mr. Burton of drug dealing cocaine, aggravated possession of cocaine, and possession of marijuana. 16 *Del. C.* § 4752(1) (2012) ("Except as authorized by this chapter, any person who: (1) Manufactures, delivers, or possesses with the intent to manufacture or deliver a controlled substance

in a Tier 4 quantity . . . shall be guilty of a class B felony."); 16 *Del. C.* § 4752(3) (2012) ("Except as authorized by this chapter, any person who . . . (3) Possesses a controlled substance in a Tier 5 quantity . . . shall be guilty of a class B felony."); 16 *Del. C.* § 4764(b) (2012) ("Any person who knowingly or intentionally possesses, uses, or consumes a controlled substance or a counterfeit controlled substance classified in § 4714(d)(19) of this title, except as otherwise authorized by this chapter, shall be guilty of an unclassified misdemeanor and be fined not more than $575 and imprisoned not more than 3 months."); HA1. Therefore, the Respondents' failure to consider the clear impact this evidence would have had on the jury renders their assertion unpersuasive.

Additionally, the Respondents do not address Mr. Burton's argument that the information regarding the OCME investigation would have required an extensive and exhaustive review, the retention of expert witnesses, such as Mr. Bono, and the issuance of subpoenas in order to introduce relevant testimony in relation to many deficiencies affecting the reliability of the OCME's work product and employees. However, as the State failed to turn over any information relating to the OCME investigation to Mr. Burton, Mr. Burton was never afforded the opportunity to further investigate the misconduct at the OCME. Thus, it is clear that Mr. Burton suffered additional prejudice as a result of the State failing to timely provide him with *Brady* information relating to the OCME investigation. *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 969, 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. 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); *United States v. Pollack*, 534 F.2d 964, 973-74 (D.C. 1976).

III. This Court may consider Mr. Burton's Fourth Amendment suppression claim.

The Respondents assert that Mr. Burton's "Fourth Amendment claim is . . . not cognizable in this proceeding." Answer at 28 (citing *Albert v. May*, 2020 WL 6742881, at *2 (D. Del. Nov. 16, 2020)). In support, the Respondents, citing to the United States Supreme Court's decision in *Stone v. Powell* and this Court's decision in *Albert v. May*, assert that Mr. Burton's Fourth Amendment claim is barred from consideration as the Delaware Superior Court conducted a suppression hearing and the Delaware Supreme Court ruled upon Mr. Burton's Fourth Amendment claim. Answer at 27-28. While it is correct that "Fourth Amendment claims are generally not cognizable in habeas review," this Court may nevertheless consider Mr. Burton's Fourth Amendment claim as he was not given a full and fair opportunity to litigate his suppression issue and therefore, the Respondents assertion has no merit. Answer at 27.

As noted by the Respondents, the United States Supreme Court in *Stone v. Powell* held "that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Stone v. Powell*, 428 U.S. 465, 494 (1976) (citing *Townsend v. Sain*, 372 U.S. 293 (1963)). However, "there may be instances in which a full and fair opportunity to litigate was denied to a habeas petitioner. . . ." *Marshall v. Hendricks*, 307 F.3d 36, 82 (3d Cir. 2002). The Third Circuit Court of Appeals has recognized that a court's "failure to give at least colorable application of the correct Fourth Amendment constitutional standard may indicate that there has been no opportunity for full and fair consideration, thereby precluding application of *Stone v. Powell*." *Gilmore v. Marks*, 799 F.2d 51, 57 (3d Cir. 1986) (citing *Gamble v. Oklahoma*, 583 F.2d 1161, 1165 (10th Cir. 1978)). And this Court, in *Albert v. May*, held that a Fourth Amendment claim "avoids the *Stone* bar, if the state system contains a structural defect that prevented the state court from fully and fairly hearing the petitioner's Fourth Amendment argument." *Albert*, 2020 WL 6742881, at *2 (citing *Marshall*, 307 F.3d at 82).

Unlike in *Stone* and *Albert*, Mr. Burton was not afforded an opportunity for full and fair

consideration of his suppression issue as state mechanism for litigating the suppression issue was defective and flawed due to the Delaware State Courts applying the incorrect Fourth Amendment constitutional standard. As described in the Opening Brief, clearly established federal law mandates that "the reasonableness of official suspicion must be measured by what the officers knew before they conducted their search," that "reasonable suspicion exists where the 'totality of the circumstances' indicates that the probation officer had a 'particularized and objective basis' for suspecting legal wrongdoing." Opening at 45 (citing *Florida v. J.L.*, 529 U.S. 266, 271 (2000)); *id.* (quoting *United States v. Arizu*, 534 U.S. 266, 273 (2002)). Additionally, clearly established federal law dictates that an informant's "'veracity,' 'reliability' and 'basis for knowledge' are all highly relevant in determining the value of his report." Opening at 46 (quoting *Illinois v. Gates*, 462 U.S. 213, 230-32 (1983)).

The record in the present matter establishes that the only information relayed to the probation officer authorizing the administrative search was that another probation officer received a tip from a past, proven and reliable informant that a black male, known as "David", who was on probation, a sex offender, and residing at 1232 North Thatcher Street in a room at the top of the stairs, was selling crack cocaine from his residence. HA21-22; HA45. The authorizing probation officer, however, did not speak to the informant and did not do anything to assess the reliability of the informant and/or the reliability of the informant's report in order to have the necessary "particularized and objective basis for suspecting legal wrongdoing" to uphold the administrative search. *Arizu*, 534 U.S. at 273; *see United States v. Waterman*, 549 F.Supp. 2d 593, 598 (D.Del. 2008) (citing *J.L.*, 529 U.S. at 272; *United States v. Valentine*, 232 F.3d 350, 354 (3d Cir. 2000)) ("In order for an informant's tip to be the basis for reasonable suspicion, the tip must be reliable both in its assertion of illegality and in its tendency to identify a determinate person."); HA21-22; HA45. And despite the failure to assess the informant and the informant's tip, the State Courts found that there was sufficient information to establish "reasonable suspicion" to uphold the administrative search. Thus, the mechanism used by the Delaware State Courts to resolve Mr. Burton's suppression

issue was flawed and defective and Mr. Burton was denied a full and fair opportunity for consideration of his suppression issue. *Gilmore*, 799 F.2d at 57 (citing *Gamble*, 583 F.2d at 1165). Therefore, the *Stone* bar does not apply and this Court may consider Mr. Burton's suppression issue.

IV. An evidentiary hearing is warranted in the event that this Court finds that the record is incomplete at present to grant relief.

In response to Mr. Burton's argument that the Delaware Courts erroneously denied Mr. Burton's ability to further develop the factual record in relation to his *Brady* claim, the Respondents contend that Mr. Burton is not entitled to an evidentiary hearing as Mr. Burton's "claims must be resolved upon the existing State court record". Answer at 28 (citing *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)). The Respondents' conclusory assertion is incorrect.

In making its assertion, the Respondents fail to consider and address the plethora of federal case law cited by Mr. Burton where Federal Courts have found that a habeas petitioner is entitled to an evidentiary hearing. Opening at 41-42 (citing *Townsend*, 372 U.S. at 313 (identifying six circumstances where "a federal court must grant an evidentiary hearing to a habeas applicant. . . ."); *Lee v. Glunt*, 667 F.3d 397, 406 (3d Cir. 2012) (quoting *Williams v. Taylor*, 529 U.S. 420, 434 (2000)) ("Thus, the opening clause of § 2254(e)(2) does not bar an evidentiary hearing for a claim that was 'pursued with diligence but remained underdeveloped in state court.'"); *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 . . . We thus remand this *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 Williams at trial."); *Marshall*, 307 F.3d at 117 (citing *Newell v. Hanks*, 283 F.3d 827, 838 (7th Cir. 2002); *Greer v. Mitchell*, 264 F.3d 663, 669 (6th Cir. 2001); *United States v. Johnson*, 256 F.3d 895, 898 (9th Cir. 2001); *Valverde v. Stinson*, 224 F.3d 129, 135 (2d Cir. 2000)) ("We note that our sister courts of appeals have likewise remanded for further factual development when the record has been inadequate to make a proper legal determination of a claim raised on habeas appeal post-AEDPA, in some instances expressly requiring an evidentiary hearing. . . ."); *Newell*, 283 F.3d at 838 (citing *Williams*, 529 U.S. at 434-35; *Burris v. Parke*, 116 F.3d 256, 258-59 (7th Cir. 1997)) ("We note that § 2254(e)(2) . . . does not apply here because Newell's claims were undeveloped through no fault of his own."); *Greer*, 264 F.3d at 669 ("Because the record has not been sufficiently developed for us to make a final determination

concerning the merits of this claim, we shall remand to the district court with instructions that it conduct an evidentiary hearing on this one issue."); *Johnson*, 256 F.3d at 898 (remanding "the case to the district court for factual findings and conclusions on whether the shed was in an open field or part of the curtilage, a matter not developed by the district court."); *Valverde*, 224 F.3d at 135 (remanding the case to the district court to further develop the factual record); *Gaither v. United States*, 759 A.2d 655, 657 (D.C. 2000); *Farley v. United States*, 694 A.2d 887, 890 (D.C. 1997). Thus, the Respondents' failure to address the cited case law render their contention unpersuasive.

The Respondents also conclusory assert that "[t]o the extent Burton seeks to supplement the State court record, he has failed to make the requisite showing under section 2254(e)(2) to justify a hearing." Answer at 28-29 (citing 28 U.S.C. § 2254(e)(2)). Again, the Respondents are incorrect as (e)(2) limitation on evidentiary hearings only applies where a habeas petitioner "has failed to develop the factual basis of a claim [during] State court proceedings. . . ." 28 U.S.C. § 2254(e)(2); *Lee*, 667 F.3d at 406 (quoting *Williams*, 529 U.S. at 434) ("Thus, the opening clause of § 2254(e)(2) does not bar an evidentiary hearing for a claim that was 'pursued with diligence but remained underdeveloped in state court.'"); *Newell*, 283 F.3d at 838 (citing *Williams*, 529 U.S. at 434-35; *Burris*, 116 F.3d 258-59) ("We note that § 2254(e)(2) . . . does not apply here because Newell's claims were undeveloped through no fault of his own."). In the present matter, the failure to develop the factual record during the state court proceedings can not be attributed to Mr. Burton as the State Courts erroneously denied Mr. Burton's requests for an evidentiary hearing. Opening at 42 (citing HA955; HA957). Thus, this assertion also has no merit.

Furthermore, the Respondents' do not in any meaningful way respond to Mr. Burton's argument that the State Courts erred by denying Mr. Burton's "request for an evidentiary hearing in order to question members of the DOJ and former employees of the OCME about their knowledge of the problems at the OCME and whether any communications took place during which the problems at the OCME were discussed." Opening at 42 (citing HA955; HA957). As was noted in his Opening Brief, it is reasonable to conclude that at least some of the members of the DOJ were

aware of the *Brady* information due to their countless interactions with law enforcement and employees of the OCME in the drug prosecutions that took place between 2008 and 2014. Opening at 37. This is especially true as the DOJ, pursuant to the 2007 Memorandum of Understanding Delaware Office of the Chief Medical Examiner and Delaware Department of Justice in accordance with the Justice For All Act, were essentially responsible for ensuring that the OCME did not engage in serious negligence or misconduct. HA13. This was illustrated through the DOJ's actions in *State v. Coverdale* and *State v. Clayton*, in which the DOJ erroneously determined that Mr. Mody's personnel file did not contain any *Brady* material. HA813-15. In addition, the Office of the Attorney General for the State of Delaware supplies legal analysis for all state agencies, such as the then OCME, by assigning deputy attorney generals to work in conjunction with the staff of state agencies. It is highly likely that members of the Delaware Attorney General's office would have been involved, via phone calls, emails, and/or meetings, in providing legal advice to the management of the OCME during the multiple occasions on employee misconduct. As it readily appears that it is likely that the DOJ had knowledge of the OCME's misconduct prior to 2014 and Mr. Burton is unaware of any court proceeding or filing in which the State was fully vetted as to their knowledge of the OCME's misconduct, an evidentiary hearing should be held by this Court should it find that the factual record is insufficient.

CONCLUSION

Based on the arguments made above and within the Opening Brief regarding the merits of his claims for relief, Mr. Burton respectfully requests that this Court grant him a writ of habeas corpus so that he may be discharged from his unconstitutional confinement and restraint. This Court must recognize that these proceedings are the "inevitable result of the disclosure of [the OCME's] misconduct." *Bridgeman v. Dist. Attorney for the Suffolk Dist.*, 30 N.E.3d 806, 816 (Mass. 2015). Additionally, Mr. Burton's conviction was the result of the Delaware State Court's failure to apply clearly established federal law when it upheld Trial Counsel's decision to stipulate to the State's evidence without Mr. Burton's consent, thereby overriding Mr. Burton's constitutional right to plead not guilty, to oppose the State's evidence, to effective assistance of counsel, and to a fair trial. As such, Mr. Burton's conviction must be vacated and the DOJ must be precluded from further prosecution of Mr. Burton. *See Han Tak Lee v. Tennis*, 2016 U.S. Dist. LEXIS 891, *21 (M.D.Pa. Jan. 5, 2016). In the alternative, this Court, under the circumstances, may resentence Mr. Burton to time-served. *See Dickerson v. Vaughn*, 90 F.3d 87, 92 (3d Cir. 1996). Lastly, although Mr. Burton asserts that he has met his burden of proof by presenting sufficient factual evidence which demonstrates that the State violated *Brady* in this matter, should this Court find otherwise and/or required additional information to determine the extent of the *Brady* violation, this Court must have an evidentiary hearing to complete the factual record. *Townsend*, 372 U.S. at 313; *Lee*, 667 F.3d at 406-08; *Williams*, 623 F.3d at 1268; *Marshall*, 307 F.3d at 117; *Newell*, 283 F.3d at 838; *Greer*, 264 F.3d at 669; *Johnson*, 256 F.3d at 898; *Valverde*, 224 F.3d at 135; *Gaither*, 759 A.2d at 657; *Farley*, 694 A.2d at 890.

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