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

CHAUNCEY S. STARLING,	)	
	)	
	)	
v.	)	
	)	No. 533, 2014
STATE OF DELAWARE,	)	
	)	
Appellee.	)	

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

STATE'S ANSWERING BRIEF

Elizabeth R. McFarlan (#3759)
Maria T. Knoll (#3425)
Karen V. Sullivan (#3872)
Deputy Attorneys General
Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8500

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NATURE AND STAGE OF THE PROCEEDINGS

On April 27, 2001, Appellant, Chauncey S. Starling, and his co-defendant, Richard Frink, were arrested and subsequently indicted on charges of first degree murder (2 counts), possession of a firearm during the commission of a felony ("PFDCF") (2 counts), and conspiracy first degree. These offenses were related to the March 9, 2001 shooting deaths of Darnell Evans and Damon Gist, Jr., (age 5) at the Made-4-Men Barbershop in the city of Wilmington.

At his March 15, 2002, proof-positive hearing, Starling was denied bail pending trial. DI 15.[1] Starling's Superior Court trial began on October 15, 2003. DI 90. On October 23, the jury found Starling guilty as charged. DI 90. On November 4, 2003, after a four-day penalty hearing, the jury unanimously found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. DI 96. The trial judge similarly found, and, on June 10, 2004, sentenced Starling to death for the two murders.[2] DI 125; B113.

The Delaware Supreme Court affirmed Starling's convictions and the jury's death recommendation on direct appeal but remanded the case to Superior Court for re-sentencing so that the trial judge could give the jury's death recommendation

[1] "DI" cites reference the Superior Court Criminal Docket in I.D. No. 0104015882.
[2] On May 18, 2004, Frink pled guilty to two counts of criminally negligent homicide and one count of first degree conspiracy. *See Frink v. State*, 2008 WL 4307199, at *1 (Del. Sept. 22, 2008).

the proper weight.[3] Thereafter, on October 12, 2005, the Superior Court resentenced Starling to death. DI 185; B143. On July 24, 2006, this Court affirmed.[4]

On April 16, 2007, Starling moved pro se for postconviction relief. DI 205. In September 2007, counsel was appointed to represent Starling in postconviction. DI 212. On April 1, 2008, Starling, through counsel, amended his postconviction motion. DI 220. The State answered on October 17, 2008. DI 226. On March 17, 2009, Starling filed his reply brief. DI 229. Post-briefing, Starling filed numerous discovery requests, which the State answered. DI 231, 238, 243, 245, 246, 251, 256, 259, 261, 263, 267, 276, 277, 282, 283, 286, 287, 288. The Superior Court issued various discovery orders. DI 253. 262, 266, 274, 285. Evidentiary hearings were subsequently held on November 26-29, 2012 and January 7-9, 2013. Testimony was provided by Starling's prosecutors Joelle Wright Florax and the Honorable Paul R. Wallace,[5] trial counsel John Malik, Wilmington Police Detectives Barry Mullins and Patrick Conner, and audio expert Doug Lacey. Defense psychological expert, Dr. Carol Armstrong, was deposed on December 17, 2012. On June 12, 1013, Starling filed a post-evidentiary hearing Supplemental Amended Petition. The State answered on September 6, 2013. DI 317. Starling

[3] *Starling v. State*, 882 A.2d 747 (Del. 2005).
[4] *Starling v. State*, 903 A.2d 758 (Del. 2006).
[5] At the time he testified, the Honorable Paul R. Wallace was the Chief of Appeals in the Delaware Attorney General's Office.

replied on October 29, 2013. DI 321. On March 28, 2014, Superior Court held post-hearing oral argument on the State's assertion of procedural bars and Starling's allegation that he was denied effective cross-examination of Alfred Gaines' because of the State's failure to disclose *Brady* information. DI 327, 331. After oral argument, the parties provided supplemental briefing. DI 329, 332.

On August 28, 2014, Superior Court issued an opinion denying Starling postconviction relief.[6] DI 334. Starling filed a timely notice of appeal and Opening Brief. This is the State's Answering Brief.

[6] Superior Court issued a corrected opinion on September 5, 2014. *State v. Starling*, 2014 WL 4386127 (Del. Aug. 28, 2014).

SUMMARY OF THE ARGUMENT

I. **DENIED.** Superior Court did not err in denying post-conviction relief based on Starling's claim that the State committed a *Brady* violation regarding certain information about Gaines' violation of probation. Superior Court correctly found the claim barred by Superior Court Criminal Rule 61(i)(3), and alternatively, meritless.

II. **APPELLANT'S ARGUMENTS II AND VI ARE DENIED.** Superior Court properly found that trial counsel's actions in both the trial and penalty phases did not amount to constitutionally ineffective assistance of counsel. As to Michael Starling's taped statement, trial counsel logically determined that the statement was admissible and in any case, Michael had testified as to the substance of the statement. Trial counsel therefore developed an appropriate trial strategy to mitigate the statement. Starling has also failed to demonstrate ineffective assistance of counsel in his preparation for trial, his questioning of Lawrence Moore and his handling of Shaylynn Flonnory's surprise in-court identification. Nor has Starling demonstrated that trial counsel was ineffective in the penalty phase. Trial counsel presented a reasonable strategy and thorough mitigation case. Starling cannot show that he was prejudiced by the State's presentation of Starling's possible diagnosis of anti-social personality disorder as a non-statutory aggravator.

III. **DENIED.** Superior Court correctly determined that Starling's claim that the State violated its *Brady* obligation by failing to provide Vicky Miller's recorded statement prior to trial was procedurally barred, and in any case Miller was known and available to Starling. Through his investigator, Starling was aware, before trial, of the exact statement he claims the State failed to provide. All of Starling's assertions are self-serving and fall far short of what is necessary to demonstrate a *Brady* violation.

IV. **DENIED.** Superior Court did not err in denying post-conviction relief on Starling's *Brady* claim regarding Richard Frink's cellphone records. Superior Court correctly found the claim procedurally barred under Superior Court Criminal Rule 61(i)(3), and in any event, Starling failed to show a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

V. **DENIED.** As Superior Court decided, Starling's claim of prosecutorial misconduct in the State's rebuttal closing argument is procedurally barred under Rule 61(i)(3). Starling has failed to substantiate his claim that the State had no basis in the record to argue that Starling could have just ignored incoming calls to his cell phone around the time of the murder.

STATEMENT OF THE FACTS[7]

About 8:30 p.m. on Friday, March 9, 2001, the barbers at Made-4-Men barbershop on 4th Street in Wilmington were working on several customers. Darnell Evans was seated in the first barber chair on the right, closest to the entrance of the shop. His girlfriend, Shalynn Flonnory, was seated next to him. Damon Gist Sr., another regular customer, was also in the shop that evening. He had brought his five-year-old son, Damon Jr. (DJ), with him as he often did on Friday nights. DJ was sitting in the third barber chair from the entrance as he waited for his father. Several other people were also in the shop.

Flonnory saw a person walking on the sidewalk, dressed in black holding a gun. Several people heard a shot fired from outside the barbershop just before the front window shattered. Lawrence Moore, the shop owner, was hit by flying glass. A person dressed in black, with a mask covering all of his face except his eyes, came into the barbershop. The gunman shot at Evans, who tried to flee toward the rear of the shop. The gunman continued to shoot at Evans. Evans fell to the floor at the back of the shop. The shooter followed Evans, stood over him and shot him twice in the head.

The gunman fled out the front door. Evans had been shot five times. DJ, who had been shot in the jaw, ran to his father with blood running from his mouth.

[7] The facts are taken directly from *Starling v. State*, 903 A.2d 758, 760-62 (Del. 2006).

Shop owner Moore followed the shooter out of the barbershop to the corner of 4th & Shipley Streets. Then he realized that it was probably not wise to chase an armed man, and abandoned the chase. He last saw the gunman turn east onto 5th Street. DJ and Evans both died as a result of their wounds.

The witnesses police interviewed at the scene agreed that the gunman was dressed in dark clothing, including a sweatshirt with a hood. The gunman's face was mostly covered with some type of mask. None of the witnesses was able to identify the gunman.[8] No weapon was recovered. The evidence gathered at the crime scene indicated that the weapon used was a .38 special or a .357 magnum.

About a month later, police discovered Alfred Gaines, a new witness regarding the shootings. Gaines testified that on the afternoon and the evening of March 9, he was riding around Wilmington with his friends, Chauncey Starling and Richard Frink. Frink was driving. Starling was in the front passenger seat, and Gaines was behind him. As they drove past the Made-4-Men barbershop, Starling thought he saw Evans inside.

According to Gaines, Starling and Frink discussed whether Evans was the person in the barbershop. While Frink circled back to pass the barbershop again, Starling said that, if it was Evans, he would "put in some work." On the second

[8] At trial, however, Flonnory testified that Starling's eyes matched those of the shooter.

pass, Frink said it was Evans in the barbershop. Frink parked the car behind the barbershop on 5th Street between Market and Shipley Streets.

Once the car was parked, Starling got out of the car and removed his jacket. He put on a "wave cap" and placed a gun in his pants. Starling was dressed in dark clothes, including a black hooded sweatshirt. Starling walked down the street to Shipley Street and turned toward Market Street. Frink and Gaines stayed in the car. Starling returned about fifteen minutes later, telling Frink, "I got him. I got him. I think I got a little boy, too." Frink then drove Gaines home.

Shortly after 10 p.m. that night, Starling telephoned Gaines saying he needed to talk. Gaines took a taxi to the house of Vicki Miller, Starling's girlfriend. Gaines testified that Starling appeared upset and admitted shooting a little boy. Starling's brother, Michael, was at Miller's house and later told police that Starling was "drunk out of his mind." Starling told Michael, "I'm sorry, I'm sorry." Michael drove Gaines home.

Starling's defense at trial attacked the credibility of the prosecutions primary witness, Gaines. The defense also pointed to contradictions in the descriptions of the shooter that the various witnesses provided. Starling's mother and uncle testified that one or both of them had been with Starling on March 9 until nearly 9 p.m. Starling did not testify.

I. SUPERIOR COURT DID NOT ERR IN DENYING POST-CONVICTION RELIEF ON STARLING'S CLAIM OF A *BRADY* VIOLATION REGARDING INFORMATION ABOUT ALFRED GAINES' VIOLATION OF PROBATION.

Question Presented

Whether Superior Court erred in finding Starling failed to establish that the State committed a *Brady* violation regarding certain information about Gaines' violation of probation.

Standard of Review

This Court reviews a trial court's denial of a motion for post-conviction relief for an abuse of discretion.[9] Legal or constitutional questions are reviewed *de novo.*[10] This Court may affirm the Superior Court's judgment on alternative reasoning.[11]

Argument

Starling argues that Superior Court erred in denying his post-conviction claim that the State violated its obligation under *Brady v. Maryland*[12] "when it failed to disclose evidence that could have been used to impeach Alfred Gaines." (Corr. Op. Brf. 8). Starling contends that his "*Brady* claim is that the State failed

[9] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (citing *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996)).
[10] *Swan v. State*, 28 A.3d 362, 382 (Del. 2011) (citing *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010)).
[11] *Torrence v. State*, 2010 WL 3036742, at *2 (Del. Aug. 4, 2010) (citing *Unitrin, Inc. v. American Gen'l Corp.*, 651 A.2d 1361, 1390 (Del. 1995)).
[12] 373 U.S. 83 (1963).

to disclose that Starling's prosecutor asked the court to withdraw the capias for Gaines' arrest and dismiss Gaines' VOP," (Corr. Op. Brf. 15), not that Gaines was "discharged from probation" as stated by the Superior Court. But, regardless of how the claim is phrased, the outcome is the same. This Court should affirm because Superior Court properly found Starling's *Brady* violation claim related to Gaines' violation of probation procedurally barred, and alternatively found it meritless.

Claim is procedurally barred

When evaluating a motion for post-conviction relief, the Superior Court must first determine whether the movant has met the procedural requirements of Superior Court Criminal Rule 61(i).[13] When a procedural bar exists, the court must refrain from considering the merits of the individual claims.[14] Superior Court correctly found Starling's claim procedurally barred under Rule 61(i)(3), which states: "[a]ny ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by t[he Superior C]ourt, is thereafter barred, unless the movant shows (A) Cause for relief from the procedural default and (B) Prejudice from the violation of the movant's rights."[15]

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[13] *See Ayers v. State*, 802 A.2d 278, 281 (Del. 2002); *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996); *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (citing *Harris v. Reed*, 489 U.S. 255 (1989)). All references to Rule 61 are to the rule in place at the time Starling filed his motion for post-conviction relief.

[14] *Younger*, 580 A.2d at 554.

[15] *Starling*, 2014 WL 4386127, at *2-3 (quoting DEL. SUPER. CT. CRIM. R. 61(i)(3)).

Starling argues that he showed cause for relief from the procedural default because "the State withheld from Trial Counsel the evidence that it had Gaines' probation violation dismissed, which prevented Starling from previously raising this claim." (Corr. Op. Brf. 13). But, a claim of a *Brady* violation cannot be made for the first time in a post-conviction proceeding if information sufficient for the defendant to raise the issue was available to him in the proceedings leading to the judgment of conviction. Here, as discussed in more detail below, pre-trial, trial counsel had in his possession a March 27, 2002 Probation/Parole Progress Report that provided information about, and in fact was the basis for,[16] the *Brady* issue that Starling presented in the post-conviction proceedings. To the extent additional materials became part of the record in post-conviction proceedings, it does not change the fact that Starling possessed sufficient evidence to raise a *Brady* claim in the proceedings leading to the judgment of conviction. Consequently, his claim was barred by Rule 61(i)(3).

Superior Court correctly found that Rule 61(i)(5) did not excuse his default and allow the court to consider the claim.[17] Rule 61(i)(5) allows consideration of a claim otherwise barred by Rule 61(i)(3) when there was a lack of jurisdiction or a "miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to

[16] *See* A997.
[17] *Starling*, 2014 WL 4386127, at *6.

the judgment of conviction."[18] "The fundamental fairness exception (as set forth in Superior Court Criminal Rule 61(i)(5)) is a narrow one and has been applied only in limited circumstances, such as when the right relied upon has been recognized for the first time after the direct appeal."[19] Superior Court correctly found that Starling failed to meet this narrow standard, stating:

> In this case, there is no evidence of an agreement between the State and Gaines in exchange for testimony. Even if there was an undisclosed agreement, there was no prejudice because Trial Counsel knew Gaines' criminal and probation history. Furthermore, Trial Counsel avoided any presentation to the jury regarding the shooting by Defendant of Gaines, which was the incident that led to violation of Gaines' probation. As discussed above, Defendant's claims do not raise concerns of fairness and reliability and there were no *Brady* violations.[20]

Consequently, this Court need proceed no further than an examination of the procedural bars. However, even if the Court reviews the merits of Starling's *Brady* claim related to Gaines, this Court should still affirm.

Law applicable to disclosure of impeachment material

In *Brady v. Maryland*,[21] the United States Supreme Court held that it is a violation of a defendant's due process rights for a prosecutor to withhold evidence favorable to the accused. However, "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the

[18] DEL. SUPER. CT. CRIM. R. 61(i)(5).
[19] *Younger*, 580 A.2d at 555 (citations omitted).
[20] *Starling*, 2014 WL 4386127, at *6 (internal footnote omitted).
[21] 373 U.S. 83 (1963).

accused that, if suppressed, would deprive the defendant of a fair trial."[22] Evidence that may be used to impeach a witness, as well as truly exculpatory material, falls within the ambit of the *Brady* rule.[23] "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[24]

Importantly, a *Brady* violation cannot be found if the defendant knew of claimed favorable evidence or otherwise had that evidence in his possession prior to trial.[25] "[T]he [State] will not be found to have suppressed material information if that information also was available to a defendant through the exercise of reasonable diligence."[26] "The rationale underlying *Brady* is not to supply a defendant with all the evidence in the Government's possession which might conceivably assist the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence *only known to the*

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[22] *United States v. Bagley*, 473 U.S. 667, 675 (1985); *Michael v. State*, 529 A.2d at 755.
[23] *Bagley*, 473 U.S. at 676; *Giglio v. United States*, 405 U.S. 150 (1972); *Michael v. State*, 529 A.2d 752, 756 (Del. 1987).
[24] *Atkinson v. State*, 778 A.2d 1058, 1063 (Del. 2001).
[25] *United States v. Perdomo*, 929 F.2d 967, 973 (3d Cir. 1991).
[26] *Flonnory v. State*, 893 A.2d 507, 532 (Del. 2006) (citing *United States v. Morris*, 80 F.3d 1151, 1170 (7th Cir. 1996)). *See also Dennis v. Secretary, Pennsylvania Dep't of Corrections*, 777 F.3d 642, 653 (3d Cir. 2015) (citing *Perdomo*, 929 F.2d at 973).

Government."[27] The State cannot be held to have withheld or suppressed anything if the defendant's information regarding the evidence is the same or even more favorable than the State had in its possession.[28]

Moreover, even where a defendant proves that the prosecution failed to disclose "*Brady* material," he is entitled to reversal only if the evidence is material.[29] The court must "directly assess any adverse effect that the prosecutor's failure to disclose might have had on the preparation or presentation of the defendant's case … given the totality of the circumstances."[30] "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[31]

No Brady violation related to Gaines' VOP

Superior Court correctly found that Starling failed to prove that the State committed a *Brady* violation or that, even if the State had, that Starling "failed to demonstrate prejudice that would put the 'whole case in such a different light as to

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[27] *United States v. LeRoy*, 687 F.2d 610, 619 (2d Cir. 1982) (emphasis added) (citation omitted) (finding no *Brady* violation where government did not disclose exculpatory grand jury testimony of 3 witnesses where defense could have surmised the substance of their testimony from other evidence).
[28] *Criven v. Roth*, 172 F.3d 991, 996 (7th Cir. 1991); *Perdomo*, 929 F.2d at 973.
[29] *Bagley*, 473 U.S. at 682.
[30] *Michael*, 529 A.2d at 757 (discussing the *Bagley* test).
[31] *Id*.

undermine confidence in the verdict.'"[32] The material Starling attempts to separate out as a different category of impeachment material that was not disclosed is simply the facts underlying Gaines' VOP issue, which Starling admits the State disclosed. Prior to trial, the State disclosed to trial counsel that the State was allowing Gaines to live out of state, notwithstanding his probationary status and without proceeding on the violation of probation related to his being in Chester, after curfew, and in possession of drugs on April 7, 2001. Additional information, including the filing of a violation of probation report recommending imposition of a jail sentence, the issuance of a capias with a $10,000 bail amount, the lodging of a detainer, the State's later request to Superior Court to withdraw the capias, and the withdrawal of the violation of probation report are not separate from the impeachment issue the State disclosed, and was information that was accessible to trial counsel through reasonable diligence.

Trial counsel believed, based on his experience and knowledge of Level III probation, that Gaines had violated his probation because Gaines was present in Pennsylvania after 10 p.m. curfew, and perhaps had cocaine on his person. (A1724, A1877-78). While he was not aware of the particular capias (A184) issued against Gaines, and he testified that the State did not specifically advise him

[32] *Starling*, 2014 WL 4386127, at *5 (quoting *Jackson v. State*, 770 A.2d 506, 516 (Del. 2001)).

that a capias had issued for Gaines' VOP, trial counsel knew "[t]here's usually an emergency capias or an arrest warrant [issued for a VOP]." (A1726).

Trial counsel's knowledge learned from the State and the knowledge garnered from his own investigation provided a basis for trial counsel to believe that Gaines "was being allowed to live out of state for safety reasons." (A1721). The lead prosecutor and trial counsel "both shared" safety concerns for Gaines. (A1721, A1334). Both the State and trial counsel knew that Starling shot Gaines in Chester when Matthew Minor was present and that the barbershop hit on Evans might have been orchestrated by Matthew Minor or other persons. (A1874-77, A1435).[33] Trial counsel also knew that the Chester shooting had left Gaines with severe injuries. (A1878). Gaines had lost an eye and part of his skull and required surgeries that "were going to require him to be out of commission for a very long time." (A1267). Trial counsel recalled at the post-conviction hearing that Gaines was required to wear a helmet because of the extent of his head injuries. (A1877-78).

[33] Trial counsel testified that he believed that Matthew Minor might have been the person drafting letters that Starling sent to him. (A1872). Although trial counsel explored calling Matthew Minor as a witness at trial, even going so far as to spend a day driving to a prison in central Pennsylvania to speak with him, Malik "had some concerns about Mr. Minor's motivations and we never got to the point of him testifying at trial. And I don't think it was his intent – I don't think he was ever actually intending on testifying at trial." (A1874-75).

Before trial, as Superior Court found,[34] trial counsel performed his own investigation of Gaines. Trial counsel "went to the Prothonotary's office, I went to the computer, I punched Alfred Gaines' name in, and I tried to look up every case that he was involved in. And then I asked one of the clerks to bring the actual files to me so I could look through them." (A1879). Trial counsel copied approximately an inch and a half of documents related to Gaines' criminal history. (B160-266). Among those documents in trial counsel's file was a March 27, 2002 Probation/Parole Progress Report, which trial counsel read before trial. (A1883; B253-55). The Progress Report stated, in pertinent part:

> This Officer received Mr. Gaines' file from Officer Garrick on 1/02/02. Officer Garrick submitted a Progress Report to the Court on 10/16/01, as Mr. Gaines was the victim in an attempted murder. Officer Garrick indicated that although Mr. Gaines survived the attack, he was undergoing medical treatment and co-operating with the [A]ttorney General's Office with regards to that case and another related matter. Consequently, a request was made to have CRA # IN97-12-1179 to be held in abeyance. This Officer submitted a Progress Report to your Honor on 2/03/02, which requested that CRA #'s VN96-11-0022-01 and PN97-03-0434 be held in abeyance as well. Since the writing of these reports, Mr. Gaines has been supervised by the Attorney General's probation as well as the Witness Protection Program. This Officer has never met with Mr. Gaines and at this point has very little information as to the status of his pending trial and whereabouts. The purpose of this correspondence is to ask for your Honor's guidance or direction on how to proceed with Mr. Gaines' probation. The concern is that since he is not reporting to the probation office and is being supervised by the Attorney General's Office, that our interest in this file should be closed. Any help in the proper course of action regarding this matter is greatly appreciated.

[34] *Starling*, 2014 WL 4386127, at *5.

> This Officer respectfully requests that Mr. Gaines probation regarding CRA#IN97-12-1179 be closed as his MED for that probation has since passed as of 11/30/01. (B253-255).

Thus, from the Progress Report, trial counsel knew that Gaines was not being supervised by Probation and Parole and that Probation and Parole had filed other Progress Reports after the VOP had been initiated. Moreover, at least as of the March 27, 2002 Progress Report, trial counsel had access to (and according to his testimony had personally reviewed) the information placed in Superior Court's dockets and files regarding Gaines. It is clear from a review of only the docket of Gaines' case number 9710007832 that trial counsel would have learned:

- A VOP report was filed against Gaines on April 18, 2001.
- A capias for Gaines' arrest was requested on April 18, 2001.
- The capias was withdrawn as of October 17, 2001.
- The VOP report was withdrawn as of October 17, 2001.
- Gaines' probation was to be held in abeyance as of October 22, 2001. (B267-68).

Thus, while trial counsel testified that he did not know that the State had asked that the Superior Court withdraw Gaines' capias and VOP, his review of the short docket in the computer, which he testified he used to investigate Gaines, would have revealed that exact information. Based on his review of the actual

Prothonotary file,[35] he would have seen that the April 18, 2001 VOP Report contained the probation officer's recommendation that Gaines' probation be revoked and his Level V sentence of at most 1 year be reimposed. (A184-190). Thus, although trial counsel disclaimed present knowledge at the post-conviction hearing, it is clear that, through his own investigation, he possessed the information regarding issuance and withdrawal of the VOP and capias. Where the defendant possessed through his own investigation the impeachment evidence claimed to have been withheld by the State, there can be no *Brady* violation.[36]

Moreover, Starling has presented no evidence – nor is there any – that the State withdrew the VOP with the intent that Gaines would not have to answer for his violation. The lead prosecutor testified that he believed that Gaines had to answer for the VOP.[37] Moreover, Starling has presented no evidence – other than the fact that Gaines had signed an extradition waiver – that Gaines even knew that the State requested that the VOP capias and the VOP be withdrawn so that he could move out of state until after he testified. The lead prosecutor testified that he had no conversations with Gaines about his VOP, (A1301), nor did the junior

[35] At the postconviction hearings, trial counsel testified he reviewed the Prothonotary file. (A1879).
[36] *Perdomo*, 929 F.2d at 973; *Criven*, 172 F.3d at 996; *LeRoy*, 687 F.2d at 619.
[37] A1342 ("[T]here was a question about what happened to [the VOP] after the trial and the probation officer contacted me and I said he's yours, you do with him what you need to do."); A1354 ("I believed he still had probation obligations. I believed that he, you know, faced the potential of a violation of probation.").

prosecutor remember any. (A1268). When asked if there was any "deal" for Gaines' testimony, the lead prosecutor stated:

> Absolutely not. I would be very, very careful about discussing with Mr. Gaines anything that could be viewed as a deal. I'm very familiar with the case law. I'm very familiar with how strict the Delaware Supreme Court is on that. And no, I made no deals with him. I – and would be sure to stay away from anything that even smelled [like] an implicit deal, an explicit deal, anything like that." (A1443).

The lead prosecutor believed that Gaines "still had probation obligations [and that Gaines] faced the potential of a violation of probation. (A1353-54). In fact, after trial, the lead prosecutor sent an email reflecting his belief, and to ensure that Gaines' probation issues were addressed. (B142). Starling failed to prove the existence of a *Brady* violation.

However, even if Starling could advance a claim that *Brady* material was not disclosed, he cannot show prejudice. Under the totality of the circumstances, the impeachment evidence about which Starling complains was not material. Cross-examination of Gaines' motivation for coming forward and testifying was a very delicate area. Trial counsel had succeeded in obtaining the State's agreement not to admit evidence in the guilt phase that Starling shot Gaines in the head in Chester.[38] In fact, at the request of trial counsel, the Court gave the jury a limiting instruction advising that the fact that:

[38] Trial counsel had moved *in limine* seeking permission to admit evidence regarding a shooting that took place in Wilmington the day before Starling shot Gaines. Starling's motion was filed in anticipation that the State would properly be allowed to admit evidence that Starling shot

> Gaines was shot in Chester, Pennsylvania on April 7, 2001 … has been admitted in this trial for the limited purpose of demonstrating how [Gaines] came to the attention of the police and became a cooperating witness in this case. It is, of course, natural that you may be curious about further details of that incident. However, you are not to speculate about that incident in Chester…. (A529).

Trial counsel explained that the agreement to exclude evidence of Starling shooting Gaines in Chester was very important because Starling would otherwise effectively have to defend against two sets of allegations – that he shot Evans and DJ in the barbershop and that he shot Gaines in Chester.[39] To defend against the Chester shooting, Starling would have had to testify to advance his claim of self-defense. (A448-50, A1888-89). Trial counsel testified that it would not have been a good idea for Starling to testify because Starling "would have had to testify that

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Gaines in Chester for the purpose of showing Starling's consciousness of guilt and his attempt to silence a witness in the barbershop shooting, and Starling argued that evidence of the Wilmington shooting was relevant to his claim that he shot Gaines in Chester in self-defense. (A441). Superior Court ruled that Starling could not mention the proffered self-defense evidence in his opening statement and noted that, under the circumstances, Starling most likely could not present evidence of self-defense unless he testified, and, if he did, he would subject himself to examination on the barbershop shootings. (A448-50). During the motion hearing, the State suggested that the need for Starling's evidence of self-defense in the Chester shooting (and the potential problem of prejudice against the State if mention of it was made in opening and then no evidence admitted) could be avoided if the State did not present evidence that it was Starling who shot Gaines, but only that Gaines being shot in Chester was the action that precipitated his communication with police about the barbershop shooting. (A445). Ultimately, in the guilt-phase, the State only presented the testimony of a Chester detective that Gaines had been found in Chester shot in the head, (A525-27) and Gaines' testimony that he had been shot in Chester in the forehead, left side of face and back of neck. (A537).

[39] A1886 ("[T]hat was a big concern I had, trying to fight two trials, one Gaines' shooting up in Chester and, then, the shooting of Darnell Evans and, then, poor Damon Gist, Jr., in Delaware."). Although Starling has not framed the Gaines VOP issue as a claim for ineffective assistance of counsel, such a claim would fail. It was an unquestionably reasonable trial strategy not to want to defend against two sets of allegations, and, as Superior Court correctly found, cross-examining Gaines on the VOP issue would have injected the facts of the Chester shooting into the guilt phase. *Starling*, 2014 WL 4386127, at *5.

he had a prior criminal record, he had prior ties with Gaines, so those would be … just some of the reasons why we wouldn't have wanted him to testify. It would have opened the door to some very adverse things coming out." (A1889). Thus, it was "very important and a big benefit to the defense, that we weren't going to have to deal with the Chester shooting in the guilt phase." (A1888).

Trial counsel certainly could have cross-examined Gaines about the withdrawal of the capias and the violation report, and any other information that Starling claims is different than that already disclosed by the State about allowing Gaines to live out of state despite his probationary status and without a VOP hearing having gone forward (collectively referred to as "the VOP issue"). But such a cross-examination would have worked to Starling's substantial detriment. If trial counsel had cross-examined Gaines about the VOP issue, the jury would have learned the reason for it – concern for Gaines' safety based on the fact that Starling shot Gaines in the head in Chester.

Gaines had already been shot by Starling in the presence of Matthew Minor, who both the State and trial counsel believed may have orchestrated the barbershop shooting. Gaines was extremely concerned for his own continued safety, (A1225) and the State shared his concern.[40] If trial counsel had cross-examined Gaines on

[40] A1308-09 At the postconviction hearings, the lead prosecutor testified, ("[H]ere's the circumstance as I understood it: He had a pending violation of probation, that was held in abeyance so that basically we could keep him out of state and alive."); A1310 ("I believe that

the VOP issue, implying that the VOP issue was Gaines' true motive for his testimony, trial counsel "very well could have" opened the door to the State eliciting testimony that "would have made it look like Mr. Starling or his associates may have been threatening Mr. Gaines." (A1887-88). Notably, Starling cites only to trial counsel's preliminary testimony that he would have cross-examined Gaines regarding the capias, violation of probation recommendation, detainer, and withdrawal of both the capias and the violation of probation, and ignores trial counsel's later testimony that doing so would have opened the door he had kept shut at trial. (Corr. Op. Brf. 11-12). Starling is incorrect as a matter of law and fact that trial counsel could have impeached Gaines with evidence of the withdrawal of the capias and violation of probation (i.e., argue that Gaines' testimony is biased by the fact that the State requested withdrawal of the VOP capias and the violation report), without the State being permitted to present the full picture to the jury.[41] In *Smith*, this Court stated:

> Delaware recognizes the evidentiary principle of 'opening the door.' The 'opening the door' theory is premised upon considerations of fairness and the truth-seeking function of a trial…. Put simply, 'opening the door' is a way of saying one party has injected an issue

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Alfred Gaines being in Wilmington was dangerous for him. He had already been shot by your client once and it was pretty clear that he was in danger."); A1311-12 ("I would not have been comfortable [ensuring Gaines's safety in prison because] it's a different and dangerous situation both for the corrections officers and the correction department and for the person."); A1313 ("This was a dangerous area for him to be in, in my estimation. Being out of state with family seemed to be a much safer option."); A1314 ("If you knew Gaines's physical condition at that time, he wasn't much – much in the making trouble mode, as far as I knew.").

[41] *Smith v. State*, 913 A.2d 1197, 1239 (Del. 2006).

> into the case, and the other party should be able to introduce evidence to explain its view of that issue.

Thus, if Starling had impeached Gaines with evidence that the State had withdrawn the capias and the VOP, the State would have presented evidence that the reason those actions were taken was not to influence Gaines' testimony, but to allow him to live out of state to ensure that he would be alive and able to testify.

Indeed, the lead prosecutor testified that he and trial counsel had specifically discussed the concern of "cross-examining [Gaines] on that because one of the answers would be he hasn't been violated on his probation, kept up here and supervised up here because we're afraid he's going to get shot again." (A1334). And trial counsel's cross-examination of Gaines reflects this concern. Trial counsel asked Gaines questions about his motivation for coming forward as a witness, his prior criminal record, including his lack of remorse for his prior offenses, and the fact that he had violated probation in connection with the Chester incident, which set up the defense closing argument attacking Gaines' credibility. (A546, A551, A558, A645-50). However, trial counsel tactically avoided asking Gaines any questions about the fact that he had not had a VOP hearing even though more than two years had elapsed since he was shot in Chester in April 2001, (A538-67) which trial counsel testified he believed at the time of trial was the source of a pending VOP. (A1726). Thus, assuming *arguendo* that trial counsel did not possess all the facts about the VOP issue, even if he had known them, he

could not have cross-examined Gaines about them without destroying his sound strategy of keeping from the jury the fact that Starling had shot Gaines in Chester. As a result, even if the State did not disclose *Brady* material, there was no "adverse effect that the prosecutor's failure to disclose might have had on the preparation or presentation of the defendant's case … given the totality of the circumstances."[42]

Even ignoring the issue of opening the door to the fact Starling shot Gaines in the head, there is not a reasonable likelihood of a different trial outcome if trial counsel had questioned Gaines in minute detail about every single chronological step (from filing of the VOP report and issuance of the capias, to withdrawal of the VOP report and capias) of the State's decision to allow him to live out of state unsupervised despite being on probation and having violated that probation. Gaines' credibility was a main focus of the defense closing. In fact, it was the first point trial counsel made. Trial counsel argued Gaines' testimony was offered to protect his self-interest and discussed the fact that Gaines was released from prison in December of 2000, (A649); Gaines had a violation of probation, (A649-50); Gaines secured dismissal of the drug charge in Pennsylvania for drugs found on him , (A649-50); Gaines had a long criminal record, (A650-51); and Gaines' lack of regret for prior crimes. (A650). Trial counsel also questioned the credibility of Gaines' testimony about the evening of the barbershop shooting, (A651-55), and,

[42] *Michael*, 529 A.2d at 757.

when he was going through jury instructions, specifically raised reasons to doubt Gaines' testimony. Trial counsel argued:

> I submit to you that what Alfred Gaines has given and what Alfred Gaines has attempted to do is to weave a tapestry of deception and misinformation, misinformation to direct any investigation away from him, and deception, to try to avoid the consequences on some other problems that he faced, the violation of probation and the criminal charges for the drug charge in Chester. (A655).

There is not a reasonable probability that more details about the VOP issue would have resulted in a different outcome. This is particularly true because, even if the additional cross-examination on the withdrawal of the VOP might have minimally impacted the jury's assessment of Gaines' credibility, the evidence that Starling had shot Gaines, even if in self-defense as Starling claimed, still would have put a gun in Starling's hands and shown that he was capable of shooting a person, something trial counsel reasonably wished to avoid given the facts of this case. Consequently, Superior Court correctly denied Starling post-conviction relief on this claim.

II. SUPERIOR COURT DID NOT ERR IN DENYING POST-CONVICTION RELIEF ON STARLINGS' CLAIMS THAT TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF HIS TRIAL[43]

QUESTION PRESENTED

Whether the Superior Court abused its discretion in denying Starling's motion for post-conviction relief based upon Starling's claims that trial counsel rendered ineffective assistance.

STANDARD AND SCOPE OF REVIEW

This Court reviews the Superior Court's denial of a motion for post-conviction relief for abuse of discretion.[44] Legal or constitutional questions are reviewed *de novo.*[45] This Court may affirm the Superior Court's judgment on alternative reasoning.[46]

ARGUMENT

Starling contends that Superior Court was incorrect when it found that trial counsel's actions with regard to Michael Starling's taped statement were not objectively unreasonable.[47] (A2427). Starling also claims that trial counsel provided ineffective assistance for failing to: 1) conduct an appropriate pre-trial

[43] Argument II responds to Arguments II and VI of Appellant's Opening Brief.
[44] *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013); *Swan v. State*, 28 A.3d 362, 382 (Del. 2011) (citing *Zebroski v. State*, 12 A.3d 1115, 1119 (Del.2010)).
[45] *Swan*, 28 A.3d at 382 (citing *Zebroski* 12 A.3d at 1119).
[46] *Torrence v. State*, 2010 WL 3036742, at *2 (Del. Aug. 4, 2010) (citing *Unitrin, Inc. v. American Gen'l Corp.*, 651 A.2d 1361, 1390 (Del. 1995)).
[47] *State v. Starling*, 2014 WL 4386127, at *11 (Del. Super. Sept. 5, 2014).

investigation (Corr. Op. Brf. at 84-86); 2) object to an eye-witness's in-court identification of Starling and the State's related comments in closing (Corr. Op. Brf. at 86-92); 3) introduce testimony that Starling was not the shooter (Corr. Op. Brf. at 93-95); 4) obtain and present sufficient mitigation evidence during the sentencing phase (Corr. Op. Brf. at 95-98); and 5) object to State's use of Starling's diagnosis of Antisocial Personality Disorder as an aggravator (Corr. Op. Brf. at 98-99). Starling failed to demonstrate either that trial counsel's performance was objectively unreasonable or that the outcome of the trial would have been different if trial counsel had handled matters differently. Superior Court did not err in denying Starling's claims of ineffective assistance of counsel. All of Starling's claims of attorney ineffectiveness are unavailing.

In order to succeed in an ineffective assistance of counsel claim, the United States Supreme Court held in *Strickland v. Washington*, that a defendant must show both: (1) "that counsel's representation fell below an objective standard of reasonableness;" and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[48] There is a strong presumption that the legal representation was professionally reasonable.[49] As such, mere allegations will not suffice; instead, a defendant must make concrete allegations of ineffective assistance, and

[48] *Strickland v. Washington*, 466 U.S. 668, 694 (1984).
[49] *Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990) (citations omitted).

substantiate them, or risk summary dismissal.[50] In other words, conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.[51]

In fairly assessing an attorney's performance under *Strickland*, "every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."[52] A defendant must also overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.[53] Trial attorneys have "wide latitude" in making tactical decisions, thus there is a "strong presumption" that the challenged conduct falls within "the wide range of reasonable professional assistance;" or in other words, that the challenged action "might be considered sound trial strategy."[54]

Indeed, the United States Supreme Court has stated that:

> Surmounting *Strickland's* high bar is never an easy task. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the

[50] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).
[51] *Id.*
[52] *Strickland*, 466 U.S. at 689.
[53] *Id.*
[54] *Id.*

> record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom.[55]

Because the defendant must prove both parts of his ineffectiveness claim, a court may dispose of a claim by first determining if the defendant established prejudice.[56] The first consideration in the "prejudice" analysis alone "requires more than a showing of theoretical possibility that the outcome was affected."[57] The defendant must actually show a reasonable probability of a different result but for trial counsel's alleged errors.[58] "It is not enough to 'show that the errors had some conceivable effect on the outcome of the proceeding.'"[59] Starling cannot meet these rigid standards.

A. TRIAL COUNSEL'S HANDLING OF MICHAEL STARLING'S TAPED STATEMENT WAS REASONABLE TRIAL STRATEGY

Starling claims that Superior Court erred by failing to grant post-conviction relief because trial counsel was constitutionally deficient in failing to: 1) move to suppress Michael's statement to the police as involuntary and thus inadmissible under 11 *Del. C.* § 3507; and 2) object to the admission of the statement at trial. He is incorrect.

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[55] *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (citations omitted).
[56] *Strickland*, 466 U.S. at 697.
[57] *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992).
[58] *Strickland*, 466 U.S. at 695.
[59] *Richter*, 131 S. Ct. at 787 (quoting *Strickland*, 466 U.S. at 693).

Prior to the admission of his April 27, 2001 recorded statements at trial, Michael testified that he went to Vickie Miller's house one night a few weeks earlier when Alfred Gaines was there and spoke to Starling in Miller's kitchen. (A571). Starling was drunk and said he was sorry. (A579). Afterwards, Starling asked Michael to give Gaines a ride, and he did. (A579). Michael also discussed that Starling had 2-3 guns, including a 9mm and a revolver. (A572). Trial counsel thoroughly cross-examined Michael. (A572-79). The State thereafter introduced, but did not play, Michael's audio and video-taped statements through the chief investigating officer, Detective Patrick Conner. (A582). Thereafter, Starling presented Michael as a defense witness, played the tapes for the jury, and presented him for cross-examination to the State. (A264-350, A614-25).

Regarding 23-year-old Michael Starling's pre-trial statements to the police, trial counsel stated in his Rule 61 affidavit:

> I believe the State did not intend to introduce Michael Starling's taped statement at trial and that they intended to rely only upon his own testimony and the testimony of Detectives Sullivan or Connor pursuant to 11 Del. C. § 3507 in summarizing the substance of the interview. [] In my opinion, Michael Starling's statement would have been admitted into evidence under 11 Del. C. § 3507. Thus, to attempt to counter the substance of Michael Starling's statement, I sought to suggest to the jury that it had been the product of coercion by the interviewing detectives since a review of the video and/or audio of Michael Starling's statement clearly showed that a great deal of pressure was exerted upon Michael Starling during his interview. I advised the State that I intended to play the tape of the interview in its entirety during the defense case to show the coercive atmosphere that existed during his interview. (A921-22).

Under section 3507,[60] Michael Starling's statement was admissible as substantive evidence of Starling's guilt. The fact that trial counsel did not put the State to the task of formally introducing Michael's statement pursuant to section 3507 does not render his conduct deficient under *Strickland*.[61] Trial counsel had correctly determined that Michael's statement was admissible pursuant to section 3507 and had developed an appropriate trial strategy to mitigate the statement. As section 3507 requires, Michael Starling was present and subject to cross-examination on the specifics of his statements.[62]

The well-settled burden of proof for determining the voluntariness of a 3507 statement is proof by a preponderance of the evidence.[63] To make that determination, it must be decided whether, under the totality of the circumstances, the declarant's will "was so overborne that the statements produced were not the product of rational intellect and free will."[64] At the postconviction hearing, trial

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[60] Del. Code Ann. tit. 11, § 3507(a) provides that "[i]n a criminal proceeding, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value."

[61] *See generally Foster v. State*, 961 A.2d 526, 530 (Del. 2008); *Jackson v. State*, 643 A.2d 1360, 1368-69 (Del. 1994) (holding that because witness trial testimony was consistent with officers recounting of the off-tape conversation, any technical non-compliance with the foundational requirements of section 3507 was harmless beyond a reasonable doubt.).

[62] *See generally Smith v. State*, 669 A.2d 1, 8 (Del. 1995) ("§ 3507 requires not just the opportunity to cross-examine the declarant, but the opportunity to cross-examine the declarant about the out-of-court statement.").

[63] *See Woodlin v. State*, 3 A.3d 1084, 1087 (Del. 2010) (citing *Hatcher v. State*, 337 A.2d 30, 32 (Del. 1975); *see also State v. Rooks*, 401 A.2d 943, 948-949 (Del. 1979).

[64] *Roth v. State*, 788 A.2d 101, 107-08 (Del. 2001) (quoting *Martin v. State*, 433 A.2d 1025, 1032 (Del. 1981)).

counsel reiterated that he believed Michael's statement was admissible under section 3507. (A1806). Counsel's determination was reasonable.

Contrary to Starling's complaints, the fact that the detectives used police interview tactics to elicit information from Michael Starling did not render his statement involuntary.[65] While promises of leniency or inducements to cooperate may affect the reliability or trustworthiness of a statement, they do not make a statement *per se* involuntary unless they are "so extravagant or so impressionable as to overbear the person's will and rational thinking process."[66] And to the extent Starling claims that police threatened Michael "with being charged with the barbershop shootings and spending the rest of his life in prison," (Corr. Op. Brf. at 26) the transcript of Michael's statement reveals that the police made no such specific threat. (A264-350). The detectives did tell Michael that he did not want to become involved in this situation, that he could possibly be charged for hindering a police investigation/obstructing justice, and the officers did not want to see him get "jammed up" or dragged down. (A268, 269, 281-85, 290-91, 293-94, 317, 325, 333, 336). Importantly, the detectives also told Michael multiple times that he was not a suspect in anything, or being charged. (A284, 286-87, 289, 292,

[65] *See, e.g.*, *Page v. State*, 934 A.2d 891, 900 (Del. 2007); *Brown v. State*, 947 A.2d 1062, 1072 (Del. 2007) (affirming Superior Court's voluntariness determination where police threatened the witnesses with jail time if they did not cooperate) (citing *Baynard v. State*, 518 A.2d 682, 691 (Del. 1986)); *Flowers v. State*, 858 A.2d 328, 330-32 (Del. 2004) (police threat to take away the witness' children if she did not cooperate did not serve to overbear witness' will).
[66] *Flowers*, 858 A.2d at 331 (citing *Rooks*, 401 A.2d at 948.).

312, 317, 327). Michael specifically asked if he was going to jail and the detective replied "I'm not charging you Michael!" (A289). The detectives stated:

> This whole thing is over with Mike, no one's here trying to scare anybody, no one's trying to force you into saying anything, no one wants you to say a lie, but we know what happened, we know what was said, your brother told us what was said, we know that he's sorry, ….. (A318).

Towards the end of the interview, the detectives even asked Michael if he was afraid of being charged and he responded "[n]o, I'm not afraid of anything." (A345).

A review of the totality of circumstances of Michael's statements reveals that under prevailing authority, his will was not overborne so as to render his statement involuntary. Michael was an adult. He was not handcuffed nor was he denied food or drink or kept in a locked room. (A1610-11).[67] Rather, he was in the unlocked "comfortable" room meant for victims and witnesses. (A1601). At no point did he request to terminate the questioning, nor did the police advise him that he had no other choice but to answer questions.[68] Starling does not realistically point to any conduct by the police that limited Michael from exercising his "rational intellect" and "free will."[69] Here, the police questioning

[67] In fact, on more than one occasion, the interviewing detective offered Michael a drink. (A312; A347).
[68] *See generally Collins v. State*, 56 A.3d 1012, 1019 (Del. 2012).
[69] *See Brown*, 947 A.2d at 1072 (trial court did not abuse its discretion in admitting out of court witness statements despite claim that police threatened witnesses with jail time if they didn't cooperate).

was within the realm of ordinary police work, as Detective Mullins explained at trial,[70] and was reasonably calculated to obtain Michael's statement about the incident.[71]

Because he realized that Michael's statement was admissible, trial counsel was faced with the formidable task of setting up a reasonable strategy to attack it. Consistent with his affidavit, trial counsel testified in post-conviction proceedings that while he thought Michael's statement was legally voluntary, he could, nevertheless, argue that it was involuntary or coerced to the jury.[72] He reasonably determined, knowing that Michael would be called to testify for the State, that it would be in Starling's best interest to play the entirety of Michael's statement, thus allowing the jury to consider the surrounding circumstances of Michael's statement and make its own determination of voluntariness. To effectuate his strategy and prepare Michael to testify, trial counsel met with him 3-5 times prior to trial. (A579). When they met, trial counsel played Michael's statement for him, and they discussed it. (A579). Trial counsel also elicited through Detective Mullins

[70] Trial counsel called Detective Mullins at trial to point out that as part of his interview strategy, Mullins told Michael inaccurate information designed to obtain a statement from Starling's otherwise recalcitrant brother. Mullins admitted that he falsely told Michael that Starling had made admissions regarding the homicides. (A625-26).

[71] *Id.*

[72] *See Woodlin*, 3 A.3d at 1087 (citing *Hatcher*, 337 A.2d at 32). At the evidentiary hearing, trial counsel testified "I think *Jackson v. Bennett* is a Supreme Court case that talks about issues of voluntariness. And I recall having cases where we filed motions to suppress statements of defendants and — claiming they were involuntarily made, and the judge ruled, "no, I'm not finding they were not involuntary made, but you're free to argue that to the jury." So, that's the basis for my answer." (A1852).

and Michael during the defense case that the police employed deceptive interview techniques to obtain Michael's statement, such as giving him inaccurate or misleading information. (A620, 626-27). Trial counsel both cross-examined Michael during the State's case-in-chief, and called him as a defense witness three days later, essentially having Michael twice testify regarding tactics police used to elicit what Michael claimed was "what [the detectives] wanted to hear" in order to avoid "going to jail." (A572-79, 615-26, 628).

In his opening statement at trial, trial counsel advanced the defense position that the jury would watch Michael's entire statement and see that it was the result of police coercion, stating that the police took Michael from his job, lied to him, pressured and scared him and suggested to him what they wanted him to say in order to not be arrested. (A482-83, A619). At trial, trial counsel specifically questioned Michael as to the voluntariness of his statement. Michael stated that he told the police what they wanted to hear because he felt he had no choice. Michael claimed he was threatened, bullied, scared, confused, and thought they would put him in jail until trial.[73] Trial counsel thereafter argued to the jury that the statement

[73] On October 17, 2003, Michael Starling testified as follows:

> Counsel: During the course of your statement, were you threatened in any way?
> Michael: Yes.
> Counsel: When you say you were threatened, describe that.
> Michael: They said they knew – I told them I didn't know my whereabouts for that night or whatever. They said they knew where I was and if you don't start telling them what they want to know, they were going to charge me with murder after the fact and obstruction of justices. And they had two witnesses to say I was there that night.

should be rejected as unreliable because it was the result of two hours of police threats, lies and intimidation until Michael said what they wanted to hear. (A655-57). Thus, while Michael's statement was legally voluntary under § 3507, the jury was still able to consider Michael's trial testimony and the context of his police statement together to determine what weight, if any, his statements should be credited.

Counsel was thereby able to effect his strategy of "contrast[ing] the interview styles and show how suggestive it was and argue as he did, that, "Look, yeah, if Michael had said this, you could see how he was questioned in the interview, you could see his body language, you could see how he reacted in the interview, and it's entirely possible that this may have been suggested to him and he merely agreed with it." (A1802). As trial counsel testified "that was my thought process with respect to playing the entirety of the Michael Starling interview with Detective Sullivan." (A1802). Counsel acted within his sound

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Counsel: How did that make you feel?
Michael: I was scared.
Counsel: Why were you scared?
Michael: Because that is a serious charge.
Counsel: What did you think was going to happen?
Michael: That they were charging me with that.
Counsel: If you got charged with that?
Michael: I would sit in jail until trial.
Counsel: Did you agree to speak with the police then?
Michael: I – I had no choice but to speak to them.
[]
Counsel: What did you end up doing at the end of this interrogation session?
Michael: I just told them what they wanted to hear because I was scared.

(A579). "I felt like they were bullying me, and I just wanted to get out of there." (A623).

professional discretion when he determined that the best avenue of attack to benefit his client would be to present facts surrounding Michael Starling's statements. Whether or not defense counsel was a flawless strategist,[74] it is clear from a review of the record that defense counsel provided active and capable advocacy in this regard and throughout the entire proceedings.

Even though trial counsel stated that he believed Michael's statement was admissible under section 3507, Starling claims that trial counsel should have filed a motion to suppress. He is incorrect. Starling has failed to set forth any legal or factual basis to support a meritorious suppression motion. Trial counsel does not have to file meritless motions; in fact, counsel has an obligation not to do so.[75]

Starling's claim fails the first *Strickland* prong, because it was not objectively unreasonable for defense counsel to present Michael's out-of-court statements. While the State presented both Michael and his statements to prove the charges against Starling, Starling also used Michael and his statements, as best he

[74] This Court does not determine the effectiveness of a trial strategy based on the case's outcome. *State v. Wright*, 653 A.2d 288, 297 (Del. 1994); *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) ("An analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective."). Thus, the decision to forego one possible defense in favor of another is not ineffective assistance of counsel; as long as, the Court finds that defense counsel made a reasonable strategic decision. *State v. Gattis*, 2011 WL 1458484, at *9 (Del. Super. Mar. 22, 2011).

[75] *See State v. Rogers*, 2013 WL 285735, at *4 (Del. Super. Jan. 17, 2013); *State v. Ashley*, 2011 WL 494742, at *3 (Del. Super. Jan. 19, 2011).

could, to undermine Michael's credibility and that of his taped statement.[76] Therefore, trial counsel's representation did not fall below an objective standard of reasonableness. In the court below, as here, Starling offered no evidence to overcome the strong presumption that counsel's actions constituted sound trial strategy, nor did he show prejudice. Prior to the admission of his April 27, 2001 recorded statements at trial, Michael Starling testified as a State's witness that he went to Vickie Miller's house one night a few weeks earlier when Gaines was there and spoke to Starling, who was drunk, in Miller's kitchen. Michael testified that Starling said he was sorry and afterwards, Starling asked Michael to give Gaines a ride, which he did. Michael further testified that Starling had 2-3 guns, including a 9mm and a revolver. This damaging evidence was already before the jury. And in any case, Michael Starling's tapes would have been admitted regardless of the filing of a motion of suppress or objections at trial. Trial counsel's only recourse was to minimize the effect of Michael's statement by undermining it, and he did just that.

To the extent Starling argues that he was prejudiced because trial counsel did not object to portions of Michael's taped statement where the detective tells him that Vicky Miller made un-detailed incriminating statements, Starling's

[76] *See Guy v. State*, 999 A.2d 863, 870-71 (Del. 2010) (finding that defendant failed to overcome that presumption that defense counsel's use of § 3507 statements to discredit State witnesses was reasonable trial strategy).

argument fails. Starling simply asserts that "the jury could reasonably believe that Gaines' story had to be true since Starling's girlfriend corroborated it" and trial counsel did not call her to suggest otherwise.[77] (Corr. Op. Brf. 48). Starling's claim falls far short of a concrete allegation of ineffective assistance that is substantiated and as such it should be summarily dismissed. Regardless, trial counsel reasonably did not request redactions of Michael's statement in order to effectuate his strategy that Michael's statement was the result of police lies, coercions and Michael's fear. Likewise, the detective's reference to the "thing in Chester" to Michael suggests that Michael was charged and not Starling;[78] thus, Starling cannot set forth a substantiated claim of ineffectiveness.

B. STARLING CANNOT SUBSTANTIATE HIS CLAIM THAT TRIAL COUNSEL FAILED TO CONDUCT AN APPROPRIATE PRE-TRIAL INVESTIGATION

Starling argues that trial counsel provided constitutionally ineffective assistance because he failed to sufficiently examine the crime scene and failed to identify and interview a number of witnesses. (Corr. Op. Brf. 83-86). He is mistaken.

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[77] To the extent that Starling makes a fleeting reference to the need for a *Bland* instruction, this argument is inapposite here. In any case, Starling has waived this argument for failing to properly raise it in the Superior Court or fully briefing it here. *See Bland v. State*, 263 A.2d 286, 289 (Del. 1970); DEL. SUPR. CT. R. 8; *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

[78] When discussing Michael's parents with him, the detective commented, "The thing you're charged with in Chester and now this, …". (A295).

At the postconviction evidentiary hearings, trial counsel testified that he reviewed physical evidence, which included looking at the photographs, the diagrams, and visiting the crime scene. (A1762, A1794-95, A1891). In both his affidavit and his evidentiary hearing testimony, trial counsel stated that, based upon his relevant prior experience and his review of rough sketches of the crime scene, there was not sufficient data (i.e., two points of reference) to plot a path of the trajectory of the bullets fired. Even if such determination was possible, the record is devoid of how that would have assisted Starling's defense that he was neither present at the barbershop, nor the shooter.[79] Starling makes absolutely no reference to any physical evidence and how further investigation, beyond what was conducted, would have aided him. Because Starling failed to substantiate his claim, Superior Court properly found that trial counsel provided sufficient pretrial representation.[80]

Starling's allegations that trial counsel was ineffective for failing to interview people allegedly at Vicki Miller's home the night of the barbershop homicide similarly fails. Such inaction, Starling claims, is "a textbook case of ineffective assistance." (Corr. Op. Brf. 85-86). But, Starling's claim that "[a]ny one of those individuals could have confirmed that Gaines was *not* at the house

[79] At the evidentiary hearing, trial counsel testified, "the defense was that he wasn't there and Gaines had the opportunity and the ability and — to do it. So, those were the two areas and there really wasn't anything, from looking at the photographs and looking at the diagrams, that suggested that Chauncey was not there or that Gaines was there." (A1891).
[80] *State v. Starling*, 2014 WL 4386127, at * 7.

that night" is not sufficient to make a case for ineffective assistance of counsel. When the allegation of the ineffectiveness of counsel centers on a supposed failure to investigate, petitioners obligation cannot be met without a comprehensive showing as to what the investigation would have produced. The focus of the inquiry must be on what information would have been obtained from such an investigation and whether such information, assuming its admissibility in court, would have produced a different result.[81] (Corr. Op. Brf. 86).

Starling's offer of proof is particularly lacking because, in his affidavit, trial counsel advised that his investigator had attempted to interview many witnesses prior to trial without success. (A921). The defense investigator report shows interviews with a number of people, including Vickie Miller (alleged to be at her home that night), Bobby Green (alibi witness), Shontay Jackson (alibi witness), Delores Starling (alibi witness), and Michael Starling (alleged to be at Miller's house that night). (A425-41). Starling failed to establish either prong of the *Strickland* test.

C. TRIAL COUNSEL'S FAILURE TO OBJECT TO SHAYLNN FLONNORY'S IN-COURT IDENTIFICATION DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL, NOR DID HIS FAILURE TO OBJECT TO COUNSEL'S REBUTTAL CLOSING COMMENT ABOUT FLONNORY'S IDENTIFICATION

[81] *See State v. Gattis*, 2005 WL 3276191, at * 11 (Del. Super. Nov. 28, 2005).

Starling argues that trial counsel was ineffective for failing to object to Shaylyn Flonnory's eye-witness in-court identification of Starling as the shooter and thereafter failing to object to the prosecutor's comments in closing that stressful circumstances cause memories to be "seared" into a witness's mind. (Corr. Op. Brf. 86-92). Superior Court properly found that Starling failed to demonstrate ineffective assistance of counsel as to this claim.[82]

At trial, Flonnory testified that she was seated in the first chair by the door in the barbershop. (A591). She was looking outside and saw a man dressed all in black, carrying a gun in his right hand, walking down the street toward the barbershop. (A591). Flonnory made eye contact with the man. (A591). She watched the man open the door to the barbershop with his left hand, while holding the gun in his right hand. (A591). The man was "right next to" Flonnory when he walked in. (A591). She noticed that he was between 5'7" and 5'9" tall, between 160-190 pounds and had a scarf or mask covering his face. (A591). According to Flonnory, there was "no way" that the shooter was 6'1" and over 200 pounds. (A592). The man aimed towards the right and started shooting. (A591). Flonnory "jumped" from the seat to the floor and continued to watch the shooter from her knees. (A591-92, A597). She saw the intruder shooting at Evans and chasing him as Evans tried to run away. (A592). She watched Evans fall to the floor. (A592).

[82] *State v. Starling*, 2014 WL 4386127, at *10.

She then watched the shooter stand over Evans and shoot him a couple more times. (A592). She watched the shooter walk out of the barbershop. (A592). Flonnory watched the entire incident. The shooter looked her in the eye twice. (A598). Flonnory replayed the shooting in her head every day from the day of the shooting until the day she testified. (A598). The things that stood out to her about the shooter were his brown skin, height, approximate weight, and his eyes. (A592, A598). Based on those, at trial she identified Starling without a doubt as the barbershop shooter. (A592).

At the postconviction evidentiary hearings, trial counsel testified that his strategy when presented with Flonnory's unexpected in-court identification was "trying not to act as if [Flonnory's identification was] completely devastating in front of the eyes of the jury." (A1747). He testified that he believed that there was no legal basis to object to her identification and that, by objecting, he would only highlight the significance of Flonnory's identification. (A1894-95). Instead, trial counsel cross-examined Flonnory thoroughly in the hopes of discrediting her identification.

Trial counsel walked Flonnory through the statement she made to police within about an hour of the shootings. Trial counsel pointed out that Flonnory had not mentioned anything about the shooter's eyes at that time. (A595). Trial counsel was able to elicit that the first time Flonnory recalled the shooter's eyes

was when she saw a news story on television about the arrest of Starling and Frink and "noticed that his eyes were similar to the ones I saw that night…. Those were his eyes." (A598). Flonnory further admitted that she had not immediately told the State that she could identify the shooter, and the first time Flonnory mentioned that she thought she could identify the shooter was in a trial preparation interview with the lead prosecutor the day she testified. (A598). Flonnory was unable to explain what it was about the eyes that made her remember them and acknowledged that she had seen the shooter for only a matter of seconds. (A595-97). Trial counsel further highlighted the weaknesses of Flonnory's identification by bringing out that she never told anyone she recognized the shooter's eyes from the news report, that she had never been shown a line-up and by pointing out that it was obvious from his presence at the courtroom defense table that Starling was the defendant. (A596, A598-99).

Flonnory's in-court identification was the first time that she was asked to identify the barbershop shooter. As a result, the general rule regarding in-court identifications applied -- "absent an unduly suggestive pretrial identification procedure, questions as to the reliability of a proposed in-court identification affect only the in-court identification's weight and not its admissibility."[83] Starling's

[83] *Byrd* v. *State*, 25 A.3d 761, 764 (Del. 2011).

reliance on *United States v. Emanuele*[84] and its application of the *Neil v. Biggers*[85] test is misplaced. Where there has not been an impermissibly suggestive pretrial identification, the two-step *Biggers* analysis does not apply to an in-court identification.[86] Here, because there was no suggestive pretrial identification procedure, there was no basis to object to the admissibility of Flonnory's in-court identification.

The fact that Flonnory had seen pictures of Starling and his co-defendant on a television news report about their arrest does not alter the conclusion.[87] Starling claims that Flonnory seeing a picture on the news was an unnecessarily suggestive pretrial identification that triggers the *Biggers* test. Not so. In *Perry v. New Hampshire,*[88] the United States Supreme Court held that "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by *law enforcement*."[89] In other words, where a

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[84] 51 F.3d 1123 (3d Cir. 1995).
[85] 409 U.S. 188 (1972).
[86] *See Byrd,* 25 A.3d at 767.
[87] In his Opening Brief, Starling cites *Emanuele* for the proposition that "[i]t is improper for a witness to base an in-court identification on a highly suggestive pretrial observation of the defendant 'in conditions reeking of criminality.'" (Corr. Op. Brf. 91) (citing *Emanuele,* 51 F.3d at 1131). In *Emanuele,* the Third Circuit concluded that the witness confrontation with defendant "was caused by the government, albeit inadvertently, and that to walk a defendant-in shackles and with a U.S. Marshal at each side-before the key identification witnesses is impermissibly suggestive." This was not the case in Flonnory's pretrial viewing on the news. *Emanuele* is inapposite, and Starling's reliance is misplaced.
[88] 132 S. Ct. 716 (2012).
[89] *Id.* at 730 (emphasis added).

witness has made an identification under suggestive circumstances, the *Biggers* test is not triggered unless the suggestive circumstances were caused by law enforcement. The 2012 *Perry* decision followed the rule, as stated in *United States v. Zeiler*, that had been in place in the Third Circuit for over forty years: "When [] there is no evidence that law enforcement officials encouraged or assisted in impermissive identification procedures, the proper means of testing eyewitness testimony is through cross-examination."[90] Flonnory's viewing of the televised news was not caused by law enforcement. The *Biggers* test is not triggered here, and her eye-witness testimony was properly tested through cross-examination. Therefore, as determined by Superior Court, trial counsel's decision to cross-examine Flonnory on her identification, without objecting or moving to suppress the identification, was not objectively unreasonable.[91]

There is also nothing improper when, as here, a witness at trial is asked if she can identify the perpetrator, and she identifies the defendant sitting by himself at the defense table. As this Court stated over 40 years ago:

> Defendant's contention would require a 'line-up' identification in every case as a prerequisite to every court room identification. We

[90] *United States v. Zeiler*, 470 F.2d 717, 720 (3d Cir. 1972) (affirming robbery convictions based on in-court identification of defendant where witnesses had viewed defendant's picture on the television and/or newspaper).

[91] *See Starling*, 2014 WL 4386127, at *9; *United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996) ("Any weaknesses in eyewitness identification testimony can ordinarily be revealed by counsel's careful cross-examination of the eyewitnesses."); *see also Pineda v. Harrington*, 2010 WL 3154095, at *5 n.3 (E.D. Cal. Aug. 6, 2010) (holding counsel effectively raised issue of misidentification through cross-examination of witness at trial).

> know of no such requirement, constitutional or otherwise, and we consider it impractical and unreasonable to create such right. Generally speaking, a court room confrontation, in the presence of court and counsel and with the right of cross examination preserved, provides adequate protection to the rights of an accused….[92]

And, in *Byrd v. State*, this Court reiterated the same principles in 2011:

> The inherent suggestiveness in the normal trial setting does not rise to the level of constitutional concern. Rather, as stated by the court in *State v. Smith*, "[t]he manner in which in-court identifications are conducted is not of constitutional magnitude but rests within the sound discretion of the trial court." Accordingly, we hold that the remedy for any alleged suggestiveness of an in-court identification is cross-examination and argument.[93]

Starling has also failed to prove that the court likely would have either stricken or suppressed Flonnory's in-court identification. The totality of the

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[92] *Laury v. State*, 260 A.2d 907, 909 (Del. 1969) (rejecting defendant's argument that identification of defendant at preliminary hearing and at trial was an impermissibly suggestive "show up" identification).

[93] *Byrd*, 25 A.3d at 767 (emphasis added) (footnotes omitted). *See also State v. Lewis*, 609 S.E.2d 515, 518 (S.C. 2005) ("cross-examination offers defendants an adequate safeguard or remedy against suggestive" first-time in-court identifications); *State v. Jordan*, 813 So.2d 1123, 1130 (La. Ct. App. 2002), *writ denied*, 845 So.2d 1067 (La. 2003) ("The opportunity to cross examine a witness about his in-court identification of the defendant as the perpetrator of a crime will ordinarily cure any suggestiveness of such an identification.") (citation omitted); *United States v. Bush*, 749 F.2d 1227 (7th Cir. 1984) (deference shown jury in weighing reliability of potentially suggestive out-of-court identification would seem even more appropriate for in-court identifications where jury is present and able to see first-hand the circumstances which may influence a witness); *People v. Brazeau*, 759 N.Y.S.2d 268 (N.Y. App. Div. 2003) (where there has not been a pretrial identification and defendant is identified in court for first time, defendant is not deprived of fair trial because defendant is able to explore weaknesses and suggestiveness of identification in front of the jury); *State v. Smith*, 512 A.2d 189, 193 (Conn. 1986) (defendant's protection against obvious suggestiveness in courtroom identification confrontation is his right to cross-examination); *People v. Rodriguez*, 480 N.E.2d 1147, 1151 (Ill. 1985) (where witness first identifies defendant at trial, defense counsel may test perceptions, memory, and bias of witness, contemporaneously exposing weaknesses and adding perspective to lessen hazards of undue weight or mistake); *Ralston v. State*, 309 S.E.2d 135, 136-37 (Ga. 1983) (in-court identification is subject to the same rules of evidence, witness credibility, and cross-examination as other testimony and therefore does not need extra safeguards).

circumstances, including the five factors summarized in *Byrd*,[94] show that Flonnory's in-court identification was reliable. First, Flonnory had a good opportunity to observe the shooter and twice made eye-contact with him. Second, from her testimony, there can be no doubt but that her attention was completely devoted to the incident at the time of the shooting. Third, Flonnory's prior description, made to the police within about an hour of the shooting, was accurate. Flonnory's description of the shooter's clothing substantially matched that provided by other witnesses. Flonnory also described the shooter as being in his 20s, brown-skinned, between 5'6" and 5'9" tall, and between 150-180 pounds. Starling fits this description. (B80). Fourth, Flonnory did not hesitate and was certain in her in-court identification of Starling. Finally, approximately 2½ years had elapsed between the shooting and her in-court identification. Taken as a whole, the totality of the circumstances shows that Flonnory's identification was reliable. As a result, Starling has failed to show that the court would have granted a motion to suppress. Without such a showing, Starling has failed to establish that trial counsel provided deficient representation for failing to move to suppress Flonnory's in-court identification. And, because it is "likely that the suppression

[94] 25 A.3d 761.

motion would have been denied (or the objection overruled), then [the defendant has failed to] show prejudice."[95]

Nonetheless, Starling further argues that "[t]he error in failing to move to suppress the Flonnory identification was compounded by the State's inappropriate argument based on that identification, and trial counsel's failure to object to that argument." (Corr. Op. Brf. 92). Starling claims that the prosecutor's rebuttal argument that "the image of the shooter's eyes had been seared" or "burned" into Flonnory's memory was inappropriate, and should have been objected to, because "[n]o evidence had been introduced at trial that in any way supported the contention that traumatic events become seared into a person's memory." (Corr. Op. Brf. 92). As Superior Court ruled, this claim is procedurally barred under Rule 61(i)(3)[96]. Alternatively, it is meritless. The prosecutor's rebuttal argument was a reasonable inference from the evidence. Flonnory testified that she replayed the shooting in her head every day. (A598). Thus, there was, in fact, evidence supporting the prosecutor's argument that the event had been "burned" into her memory. Expert testimony regarding the effect of traumatic events on memory was not required because Flonnory's own testimony provided the basis for the prosecutor's argument. Starling's prosecutorial misconduct and ineffective

[95] *See Thomas v. Varner*, 428 F.3d 491, 502 (3d Cir. 2005).
[96] *Starling*, 2014 WL 4386127, at *14-15.

assistance of counsel claims based on the rebuttal argument regarding Flonnory's in-court identification are both meritless and properly rejected.

D. STARLING CANNOT SUBSTANTIATE A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE FAILED TO RECALL LAWRENCE MOORE AT TRIAL

Starling claims that he received ineffective assistance of counsel and was denied a fair trial because trial counsel did not "elicit exculpatory evidence from Lawrence Moore" that "Starling was not the barbershop shooter." (Corr. Op. Brf. 93-95). This Court may resolve a claim of ineffective assistance of counsel by examining only the prejudice prong.[97] In order to show prejudice, Starling must prove not a theoretical, but a reasonable probability of a different result but for trial counsel's alleged errors.[98] As Superior Court decided, Starling has failed to demonstrate that trial counsel's failure to "elicit more detailed testimony from Moore" fell below an objective level of reasonableness or caused him prejudice.[99]

There is no dispute that trial counsel's investigator's report detailed an interview with Lawrence Moore, in which he described the barbershop shooter as wearing all black clothing, a skull cap, a hood and a bandana across his mouth and that Moore stated that none of the suspects pictured in the newspaper "had the same appearance as the shooter." (A361). Trial counsel had intended, but forgot,

[97] *Strickland*, 466 U.S. at 697.
[98] *Strickland*, 466 U.S. at 695.
[99] *Starling*, 2014 WL 4386127 at *10.

to ask Moore about that at trial. (A1840). Trial counsel's process server's repeated attempts to serve Moore with a subpoena to reappear at trial were unsuccessful and counsel believed Moore to be uncooperative. (A921). However, the fact that counsel did not ask Moore at trial whether he thought that any of the individuals pictured in the newspaper looked like the shooter does not amount to ineffective assistance of counsel.

On direct examination at trial, Moore explained that he watched the whole event happen "so quick" while he was "in between standing and crouched down." (A494). He then chased the shooter for about a block and watched him turn down Fifth Street. (A494-95). Moore testified that the shooter was dressed all in black, wearing a hoodie and what "could have been a scarf from a durag" covering his face from the nose down." (A494). From what he could see between the shooter's garments, he determined his race to be "skin tissue color is basically fairly my complexion." (A495). Moore also testified that the shooter was "probably about 5'11", maybe a little shorter, because I was crouched down by the chair." Because it happened so quickly, he testified "I just have my guesstimate. He was either shorter or taller, but I know he wasn't taller than me. I know that for a fact." (A496).

On Moore's cross-examination, trial counsel elicited that Moore "stood up all the way to the last shot" and the shooter then walked by him on the way out the

door. (A497). He was about 6-7 feet from the shooter. (A497). When Moore again testified that the shooter was 5'11", like himself and had a medium-build, or may have been smaller, (A498), trial counsel showed him the investigator's report and elicited that Moore had told the investigator that the shooter was approximately 6'1" or 6'2" tall and weighed about 200 to 205 pounds. (A498-99). Although he told police that he kept his head on the ground, Moore testified that he did not recall saying that because he was standing the entire time. (A499). Trial counsel used Moore's testimony to argue to the jury that Moore was "[t]he one witness who obviously got the best look and paid the most attention," (A646), and that his description of the shooter given to the investigator "is more consistent with Alfred Gaines, and that is less consistent with my client Chauncey." (A647).

Trial counsel's cross-examination of Moore effectively allowed him to argue that Gaines was the killer. Contrary to Starling's argument, Moore's opinion that the pictures in the paper did not match Starling would not have been "dramatic" or "contradicted Shaylynn Flonnory's *specious* identification." (Corr. Op. Brf. 95) (emphasis added). Starling ignores that Moore's trial testimony differed substantially from his pretrial statements in many respects, including the description of the shooter as well as Moore's vantage point at the time of the shooting. There is no reason to believe he would have testified consistently as to his recollections regarding the newspaper photographs. Certainly, more questions

directed at Moore's spotty and conflicting recollection would not have assisted Starling, nor would it have undermined Flonnory's identification or the eyewitness testimony of Made-4-Men barber, Charrod Ali Batts, and that of Damon Gist, Sr.

Batts testified that he heard a loud pop coming from outside and ducked down. (A486-87). He watched the shooter "coming in [the front door] at a very fast pace and then [heard] more popping sounds." (A487). He saw the shooter shoot directly at Evans, who "started stumbling and running, at the same time, towards the back of the shop." (A487-88). The shooter chased and fired his gun at Evans until Evans fell and the "shooter got over top of him, shot him a couple more times, turned around and proceeded toward the front door." (A488). The shooter was dressed in all black, including a hoodie sweatshirt and a "black mask or bandanna-type something covering up his mouth area." (A488). Batts tried not to make eye contact with the shooter and did not know his race but described him as "a medium build, medium height. He wasn't too tall. He wasn't too short." (A488). Batts stated he was "[a]bout 5'8" with a slim build and the shooter was slim like him, "probably the same size as me if not a little bit shorter." (A488).

In Damon Gist, Sr.'s police statement, which was played for the jury, he explained that he was walking to the bathroom when the shooting started, and then was "peekin'" out of the bathroom at what was happening in the barbershop. (B3-4). Gist saw the shooter go straight towards Evans and chase him to the back of

the shop. (B5). Gist described the shooter as wearing a black hoodie, a scarf covering his face, a baseball hat and jeans. Gist said that the shooter was "five—five eleven, six foot or somethin." (B1). Gist said he was on the "[prob'ly thin side" and his skin was "not dark dark" and "light-[]medium dark." (*Id.*). At trial, Gist testified that, when he heard the first gunshot, he saw the shooter, dressed all in black, enter the barbershop. (A504). When the shooter shot again, he and everybody else went down. (A504). Gist repeatedly glanced at the shooter. (A507). The shooter went directly to Evans, firing at him, as Evans was "like trotting to the back of the shop." (A504-06). The shooter then stood over Evans and shot him a couple more times and then ran out of the shop. (A505). Gist testified that the shooter was wearing a black hoodie, black jeans and a black bandanna over his face. (A505). Gist said that the shooter's skin was brown with a complexion, "not dark dark" like his own. (A505, A507). Gist testified that he is 6'0" tall and about 170 pounds, which is a medium build, and he guessed that the shooter was about his height and a bit thinner. (A506).

Varying descriptions of the shooter were presented during trial. Testimony elicited from Moore about his statement to the investigator that the photographs of suspects in the newspaper did not have the same appearance as the shooter would have been but one more varying, ultimately unnecessary piece of the puzzle for the jury to put together and, in reality, Starling can only speculate how Moore would

have testified. Under these circumstances, as determined by Superior Court, Starling has failed to show that the result of the trial would have been different if trial counsel had asked Moore about the pictures in the paper.[100]

E. STARLING FAILED TO DEMONSTRATE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN THE PRESENTATION OF MITIGATION

Starling argues that Superior Court erred in failing to find trial counsel constitutionally ineffective for failing to obtain and present sufficient mitigation evidence during the penalty phase of his case. (Corr. Op. Brf. at 95-98). Specifically, Starling alleges that trial counsel's failure to present evidence of organic brain damage from a neuropsychologist, and of fetal alcohol syndrome, amounted to ineffective assistance of counsel. As Superior Court found, trial counsel's representation did not fall below an objective level of reasonableness.[101] Superior Court correctly found that Starling's jury in the penalty phase had already heard very similar mitigating evidence that Starling now claims was not presented, and that there was not a reasonable likelihood that the outcome of his penalty phase would have been any different if additional evidence been presented.[102] Starling's claim fails.

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[100] *Starling*, 2014 WL 4386127, at *10.
[101] *Starling*, 2014 WL 4386127, at *11.
[102] *Id.*

Starling's theory in mitigation was that he had a difficult childhood, suffered from mental limitations, and had a biological father who was never involved in his life. (A871-80). This mitigation strategy was reasonable. Counsel need not pursue all lines of investigation in mitigation. "Counsel can make reasonable choices about what factors stand the best chance to convince the jury not to impose death and focus his investigation on uncovering evidence related to those particular factors."[103] Even then, counsel need not present all evidence uncovered, because the "decision about what evidence to present remains with defense counsel and in a given case counsel may, quite reasonably, refrain from presenting evidence."[104]

To advance his strategy, trial counsel called to testify Starling's mother, aunt, stepfather, mother of his first child, and wife. (A759-71, A786-98). Trial counsel also called Dr. Margaret Parish, a social worker and faculty member at the University of Maryland, who had interviewed Starling's mother, step-father, and children, and had reviewed Starling's school and prison records. (A799, A805). Dr. Parrish testified that Starling was cognitively limited, had had a difficult childhood, was chronically depressed, and his parents had failed to get him the type of counseling that had been recommended for him. (A800-04).

[103] *Flamer v. State*, 585 A.2d 785, 757 (Del. 1999) (citing *Burger v. Kemp*, 483 U.S. 776, 794-95 (1987)). *Starling*, 2014 WL 4386127, at *11.
[104] *Flamer*, 585 A.2d at 757*; Starling*, 2014 WL 4386127, at *11.

In addition, trial counsel presented Dr. Stephen Mechanick, an extremely experienced psychiatrist,[105] to testify about Starling's mental condition. Prior to rendering his diagnosis, Dr. Mechanick testified that, in addition to interviewing Starling, he reviewed Starling's school records, Department of Youth and Rehabilitative Services records, Department of Youth and Families records, prison records, Ferris School reports and Dr. Parrish's report. (A826, A833). Dr. Mechanick testified that Starling had a "mixed learning disorder," borderline intellectual functioning, and substance abuse problems." (A825-28). According to Dr. Mechanick, Starling's IQ throughout his childhood consistently remained in the 80-81 range. (A830). Dr. Mechanick also testified about Starling's difficult childhood that included his feelings of betrayal when he found out his stepfather was not his biological father and all the warning signs his family and teachers ignored. (A829-31). Dr. Mechanick opined that, amongst other reasons, the likelihood of Starling's future dangerousness was reduced because he would be imprisoned with no access to drugs or alcohol. (A833-34).

The only witness called by Starling during the postconviction hearings in support of his penalty phase claim was Carol L. Armstrong, PhD. Dr. Armstrong was retained to examine Starling for brain damage, including but not limited to brain damage or deficiencies caused by fetal alcohol syndrome, physical abuse,

[105] At the time of trial, Dr. Mechanick was the chairman of Main Line Health Systems, had been practicing for over twenty years, and had testified in approximately 100 cases. (A825-26).

and/or traumatic head injuries. (B147). In a written report, Dr. Armstrong provided her opinion regarding Starling's neuropsychological impairments. (A903-911). On cross-examination, Dr. Armstrong testified that she had relied upon her own clinical evaluation of Starling in addition to various records supplied by postconviction counsel. (B146-47). Dr. Armstrong concluded that Starling was of below average intelligence with severe deficits in several areas of brain functions. (B149). She opined that fetal alcohol effects were a contributory factor to Starling's brain dysfunction. (*Id.*).

Starling contends trial counsel provided constitutionally deficient performance by failing to call his biological father, Thomas Boyer, and Boyer's two sisters, to show that he has some form of fetal alcohol spectrum disorder. To support this claim, Starling presented only one witness during the postconviction hearings, not Thomas Boyer, but Dr. Armstrong. Dr. Armstrong relied exclusively upon the unsworn, typed statements of Thomas Boyer and Boyer's two sisters to come to the conclusion that there must be a history of alcohol abuse by the biological mother. (A924-27; B150). These un-notarized statements, all dated March 24, 2008 provide the only mention of alcohol use by Starling's mother. (A924-27). The statements are identically worded in parts, clearly indicating that they were drafted by someone other than the declarants. These statements are suspect at best. Most importantly, for no apparent reason, Starling did not call any

of these witnesses during the postconviction hearings or submit any medical records supporting his contention. Without any contemporaneous records on the topic or live testimony subject to cross-examination, Starling can hardly substantiate his claim that trial counsel was deficient for failing to present mitigation evidence based on fetal alcohol spectrum disorder. Moreover, because Dr. Armstrong could only opine that the fetal alcohol spectrum disorder was just a possible contributory factor to Starling's brain dysfunction, Starling did not and cannot establish prejudice.

Nor can Starling show that trial counsel was deficient in failing to have a neuropsychologist examine Starling, particularly where his psychiatric expert, Dr. Mechanick gave no indication of an organic brain injury. The expert Starling now relies upon, Dr. Armstrong, was presented with the transcripts of Starling's penalty phase and substantially agreed with Dr. Mechanick's testimony. In the penalty phase, Dr. Mechanick testified, consistent with Dr. Armstrong's findings during the postconviction proceedings, that Starling had borderline intellectual functioning and a mixed learning disorder with difficulty in math, reading and writing. (A827-28; B157). Dr. Armstrong also agreed with Dr. Mechanick's diagnosis of substance abuse. (A828; B157). Dr. Mechanick told the jury that Starling had difficulty with judgment and impulsivity, and some limitations in processing information. Dr. Armstrong agreed. (A831; B158).

Starling's argument that trial counsel should have obtained a neuropsychologist to investigate his reports that he had previously suffered head trauma does not advance his argument. In the penalty phase, Dr. Parrish testified that "there were at least three references to his having been hit in the head in a fight, [] with an ironing board, and then in a fight in which he was hit and was knocked to the ground and lost consciousness," but there was no ensuing documentation of organic brain damage. (A801-02, A922). Dr. Mechanick testified that head trauma was not "likely a significant cause of impairment." (A832; B158). Nevertheless, trial counsel offered history of Starling's "head trauma" as a potential statutory mitigator in the penalty phase, even though he believed that it had not caused him any organic brain damage. (B158). Trial counsel therefore cannot be faulted for failing to secure a neuropsychologist to evaluate Starling. The jury heard ample evidence of Starling's cognitive and learning disabilities and about his social and family history. None of the conclusions presented by Dr. Armstrong were sufficiently different from that of Drs. Mechanick or Parrish or revealing such that a jury would have had a different view of Starling and his aptitude.[106] As Superior Court decided, Starling cannot

[106] *See Swan v. State*, 28 A.3d 362, 391 (Del. 2011) ("'When a [movant] challenges a death sentence such as the one at issue in this case, the question is whether there is reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' 'Reasonable probability' equates to'a probability sufficient to undermine confidence in the outcome.'").

establish either attorney error or prejudice based on trial counsel's reliance on Drs. Mechanick and Parrish and his overall presentation in the penalty phase.[107]

F. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE STATE'S PRESENTATION OF STARLING'S POSSIBLE DIAGNOSIS OF ANTI-SOCIAL PERSONALITY DISORDER AS A NON-STATUTORY AGGRAVATOR DID NOT AMOUNT TO INEFFECTIVE ASSISTANCE OF COUNSEL

Starling claims that Superior Court erred in denying him relief because trial counsel was ineffective in failing to object to the State's use of the "possibility" that he had antisocial personality disorder (ASPD) as a non-statutory aggravating factor. (Corr. Op. Brf. at 98-99). He is incorrect.

At trial, Dr. Mechanick testified he was unsure whether Starling met all the criteria for an ASPD diagnosis. (A832). At the conclusion of his testimony the following relevant sidebar or discussion occurred:

> State: There is another nonstatutory aggravator, and I would note Mr. Malik, in his mitigating circumstances, lists the psychiatric or psychological diagnoses individually, if that is to be done, and the State, too, would like to put in as its nonstatutory aggravator, as I think has now come in through the evidence, the possibility that this person is an antisocial person, or that a possible diagnosis for this person could be antisocial personality disorder, because I think both of the experts have said that certainly is a very real possibility, and I think it was clearly brought out through the evidence.
>
> Now, I did not list that in my nonstatutory aggravators before, mainly because I had no idea what those folks were going to say, I hadn't been provided with any reports. I hadn't been provided with anything that they wished to put in. []

[107] *See Starling*, 2014 WL 4386127, at *11.

> Trial counsel: Your Honor, I can't dispute that. The evidence is what the evidence is, and Mr. Mechanick just stated it as a possibility. [] I don't think I have any objection to it because I can't. That's what the experts had said, Your Honor.

Because of the State's late notice of this non-statutory aggravator, the Court asked the parties to address 11 *Del. C.* § 4209(c)'s requirement that the State provide such notice in writing "prior to the punishment hearing, and after the verdict on guilt, unless, in the discretion of the Court, it is impracticable to give advance notice. (A852). Trial counsel, acknowledging that his lack of objection would be subject to later review, stated that the intent behind section 4209's notice requirement was to prevent sandbagging, which was not the case in Starling's trial because trial counsel knew before the State that his own experts thought Starling exhibited ASPD features. (A852-53). Trial counsel affirmed that he and the State had been communicating about it outside of court so the defense could not claim surprise by the State's listing of "the possibility of" ASPD as a non-statutory aggravator. (A853). The court found "under the circumstances, that written advance notice of that as a nonstatutory aggravating circumstance [] was not required under the totality of the circumstances under 4209, subsection (c)." (A853).

As defined by the DSM IV, the essential feature of ASPD "is a pervasive pattern of disregard for, and violation of, the rights of others."[108] Antisocial personality is not a mental illness, as Starling claims, but rather a personality disorder.[109] Because the sole determination for the jury and judge at Starling's hearing was the appropriate penalty for his first degree murder conviction, the State and defense were permitted to present evidence as to any matter that the Court deemed relevant and admissible to the penalty imposed.[110] Certainly, Starling's borderline intellectual functioning, learning disorder and chronic depression and other mitigation Starling offered through his experts was relevant to that determination, as was Starling's possible ASPD diagnosis.

In any case, Superior Court, in its sentencing decision, discounted Starling's possible ASPD as a non-statutory aggravator.[111] The court made the following findings of fact:

> The defense did not object to this last minute circumstance being added. The reason was that the defense counsel for months prior to trial had been diligently seeking to get Starling's school records.

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[108] Am. Psychiatric Ass'n, Diagnositic and Statistical Manual of Mental Disorders 701 (4th ed. 2000).

[109] *Cf. Melendez v. State*, 2009 WL 187950, at *2 (Del. 2008); *United States v. Sampson*, 486 F.3d 13, 50 (1st Cir. 2007); *Government of the Virgin Islands v. Martinez*, 239 F.3d 293, 296 (3d Cir. 2001); Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 701 (4th ed. 2000).

[110] 11 *Del. C.* § 4209(c).

[111] *See Starling*, ID No. 0104015882, Sentencing Decision, at 2 (Del. Super. Jun. 10, 2004) (B115). In the penalty phase jury instructions, the court read 8 non-statutory aggravators, "including that defendant's psychiatric and psychological history may indicate an antisocial personality disorder," and also cited Starling's seventeen mitigators. A884-85.

> The school district either did not look for them or said they had not been retained. At the Court's suggestion, defense counsel was instructed to pass along the Court's concern and tell appropriate school district officials to either find the records or affirmatively determine that the records had been destroyed. The trial started on October 1, 2003, with jury selection. The records were found, however, but only delivered to defense counsel just days before one of his mitigation experts reviewed them and incorporated them into her report and testimony. Her report, which hints at the existence of anti-social personality disorder, was given to the State just before she testified and explains how the issue arose at the last minute.[112]

Thereafter, the court ruled that while the State developed on cross-examination of Dr. Parrish that Starling met many criteria for an ASPD, she would not diagnose him with an ASPD.[113] Thus, Superior Court found that the State did not meet the aggravating circumstance that "defendant's psychiatric and psychological history may indicate an antisocial personality disorder."[114] Regardless, the court found that the Starling's seventeen offered non-statutory mitigators did not outweigh the State's two statutory and eight offered non-statutory aggravators. The Court found that Starling's mitigating circumstances:

> pale[d] in comparison to the aggravating circumstances. Those start with the juvenile criminal history just cited. As an adult he was convicted in 1995 of reckless endangering, involving shooting someone, robbery in the first degree, and a weapons charge. He received a four year sentence. But the overriding aggravating circumstances are the particular circumstances and details of the commission of these killings.
> ***

[112] *See Starling*, ID No. 0104015882, at 18-19 (B131-32).
[113] *Id.* at 23 (B136).
[114] *Id.*

> This is not a case of a robbery gone bad, nor a "drive by" random shooting. The original intention was and remained to do one thing and that was to kill Evans. Not only to kill him but to do so in a way meant there was no mistake and that he would be dead. In his shooting frenzy, it was tragical, but inevitable, that someone else in the barbershop would be killed. Damon Gist, Jr., just five years old, was the victim of Starling's monstrous murderous actions directed towards Evans.[115]

Trial counsel acted reasonably in providing experts to present all of Starling's psychiatric and psychological features in mitigation. The fact that the State also presented his ASPD features in aggravation is of no moment, as Superior Court did not consider them in its sentencing decision. Starling cannot show either deficient performance of trial counsel nor prejudice, and his claim, therefore, fails.

To the extent that Starling claims that trial counsel provided ineffective assistance of counsel in failing to timely obtain school records, that claim is also unavailing. In its sentencing decision, Superior Court properly found that counsel was diligent in its pursuit of records and that the Starling's expert incorporated them into her mitigation presentation.[116] Trial counsel averred in his Rule 61 affidavit that he had unsuccessfully attempted to get Starling's records for months and once he received them, albeit late, Dr. Parrish gave no indication that her ability to present mitigation was hindered. (A922). Starling's mere statement that "[t]rial counsel's last minute access to the records left insufficient time to assess

[115] *Id.*, at 26-27. (B139-40).
[116] *See State v. Starling*, I.D. No. 0104015882, Sentencing Decision, at 18-19. (B131-32).

the mitigating evidence that they contained," (Corr. Op. Brf. 97) is cursory and unsubstantiated by the record. Starling cannot substantiate this claim of ineffective assistance of counsel.

III. SUPERIOR COURT DID NOT ERR IN DENYING POST-CONVICTION RELIEF ON STARLING'S *BRADY* CLAIM REGARDING THE STATE'S FAILURE TO PROVIDE VICKY MILLER'S STATEMENT IN DISCOVERY

QUESTION PRESENTED

Whether Superior Court erred in determining that Starling's claim that the State violated its *Brady* obligation by failing to provide Vicky Miller's recorded statement prior to trial is procedurally barred and, if so, whether Starling proved a *Brady* violation.

STANDARD OF REVIEW

This Court reviews the Superior Court's denial of a motion for post-conviction relief for abuse of discretion.[117] Legal or constitutional questions are reviewed *de novo.*[118] This Court may affirm the Superior Court's judgment on alternative reasoning.[119]

ARGUMENT

Starling claims that the State violated *Brady v. Maryland*[120] by failing to disclose Vicky Miller's statement to the police. Starling argues a specific portion of Miller's statement, wherein she states that she and Starling discussed a news story regarding the murders, was never reviewed by Superior Court at the time

[117] *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013); *Swan v. State*, 28 A.3d 362, 382 (Del. 2011) (citing *Zebroski v. State*, 12 A.3d 1115, 1119 (Del.2010)).
[118] *Swan*, 28 A.3d at 382 (citing *Zebroski* 12 A.3d at 1119).
[119] *Torrence v. State*, 2010 WL 3036742, at *2 (Del. Aug. 4, 2010) (citing *Unitrin, Inc. v. American Gen'l Corp.*, 651 A.2d 1361, 1390 (Del. 1995)).
[120] 373 U.S. 83 (1963).

Starling moved for a new trial to determine if the State withheld that portion in violation of *Brady*. Starling is really repeating his argument that Miller's statement as a whole should have been turned over in advance of trial pursuant to *Brady* because her "statement directly contradicts Gaines' statement that Starling, Gaines, Michael Starling, and Miller were all at Miller's house right after the shootings." (Corr. Op. Brf. at 54-55). As Superior Court decided, Starling's claim is procedurally barred and meritless.[121] Starling's claim therefore fails.

On direct appeal, Starling argued that the trial judge abused his discretion by denying Starling's motion for new trial based upon the State's failure to disclose the "Wilmington police interview of Vicki Miller."[122] In affirming Starling's conviction, this Court held that Starling failed to show how the withheld evidence materially affected the verdict.[123] This Court further ruled that Miller's statement indicated only that she could not remember seeing Starling on the night of the shooting and characterized it as an "(at most) ambiguous" statement that "hardly 'undermines confidence in the outcome of [Starling]'s trial.'"[124]

Now, under the pretext that the Superior Court did not consider the entirety of Miller's statement, Starling seeks to revisit his *Brady* claim. Starling essentially contends that because he is arguing about a subset of the statement, he should not

[121] *Starling*, 2014 WL 4386127, at *4.
[122] *Starling*, 882 A.2d at 756.
[123] *Id.*
[124] *Id.*

be precluded from a reattack under *Brady*. He is mistaken. Trial counsel was aware of the entirety of Miller's statement and the trial judge advised he reviewed all of it. (B83; B85).

To the extent this Court decides, as Superior Court did, that this issue was not decided previously, this argument is barred under Rule 61(i)(3) because Starling failed to raise it on direct appeal and could have done so, and he has failed to show either cause for relief from the procedural default or prejudice.[125] Should this Court agree with Appellee that this issue has been decided previously, this argument is barred under Rule 61(i)(4), and Starling has presented no reason to have it reviewed again in the interest of justice. In either instance, the argument is procedurally barred.

Even if this Court considers the claim, Superior Court did not abuse its discretion in finding it meritless.[126] As Superior Court stated in its Memorandum Opinion denying Starling's motion for new trial: "Miller was not an unknown witness to Starling. She was his girlfriend and still available as a witness."[127] In a recorded teleconference on April 8, 2004, Malik advised the Court that, in fact, he had interviewed Miller prior to trial. (B87). Superior Court found that there can

[125] *Starling*, 2014 WL 4386127 at *4.
[126] Starling alleges that Superior Court failed to make a ruling on this *Brady* claim related to Miller's statement. He is incorrect: Superior Court ruled, "Starling has failed to meet his burden of establishing prejudice, the third requirement of a valid *Brady* violation claim." *Starling,* 2014 WL 4386127, at *4.
[127] *State v. Starling*, I.D. No. 0104015882, Mem. Op. at 22 (Del. Super. Apr. 26, 2004).

be no *Brady* violation where Starling was aware of Vicky Miller and had equal access to her.[128]

Indeed, it is clear from an Investigative Report dated April 8, 2003, from Private Investigator Robert Shannon to Starling's counsel, that Starling was aware of Vicki Miller's exact statements that he now complains he did not have. Miller told Shannon that she was watching the news with Starling and Starling said, "whoever did it deserves to die." (*See* A426). A *Brady* violation cannot be found if the defendant knew of claimed favorable evidence or otherwise had that evidence in his possession prior to trial.[129] And, when trial counsel was questioned at the postconviction hearings, he stated:

> [S]he makes a statement that's beneficial to the defense here, okay. If she was going to say that in Court on the witness stand, she would have been there. My recollection is there was some issue with her and we didn't want to touch her with a ten foot pole and that's why she wasn't called. The point is, why didn't you call Vicky Miller? There was a damn good reason we were afraid to call her.
>
> ***
>
> The reason she wasn't called was she wasn't going to say this statement, that she was – she was suggesting that she would say something otherwise or say what the State was – again, trying to think about this now, Vicky Miller may have been sort of a loose cannon witness that both sides were fearful of. So, maybe that's why the State didn't call her. But I know we were equally fearful. If she wasn't called, there was some issue with her and that's why she wasn't called.

[128] *Starling*, I.D. No. 0104015882, Mem. Op., at 22 (Del. Super. Apr. 26, 2004).
[129] *Perdomo*, 929 F.2d at 973.

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> And if she wasn't called, it was because she would have been detrimental to the defense. (A1831).

Trial counsel's recollection is supported by the April 8, 2004 teleconference at which he advised all parties that "when we went to trial last fall [Miller] had absolutely no interest in contacting Mr. Shannon in his attempts to re-interview her, just to get up with her." (B86).

Starling's current statement that he could have called Miller to testify on his behalf at trial and introduced her statement pursuant to 11 *Del. C.* 3507 is merely unsupported self-serving hindsight. Miller was clearly an uncooperative witness and, as already decided by this Court, her police statement was ambiguous at best.[130] The fact that the police, when questioning Starling, made nebulous statements that Miller provided the police with information, changes nothing. If Miller had been helpful to the State's case, the State would have called her in its case in chief. The State did not. Starling's protestations that he was afraid to call Miller in his case because he did not know what the State had, is nothing more than a convenient after the fact argument. Starling failed to make a case for a *Brady* violation, and this Court should affirm the denial of post-conviction relief.

[130] *See Starling*, 882 A.2d at 756.

IV. SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING POST-CONVICATION RELIEF ON STARLING'S *BRADY* CLAIM REGARDING RICHARD FRINK'S CELLPHONE RECORDS.

Question Presented

Whether Superior Court abused its discretion in denying post-conviction relief on Starling's claim that the State committed a *Brady* violation regarding Richard Frink's cellphone records.

Standard of Review

This Court reviews a trial court's denial of a motion for post-conviction relief for an abuse of discretion.[131] Legal or constitutional questions are reviewed *de novo.*[132] This Court may affirm the Superior Court's judgment on alternative reasoning.[133]

Argument

Starling argues that "the Superior Court completely ignored Starling's claim that the State's failure to produce [co-defendant Richard] Frink's cellphone records constituted a *Brady* violation that required the court to reverse Starling's conviction." (Corr. Op. Brf. 62-63). But Superior Court held that "STARLING'S

[131] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (citing *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996)).
[132] *Swan v. State*, 28 A.3d 362, 382 (Del. 2011) (citing *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010)).
[133] *Torrence v. State*, 2010 WL 3036742, at *2 (Del. Aug. 4, 2010) (citing *Unitrin, Inc. v. American Gen'l Corp.*, 651 A.2d 1361, 1390 (Del. 1995)).

CLAIMS OF *BRADY* VIOLATIONS ARE PROCEDURALLY BARRED."[134] Superior Court acknowledged that "Starling claim[ed] that the State failed to disclose exculpatory evidence when the State withheld information that Trial Counsel could have used to impeach Gaines."[135] As the opening brief on appeal and the papers below make clear, that is the basis upon which Starling contends Frink's cellphone records were *Brady* material. (Corr. Op. Brf. 63-73; Supp. Am. Pet. at 72-73 & 92-99). Superior Court found all of Starling's *Brady* claims to be barred by Superior Court Criminal Rule 61(i)(3)[136] Rule 61(i)(3) states: "[a]ny ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by t[he Superior C]ourt, is thereafter barred, unless the movant shows (A) Cause for relief from the procedural default and (B) Prejudice from the violation of the movant's rights."[137]

Starling contends that "[b]ecause the State withheld Frink's cellphone records until after trial, Starling's *Brady* claim is not procedurally barred [by Rule 61(i)(3)]." (Corr. Op. Brf. 63, n.183). He is wrong. Even if Superior Court did not explicitly include reference to this claim in its holding that Starling's *Brady* claims were procedurally barred, this Court may affirm denial of Starling's motion

[134] *Starling*, 2014 WL 4386127, at *2 (capitalization in original).
[135] *Id.* at *2.
[136] *Id.* at *2.
[137] *Starling*, 2014 WL 4386127, at *2-3.

for post-conviction relief.[138] Assuming *arguendo* that Starling could prove cause for relief under Rule 61(i)(3), Superior Court, in the course of rejecting Starling's claim of ineffective assistance of counsel for withdrawing his motion to compel production of Frink's cellphone records,[139] found that Starling failed to establish *Strickland* prejudice.[140] That conclusion was correct, and provides a basis to conclude that Starling failed to establish prejudice under Rule 61(i)(3) for his *Brady* claim related to the same records. Consequently, this Court should affirm Superior Court's denial of post-conviction relief. However, even if this Court were to examine the merits of this claim, the Court should still affirm.

No Brady violation with respect to Frink cellphone records

As discussed previously, the three components of a true *Brady* violation are: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[141] With respect to the last prong, the court assesses "materiality."[142] The court must "directly assess any adverse effect that the prosecutor's failure to disclose might

[138] *Unitrin, Inc.*, 651 A.2d at 1390.
[139] Starling did not argue in his opening brief that Superior Court erred in denying the claim of ineffective assistance of counsel for withdrawing the motion to compel production of Frink's cellphone records. Consequently, he has waived that claim. *See* Del. Supr. Ct. R. 14(b)(vi)(3).
[140] *Starling*, 2014 WL 4386127, at *8 (finding that [t]he availability of additional phone records would not have changed the outcome of the trial.").
[141] *Atkinson*, 778 A.2d at 1063.
[142] *See Bagley*, 473 U.S. at 682.

have had on the preparation or presentation of the defendant's case … given the totality of the circumstances."[143] "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[144]

At the outset, it is clear that Starling's argument that "the prejudice suffered by Starling as a result of the State's *Brady* violation cannot be overstated" is, itself, overstated. (Corr. Op. Brf. 73). Starling argues that: "The only evidence that places Starling at the barbershop is Gaines's uncorroborated testimony. Therefore, evidence that impeaches Gaines's testimony casts doubt on the only evidence that Starling was at the barbershop the night of the shooting and undermines any confidence that this Court can have in the outcome of Starling's trial." (*Id.*). Starling is incorrect. As this Court previously recognized, Gaines' testimony was not the only evidence that Starling committed the barbershop murders.[145] "Michael [Starling's] recorded statement corroborated Gaines's testimony" that "on the night of the shooting, Starling admitted to Michael, Miller, and Gaines that he shot a child."[146] And, at trial, Shalynn Flonnory identified Starling as the shooter.[147]

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[143] *Michael*, 529 A.2d at 757 (discussing *Bagley* test).
[144] *Id.*
[145] *See Starling v. State*, 903 A.2d 758, 761 n.4 (Del. 2006) & *Starling v. State*, 882 A.2d 747, 751 (Del. 2005).
[146] *Starling v. State*, 882 A.2d 747, 751 (Del. 2005).
[147] *See Starling v. State*, 903 A.2d 758, 761 n.4 (Del. 2006).

When the totality of the circumstances is examined, Frink's cellphone records were not material. As discussed below, Starling failed to show a reasonable probability that the result of the proceeding would have been different if trial counsel had the records.

Cellphone records

Prior to trial, the State produced to Starling a copy of his own cellphone records. Those records, which were admitted at trial as Joint Exhibit 1 during Gaines' cross-examination, reveal that Starling generally had a large volume of calls.[148] With respect to the evening/night of the barbershop shooting, Starling's cellphone records reveal Starling was billed for:

- 8 calls to Frink's cellphone during the period in which Gaines testified that he, Starling and Frink were "riding around" Wilmington (encompassing prior to and 15 minutes after the barbershop shooting).
- A number of "Calls To" and "Incoming Calls" during the time his uncle ("Bobby" Green) testified that he and Starling were at a bar together.
- Incoming calls of a 1 minute increment each at 8:33 p.m., 8:41 p.m., 8:45 p.m., 8:49 p.m. and 8:49 p.m.
- A 5 minute and 9 second call to his voicemail at 9:13 p.m.[149]
- A call to Gaines' home phone at 10:04 p.m.
- A call to Frink's cellphone at 10:09 p.m.

[148] Starling used a cellphone billed under Michael Starling's name. *See* A85; A549 (admission of Starling's cellphone records at trial as Joint Exhibit 1).

[149] Because this is listed as a "Call To" "Wilmington, DE," the location of his cell phone billing address, and that his "Voice Mail" was the "Number Called," the only reasonable explanation for the notation on the record is that he placed a call to his voice mail. It would not be reasonable to conclude that the "Voice Mail" entry reflects a person leaving a voice mail for him, as that would be an incoming call rather than a "Call To."

- A call to Michael Starling's cellphone at 1:17 a.m.

Because it was a record of his own cell use, Starling possessed personal knowledge about his use of the cellphone the day of the barbershop shooting.

Frink's cellphone records reveal:

- Incoming calls for 5 of the 8 calls that Starling made to Frink during the pertinent period.
- 5 calls to or from Frink from 8:20 p.m. to 8:56 p.m., but he was not continuously on the phone.

Starling's arguments fail

Starling bases his *Brady* claim related to Frink's cellphone records on his conclusion that the records impeach Gaines' testimony: 1) that he was "riding around" with Starling and Frink during the period before the shooting (Corr. Op. Brf. 64-68); 2) that it was quiet in the car after they saw Evans' car outside the barbershop, except for a discussion between Frink and Starling and a 3-4 minute call Starling made about spotting Evans (Corr. Op. Brf. 68-70); and 3) Frink was talking on his cellphone with a woman while Starling was out of the car and when he returned, confessing, "I got him. I think I got a little boy too;" (Corr. Op. Brf. 70-73). Starling's conclusions are either incorrect or do not provide a basis for post-conviction relief.

"Riding around" testimony

Gaines testified that, from the time Frink and Starling picked him up before dark until about 8:30, "we was like hanging out. We [rode] on just about every side of town and between the three of us one of us knew on one side of town or another, so we would all get out and meet back at the car and go somewhere else." (A531-32). Gaines further explained, "[W]e would all go see whoever we were going to see and meet back at the car before we're getting ready to leave." (A532). Gaines testified that the group stopped "like four or five times." (A540). As stated above, Starling's cellphone records, which trial counsel had pretrial, showed that Starling called Frink 8 times during the "riding around" time period.

Starling was certainly free to, and did, use Starling's cellphone records to argue that his alibi was more likely than Gaines' description of events. Indeed, Malik cross-examined Gaines extensively on this point and argued to the jury that Gaines was not believable. (A539-42, A547-50, A651-52, A657-58). Frink's cellphone records do not change anything. First, Frink's records do not prove that Starling was calling him during the "riding around" period. Indeed, it is Starling's records, which the State produced to Starling, that reveal that Starling was making "calls to" Frink. Frink's records show only "incoming" calls, which you can link to Starling only through Starling's records. Thus, Starling's records provided sufficient information to attack Gaines' testimony.

Starling argues on appeal that Frink's cellphone records reveal that Frink did not answer 3 of Starling's calls. (Corr. Op. Brf. 65). But that does not lead to a reasonable probability that the outcome of trial would have been different if this information had been presented to the jury. Starling makes a number of "it makes no sense" conclusions that are not the only reasonable inference from the fact that Frink did not answer 3 calls. (Corr. Op. Brf. 67-68). Importantly, the fact that there were unanswered calls does not disprove Gaines' testimony, and the State's argument based on the evidence, that Starling would call Frink when they were separated to meet back. For instance, the fact that Frink did not answer calls at 5:29 p.m. and 5:49 p.m. and "[t]hus, Starling did not say *anything* to Frink during these calls, let alone, "let's meet at the car" (Corr. Op. Brf. 67) does not mean that Starling was not calling Frink for the purpose of saying to meet back at the car. The fact that Frink did not answer 3 of the 8 calls from Starling does not prove "that Starling and Frink were not together during this period." (Corr. Op. 68).

Testimony that, after seeing Darnell Evans, it was quiet in the car except for Starling and Frink discussing him

Starling argues that Frink's cellphone records impeach Gaines' testimony about what happened in the car after Starling saw Darnell Evans in the barbershop. Specifically, Starling argues that Gaines "never mentioned that Starling and Frink were on their cellphones throughout this critical period immediately prior to the barbershop shootings." (Corr. Op. Brf. 70). The main problem with this argument,

and the primary reason it fails, is that Starling's cellphone records, which trial counsel had pretrial and which were before the jury, showed that Starling made and received cellphone calls in the time period about which Starling complains. The fact that Frink was also making phone calls during the same time period adds very little. Moreover, it is not clear that the period of time that Starling argues Frink and Starling each used their cellphone 5 times is actually the same period of time after Starling first saw the adult victim in the barbershop and when he left the car to go kill him. As Starling states, it was "sometime after 8:00 pm" that Starling saw Darnell Evans, and Starling shot the victims at 8:40 p.m. Starling acknowledges that Gaines testified that Starling did use his cellphone to call someone to tell the person he saw Darnell Evans. (Corr. Op. Brf. 68). Consequently, the addition of Frink's cellphone records to Starling's cellphone records which already proved the same point that Starling raises does not lead to a reasonable probability that the outcome of trial would have been different if the jury was aware of Frink's records.

Testimony that Frink was talking on his cell phone with a woman while Starling was out of the car and when he returned, Starling confessed, "I got him. I think I got a little boy too"

At trial, Gaines testified that, after Starling got out of the car, he walked up Fifth Street until he turned the corner to go down to the barbershop on Fourth Street. (A534). At that point, Gaines got out of the back seat and sat in the front

seat next to Frink, who was "talking to some girl on the phone." (*Id.*). Gaines listened to the radio as Frink talked on the phone. (*Id.*). Gaines did not hear Frink's conversation because he "wasn't into his conversation." (A547). After about 15-20 minutes, Gaines saw Starling coming back and returned to the back seat. (A550). When Starling got back in the car and closed the door, he said, "I got him. I got him. I think I got a little boy too." (*Id.*). Frink had hung up the phone by that point, (*Id.*, A552), and responded, "You're dumb. You're dumb." (A535).

Gaines never specifically testified that Frink was on the phone the *entire time* that Starling was out of the car. At most, that is an inference that can be drawn from his testimony. More importantly, even without Frink's cellphone records, trial counsel attacked the credibility of Gaines' testimony that Frink was on the phone talking with a girl while Starling was out of the car. Trial counsel questioned Gaines about the inference that, if Frink was still on the phone when Starling returned and said "I got him," the girl would have heard the statement. (*See* A550-52). Trial counsel pointed out that, in his April 25, 2001 police interview, Gaines said that Frink "was still half way talking to a female" when Starling said "I got him." Gaines admitted he had told the police that, but that Frink had already hung up the phone. Trial counsel argued in his closing argument that this showed that Gaines' testimony at trial was not truthful. (A652-53). Even

if trial counsel had used Frink's cellphone records to show that Frink was not, in fact, on his cellphone continuously from 8:20 p.m. to 8:56 p.m. (the time period Starling raised in post-conviction below), the only inference that must be drawn from that evidence is that Frink was not talking to a woman on his cellphone during that time period. Indeed, if Starling had attacked Gaines' credibility on this point, the State would have pointed out that, in his April 25, 2001 interview, Gaines did not specifically state that Frink was on the phone the entire time Starling was gone from the car, but that he and Frink also talked while they were waiting. (*See* B27). Thus, although Frink's cellphone records could be used to impeach Gaines' testimony on what Frink was doing while Starling was committing murder, it does not lead to a reasonable probability that the outcome of trial would have been different if the jury was aware of Frink's cellphone records.

Trial counsel had also attacked the believability of Gaines' testimony based on a number of other issues, including: Gaines' prior convictions; the calls from Starling to Frink during the ride around period; Gaines' inability to recall any people that he talked to when they stopped; that Gaines never told the police that they had stopped and talked to people; no one corroborated that Starling, Frink and Gaines were seen together on March 9th; no one corroborated Gaines' testimony that Starling said he saw Jabbar and Steve Ellis; no one corroborated Gaines' testimony that he took a cab to Vickie Miller's house; the discrepancies between

Gaines' recorded interviews and his trial testimony; that Gaines said he did not hear his home phone ring in the middle of the night after the barbershop shootings and that his mother did not give him any messages the next morning despite Starling's phone records showing he called Gaines four times between 2:41 a.m. and 2:44 a.m.; Gaines' answers that he did not know something "because [if] it can't be pinned down, it can't be corroborated;" and Gaines' demeanor and argumentative nature on cross-examination. (A650-55). Based on these various considerations, trial counsel argued that "what Alfred Gaines has attempted to do is to weave a tapestry of deception and misinformation." (A655). Even when presented with a laundry list of reasons not to believe Gaines' testimony, the jury, as the judge of credibility, considered all of the evidence presented and convicted Starling. Identifying the additional reasons not to believe Gaines' testimony based on Frink's cellphone records would not have resulted in a different outcome at trial. Starling cannot show prejudice. Therefore, even if this Court does not affirm denial of post-conviction relief on the basis that Starling's *Brady* claim based on Frink's cellphone records is procedurally barred, this Court should affirm based on the fact that the claim is meritless.

V. SUPERIOR COURT DID NOT ERR IN DENYING POST-CONVICTION RELIEF ON STARLING'S CLAIM OF PROSECUTORIAL MISCONDUCT IN THE GUILT-PHASE REBUTTAL ARGUMENT.

QUESTION PRESENTED

Whether Superior Court erred in determining that Starling's claim of prosecutorial misconduct in rebuttal closing argument was procedurally barred.

STANDARD OF REVIEW

This Court reviews the Superior Court's denial of a motion for post-conviction relief for abuse of discretion.[150] Legal or constitutional questions are reviewed *de novo.*[151] This Court may affirm the Superior Court's judgment on alternative reasoning.[152]

ARGUMENT

Starling challenges part of one sentence in a 13-page rebuttal argument in which the prosecutor argued: "First of all, during the time that he probably would have been out of the car, or otherwise occupied such that he's not really answering the phone, he's not really taking calls, he's not really placing calls, they are all incoming, so [Starling] can just ignore them." (A665). Starling argues that this statement by itself amounted to prosecutorial misconduct because the State had no

[150] *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013); *Swan v. State,* 28 A.3d 362, 382 (Del.2011) (citing *Zebroski v. State,* 12 A.3d 1115, 1119 (Del. 2010)).
[151] *Swan,* 28 A.3d at 382 (citing *Zebroski* 12 A.3d at 1119).
[152] *Torrence v. State,* 2010 WL 3036742, at *2 (Del. Aug. 4, 2010) (citing *Unitrin, Inc. v. American Gen'l Corp.*, 651 A.2d 1361, 1390 (Del. 1995)).

basis to argue that Starling ignored the incoming calls he received around the time of the barbershop shootings. (Corr. Op. Brf. 78-79). Starling further argues that a comparison of Frink's cell phone records to Starling's shows that Starling actually answered the incoming calls appearing on Starling's record. (Corr. Op. Brf. 78-79).

As Superior Court decided, Starlings claim of prosecutorial misconduct are procedurally barred under Rule 61(i)(3) because the claim was never presented at trial or on direct appeal.[153] Superior Court further ruled that Starling did not establish cause or prejudice overcoming his procedural default and thus concluded that his prosecutorial misconduct claim was without merit.[154]

Starling only argues why his interpretation of the cell phone records should be believed. Starling has failed to present any evidence proving his conclusion that Starling did not ignore his calls but answered his phone. At the evidentiary hearing, no lay witness testified that Starling answered the calls listed as incoming on the record. Moreover, no expert on 2001 Nextel cell phone records testified that the disputed incoming calls were answered.[155] Because this is Starling's motion, he bore the burden of proof and he did not sustain that burden.

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[153] *State v. Starling*, 2014 WL 4386127, at *15.
[154] *Id.*
[155] Because Starling would have personally possessed the information as to whether or not he answered the calls, there can be no *Brady* violation related to the argument that Frink's cell phone records proved that Starling answered the calls listed as incoming on his own cell phone record. *See Perdomo*, 929 F.2d at 973; *Criven*, 172 F.3d at 996.

Starling's conclusion that he answered his phone is not the only inference to be made from the cell phone records. Another fair inference based on comparison of Frink's and Starling's cell phone records is that an incoming call is listed as a charged call either if it is answered by the receiving party or the calling party left a voicemail message. In the latter event, of course, the receiving party has "ignored" the call and allowed it to go voicemail. This explanation is supported by the cell phone record showing that Starling made a call to his voicemail at 9:13 p.m. that lasted 5 minutes and 9 seconds. (A103). Likewise, the records cannot disprove the possibility of a billing error or other neutral explanation for the discrepancy between the 8 calls from Starling to Frink listed on Starling's phone record while only 5 of those calls appeared as an incoming call on Frink's record. At the evidentiary hearing, the lead prosecutor stated that he was sure that he "had some good-faith basis to believe that what I was arguing [was] true." (A1404). Starling has failed to offer proof that the prosecutor's argument was anything but a fair inference based on the evidence.[156]

Moreover, Starling failed to show prejudice. Starling cannot show that proving that Starling answered all of the calls reasonably would have resulted in a not guilty verdict. Indeed, Starling could have answered each of the listed calls *and* committed the murders. As the defense brought out in the cross-examination

[156] *See Hooks v. State,* 416 A.2d 189, 203-04 (Del. 1980).

of Flonnory and argued in closing, the shooter was only in the barbershop for a matter of seconds. (A597, A648). None of the incoming calls listed on Starling's phone record occurred during the time of the shooting. Thus, while Starling argues that "it is unfathomable that someone who just shot two people, wearing a mask over his face and a hooded sweatshirt over his head, carrying a weapon in one hand, and being chased down the street would answer his phone," (Corr. Op. Brf. 80), *none* of the incoming calls at issue rang while Starling was in the barbershop, nor can he show they rang while he was running down the street. Starling only offers conjecture, not evidence, that the shooter could not have answered the phone in the minutes after the murders. (Corr. Op. Brf. 80-81).

Moreover, the prosecutor pointed out in his rebuttal Starling's phone records "kill his alibi case." (A664). The prosecutor argued:

> Uncle Bobby says, I know I came down on that day, I know I picked him up, I know we went to a bar. Where are you seated? Right next to him. What are you doing? Just talking. Does he get up? Yeah, he talks to other guys, but, you know, I'm not going beyond who those guys are.
>
> Does he talk with them personally? Yeah. Does he do anything unusual? No.
>
> Look at the phone records for the time that they would have been together, if, in fact, he has the right day. During that time that they would have been together Chauncey Starling is placing call after call after call. And they're not incoming, they're outgoing. 7:09, 7:16, 7:16, I mean these are all calls that he's dialing up. They would still be together – 7:46, 7:47 – 7:47 is incoming – 7:51, 7:57, 8:07. He's making all these calls after calls after calls. Uncle Bobby doesn't say that.

> Well, they're in the bar sitting right next to one another, he's sitting there constantly on the phone. And why, why doesn't he notice it? Because Uncle Bobby is off, and he's off by a day….
>
> And if Uncle Bobby is wrong, then everybody else, we're off on a different day, because they all pin it to the day Uncle Bobby came down, the day that Uncle Bobby was here. And we can only go by what he tells us his actions are and what Chauncey Starling's actions are.
>
> And the day that they're in the bar Chauncey isn't making all these calls…. And it simply isn't March 9th of 2001, no matter how much they wish it was. (A664).

The prosecutor also explained that the records show that Starling was paranoid after the shooting, making the fair inference that a double homicide in which a 5-year-old was killed would have been the lead story on the 10 p.m. news. The prosecutor noted that Starling called Gaines at 10:04 p.m. and then Frink at 10:09 p.m. Gaines testified that Starling was paranoid and asked Gaines to come over to Vickie Miller's house. When Gaines left Miller's house, Starling was still paranoid. Starling then made another set of calls to Gaines at 2:41 a.m., 2:41 a.m., 2:43 a.m. and 2:44 a.m. "Why? He's paranoid, he's concerned. Why? Because he screwed up. He went after the target … as best he could, and he ended up taking out an innocent little boy, also." (A665).

Thus, the prosecutor's rebuttal statement about "ignoring" calls was but a portion of one sentence in an overall argument that Starling's cell phone records proved his guilt, which was but one topic the prosecutor addressed in his lengthy rebuttal argument. As Superior Court correctly found, Starling failed to show

cause or prejudice for his failure to raise his prosecutorial misconduct claim at trial or on direct appeal of his conviction. Nor did he provide a basis for the court's review of his claim under Rule 61(i)(5).

CONCLUSION

For the foregoing reasons, this Court should affirm Superior Court's denial of postconviction relief.

STATE OF DELAWARE

Dated: May 7, 2015

/s/ Maria T. Knoll
Elizabeth R. McFarlan (No. 3759)
Maria T. Knoll (No. 3425)
Karen V. Sullivan (No. 3872)
Delaware Department of Justice
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500