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Case Number 533,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHAUNCEY S. STARLING, Defendant below, Appellant v. STATE OF DELAWARE, Plaintiff below, Appellee	)	No. 533, 2014 On appeal from the Superior Court of the State of Delaware in and for New Castle County

APPELLANT'S REPLY BRIEF

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I. Gaines Brady Violation

In his opening brief, Starling explained why the Superior Court improperly denied Starling's claim that the State violated its *Brady* obligation by failing to disclose benefits that the State provided to its key witness, Alfred Gaines.[1] In response, the State argues that "the Superior Court properly found Starling's *Brady* claim related to Gaines's violation of probation procedurally barred and, alternatively, found it meritless."[2] The State ignores the significant errors on both legs of the Superior Court's ruling and further relies upon a plain and substantively crucial misstatement of the record.

a) Starling's Brady claim is not procedurally barred.

The State argues that Starling was procedurally barred from raising his *Brady* claim because it was not raised in the proceedings leading to the judgment of conviction and was not based on a constitutional violation that "undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."[3] The State's argument fails on both counts.

First, the State argues that Starling's claim is procedurally barred because "trial counsel had in his possession a March 27, 2002 Probation/Parole Progress Report ("the March 2002 probation report") that provided information about, and

[1] *See* Starling Br. at 7-24.

[2] *Id*. at 10.

[3] *See id*. at 11-12.

in fact was the basis for, the *Brady* issue that Starling presented in the post-conviction proceedings."[4] The State's argument is entirely misleading. Starling referenced the March 2002 probation report in his *original* amended petition—which he filed before post-conviction discovery. That probation report does not contain *any* information about Gaines's probation violation. It was only through post-conviction discovery that Starling first learned that one of his prosecutors caused the Superior Court to withdraw Gaines's capias and dismiss his probation violation. The State suppressed that information, and as a result Starling was not able to present his *Brady* claim prior to the judgment of conviction. Once it was revealed, Starling supplemented his petition for post-conviction relief and presented the *Brady* claim to the Superior Court.

Second, the State argues that the Superior Court correctly found that Starling's claim did not meet the fundamental fairness exception contained in Superior Court Criminal Rule 61(i)(5).[5] However, other than quoting the Superior Court's faulty reasoning,[6] the State failed to address the established precedent, which holds that post-conviction relief cannot be procedurally barred when the

[4] *Id*. at 11 (citing A997).

[5] *See id*. at 12.

[6] Starling's opening brief reviewed the errors in the Court's reasoning. *See* Starling Br. at 14-15.

Brady rule is violated because *Brady* violations "strike at the core of a fair trial…."[7] The Superior Court erred in ruling otherwise.

b) The State's claim that Trial Counsel possessed the impeachment evidence that the State withheld contradicts the evidentiary record.

The State contends that Trial Counsel actually possessed the impeachment evidence that forms the basis of Starling's *Brady* claim.[8] That argument is based on speculation that directly contradicts the evidentiary record.

First, the State argues that the lead prosecutor had properly disclosed to Trial Counsel the relevant information pertaining to Gaines's probation violation. That is undeniably false. According to the State:

> 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.[9]

[7] *See id*. at 14 nn.51,52 (citing *Wright v. State*, 91 A.3d 972, 985-86 (Del. 2014).

[8] *See* Answering Br. at 11.

[9] Answering Br. at 15.

That summary overlooks a critical fact: when the State prosecutor told Trial Counsel that it was allowing Gaines to live out of state, he *concealed* the fact that one of Starling's prosecutors had Gaines's violation of probation dismissed.

As the lead prosecutor conceded, prior to trial he told Trial Counsel that the State was *not doing anything* with Gaines's probation violation, which he said was being held in abeyance until after Starling's trial.[10] The lead prosecutor also provided Trial Counsel with an outdated rapsheet, which incorrectly listed Gaines's VOP as "pending."[11] This information was factually wrong—Gaines's VOP was not awaiting the outcome of Starling's trial because one of Starling's prosecutors had already caused it to be dismissed. Thus, the information that Starling obtained through post-conviction discovery is materially different from the false information he was provided prior to his trial.

Second, the State takes a snippet of testimony out of context and speculates that Trial Counsel would have learned through his own investigation that the lead prosecutor had caused Gaines's probation violation to be dismissed. According to the State, because Trial Counsel vaguely recalled performing a computer search at the Prothonotary's office and asked a clerk to copy documents, Trial Counsel must

[10] *See* Starling Br. at 11, 16.

[11] *See id*. at 16.

have learned that the lead prosecutor caused Gaines's probation violation to be dismissed.[12] The State's speculative theory suffers from a host of problems:

- The *only* probation and parole report contained in Trial Counsel's files that related to the probation that Gaines violated (the March 2002 probation report) does not contain *any* information pertaining to Gaines's probation violation—let alone any disclosure that Starling's prosecutors caused it to be dismissed;

- Although the State argues that the March 2002 progress report references other progress reports, and therefore Trial Counsel was aware "that Probation and Parole had filed other Progress Reports after the VOP had been initiated,"[13] the fact is that *none* of these other reports were among the "approximately an inch and a half of documents related to Gaines's criminal history" that Trial Counsel had copied;[14] and

- The State speculates that "[b]ased on [Trial Counsel's] review of the actual Prothonotary files, he would have seen that the April 18, 2001 VOP Report contained the probation officer's recommendation that Gaines's probation be revoked and his Level V sentence of at most 1 year be reimposed."[15] However, Trial Counsel's files do not contain the April 18, 2001 VOP Report and his actual handwritten notes do not reflect *any* of the information that the State speculates that he must have learned about Gaines's probation violation. Rather, Trial Counsel's notes reflect

[12] *See* Answering Br. at 18 ("Thus, while trial counsel testified that he did not know that the State had asked that the Superior Court withdraw Gaines's capias and VOP, his review of the short docket in the computer, which he testified he used to investigate Gaines, would have revealed the exact information.").

[13] *See id*. at 18.

[14] *See id*. at 17.

[15] *See id*. at 18-19. There is no evidence that documents related to Gaines's criminal history for that particular offense were at the Protonotary's office (not the State Archives) when Trial Counsel visited the office, because that particular case was closed as of April 7, 2002 (*see* A919), whereas the March 2002 probation report (docketed on April 7, 2002) was listed with a *different* case that was still active until 2007 (*see* A913). Also, as the Superior Court explained in its discovery order, Gaines's file was located in State Archives and was incomplete; thus, "the Court was subsequently compelled to get the Prothonotary's files which turned out also to be in Archives." *See State v. Starling*, 2010 Del. Super. LEXIS 296 at *8-9 (Del. Super. Ct.).

> that the lead prosecutor told him (falsely) that Gaines's April 18, 2001 probation violation was still pending at the time of Starling's trial, as corroborated by in the outdated rapsheet that the lead prosecutor provided to trial counsel.[16]

Plainly, Trial Counsel relied upon the incorrect information that the State provided him—not the information that the State imagines Trial Counsel must have seen.

c) The State's argument that the lead prosecutor was unaware that the VOP had been dismissed is meritless.

According to the State, Starling failed to prove a *Brady* violation because there is no evidence that "the State withdrew the VOP with the intent that Gaines would not have to answer for his violation."[17] The State supports its argument with evidence that the lead prosecutor mistakenly believed that Gaines's VOP was still pending at the time of Starling's trial. The State's argument fails for several reasons.

First, Starling's *Brady* claim is not based on whether the State *intended* to withdraw Gaines's VOP permanently. Rather, but for the fact that the State withdrew the VOP, Gaines would have been extradited to Delaware and faced the very real possibility of being sentenced to prison. That was a significant benefit that Starling's prosecutor bestowed upon Gaines and failed to disclose.

[16] *See* A456-69 (Gaines's DELJIS rapsheet along with trial counsel's handwritten notes summarizing Gaines's criminal history); *see also* A1333 (Wallace Tr. 59:2-6, Nov. 27, 2012 (The lead prosecutor testified: "That he had pending VOPs? Yeah, I told him that. That he was not—that we weren't doing anything or that nothing was being done with them, they were being held in abeyance until after his trial, I told him that.")).

[17] *See* Answering Br. at 19.

Second, the fact that the lead prosecutor, who was *not* involved in the decision to withdraw Gaines's VOP, incorrectly believed that Gaines's VOP was still pending at the time of Starling's trial merely explains why he provided Trial Counsel with false information and failed to disclose that another of Starling's prosecutors had already had Gaines's VOP dismissed. It does not negate the fact that Gaines's VOP was, in fact, dismissed on October 17, 2001, and it certainly does not absolve the State of its *Brady* violation. The law is clear: an "individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf . . . ."[18]

Finally, Starling is not claiming that the lead prosecutor, or anyone else, intentionally withheld Gaines's *Brady* information. As the State concedes, the State violates its *Brady* obligation whenever it suppresses, "either willfully or inadvertently," exculpatory or impeachment evidence.[19]

d) The State's argument that Starling was not prejudiced by the State's Brady violation is based on a complete misstatement of the evidentiary record.

The State argues that Starling was not prejudiced by its failure to disclose the fact that one of Starling's prosecutors caused Gaines's VOP to be dismissed because Starling could not have used this evidence effectively at trial without

[18] *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).

[19] *See* Answering Br. at 13 (citing *Atkinson v. State*, 778 A.2d 1058, 1063 (Del. 2001)).

opening the door to questions about whether Starling shot Gaines in Chester, Pennsylvania.[20] That argument is based on a complete misstatement of the evidentiary record.

First, Trial Counsel never testified that it was his strategy not to impeach Gaines's credibility using the State's decision not to extradite Gaines to Delaware and withdraw the VOP because he was worried about opening the door to the Chester shooting. Clearly, Trial Counsel could not have formed that strategy because the State's lead prosecutor told Trial Counsel that Gaines's VOP was still pending. The State has not refuted Trial Counsel's unequivocal testimony that had he been aware that the State withdrew Gaines's VOP, he would have used it to impeach Gaines's credibility.[21]

Second, the State attempts to convince this Court that Trial Counsel actually believed that cross-examining Gaines on the State's decision to dismiss the VOP would have opened the door to unwanted testimony. According to the State:

> If trial counsel had cross-examined Gaines on the VOP issue, implying that the VOP issue was Gaines's 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."[22]

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[20] *See id*. at 20-25.

[21] *See* A1729 (Malik Tr. 17:6-23, Jan. 8, 2013) and A1176 (Aff. of John S. Malik, dated Mar. 22, 2012).

[22] *See* Answering Br. at 22-23.

Although the State cites Trial Counsel's testimony during the evidentiary hearing, Trial Counsel did *not* actually testify that cross-examining Gaines on the dismissal of the VOP would have opened the door to testimony that "Mr. Starling or his associates may have been threatening Mr. Gaines."[23] Trial Counsel is clear that had he been told that the State had Gaines's VOP dismissed, he would have used it to cross-examine Gaines.[24] Likewise, the State asserts that "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 . . . ."[25] The State overlooks the obvious reason why Trial Counsel did not ask Gaines that question: the State falsely told Trial Counsel that the VOP was being held in abeyance until after the outcome of Starling's trial.

Finally, the State argues that there is not a reasonable likelihood that the outcome of the trial would have been different had Starling cross-examined Gaines about the State's decision to withdraw the VOP. The State simply fails to acknowledge the importance of the information it suppressed. As Starling explained in his opening brief, it was the State that emphasized Gaines's

[23] Rather, Trial Counsel was asked "if you had asked Mr. Gaines *why he was living out of state*, would that have opened the door for the State to say for his own protection?" *See* A1887 (Malik Tr. 101:17-19, Jan. 8, 2013) (emphasis added). The relevant issue is the State's decision to have Gaines's VOP dismissed, which has nothing to do with Gaines being allowed to live out of state.

[24] *See* A1729 (Malik Tr. 17:6-23, Jan. 8, 2013) and A1176 (Aff. of John S. Malik, dated Mar. 22, 2012).

[25] *See* Answering Br. at 24 (emphasis added).

credibility, introduced the Chester shooting as a motive for Gaines to incriminate Starling, and argued to the jury that Gaines should be believed because he only wanted to "try and give some peace to a couple of families of murder victims and come forward with what he said."[26] And it was the State that represented to the jury that the State had been completely forthcoming about Gaines's criminal history. [27] Nowhere in its brief does the State address its role in presenting a false picture of Gaines while simultaneously suppressing evidence that impeached Gaines's credibility. The jury was never told that a probation officer had recommended that Gaines be sentenced to prison for violating his probation, that the State was scheduled to extradite Gaines for a VOP hearing, and that Gaines was allowed to go free because *one of Starling's prosecutors* asked a court to dismiss the VOP. Had the jury known this information, it would have questioned Gaines's purported motivations for incriminating Starling and discounted the State's passionate argument that Gaines should be believed because he gained nothing by testifying against Starling. In a case that rested so heavily on the credibility of this single witness, it is disingenuous to argue that the opportunity to impeach that witness would have had no bearing on the outcome of the trial.

[26] *See* Starling Br. at 22.

[27] *See id.*

II. The Michael Starling Statement

The State argues that Trial Counsel's failure to object to the admission of the Michael Starling statement does not warrant a new trial for three reasons: (1) the State merely failed to "formally" introduce Michael's statement under Section 3507; (2) Michael's statement was voluntary, so the State could have met Section 3507's requirements; and (3) it was reasonable trial strategy to play the recorded statement to the jury to show the jury it was coerced. The State's arguments fail.

a) The State did not merely fail to formally introduce the Michael Starling statement—the State failed to meet any of Section 3507's requirements for admission.[28]

The State did not introduce the Michael Starling statement during its direct examination of Michael. It did not question him about the substance of his statement. Most importantly, the State did not even attempt to establish that the statement was voluntary. And the Trial Court did not make any ruling about the admissibility of the statement. The State does not dispute this, but instead suggests the procedural requirements are mere formalities that it can choose to meet or not.

Section 3507's procedural requirements are not mere formalities. This Court has ruled repeatedly that the procedural requirements *must* be met before an out-of-court statement is admissible. Just last year, this Court reiterated the rule:

[28] Answering Br. at 32 ("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.*")

> Provided that a proper foundation is laid, an out-of-court statement may be admissible under *Section 3507* even if the statement otherwise would be inadmissible under the Delaware Rules of Evidence. A statement offered under *Section 3507* must be offered before the conclusion of the direct examination of the declarant. The prosecutor must inquire about the voluntariness of the statement during the direct examination of the declarant, and the judge must make a ruling on whether the declarant made the statement voluntarily before the statement may be submitted to the jury for consideration.[29]

The State did not meet any of those requirements before Michael's statement was admitted. If the State were correct that it did not have to comply with the formal requirements of Section 3507, it would render the Section and this Court's holdings meaningless.[30]

b) **The totality of the circumstances demonstrates that Michael's statement was involuntary and inadmissible.**

In trying to show that Michael's statement was voluntary and therefore could have been admissible had the State met Section 3507's procedural requirements, the State (1) fundamentally disregards the overwhelming evidence of the coercive circumstances that led to the statement; (2) cherry picks a few out-of-context comments by the detectives to argue that the hours of coercive statements by the detectives should be ignored; and (3) describes a few coercive tactics the detectives did not employ. These attempts fail.

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[29] *Dunn v. State*, 2014 Del. LEXIS 243, *5-6 (Del. Supr.).

[30] Nor could Trial Counsel have waived Section 3507's requirements. *See State v. Reeves*, 2007 Dist. LEXIS 535 (Del. Super. Ct.) (requiring a colloquy of defendant before waiving the procedural requirements).

First, the State simply ignores nearly all of the coercive circumstances detailed in Starling's opening brief.[31] The State did not address the following:

- that Michael was surprised by "a hallway full of police" at his workplace and forced to go to the police station;
- that the police took Michael's cell phone and never read him his *Miranda* rights;
- that Michael repeatedly asked to speak to his mother;
- that detectives threatened Michael with being charged with obstruction of justice and hindering a police investigation, even though Michael could not actually be charged with those crimes;
- that the detectives told Michael over a dozen times what they wanted him to say (which is the statement he ultimately repeated back); and
- that the detectives told Michael they would end the questioning only when he repeated the statement back.

Second, the State attempts to downplay the highly coercive circumstances surrounding Michael's statement by plucking a few out-of-context statements by the detectives and glossing over the rest. For example, the State asserts that "[a]t

[31] *Id.* at 33-34. The State cites a single case, *Brown v. State*, 947 A.2d 1062, 1072 (Del. 2007) to argue that Starling has not pointed to any conduct by police that overcame Michael's will. *Id.* at 34. In *Brown*, the Delaware Supreme Court upheld the trial court's admission of out-of-court statements under Section 3507, despite the defendant's argument that the statements were involuntary, because police had threatened the witnesses with jail time if they did not cooperate in the investigation. But in *Brown*, the trial court had conducted a *voie dire* of the witnesses and determined that they gave voluntary statements. The Delaware Supreme Court merely affirmed the trial court's voluntariness determination. Here, the Court never made a voluntariness determination or conducted a *voir dire* of Michael Starling.

no point did [Michael] request to terminate the questioning, nor did the police advise him that he had no other choice but to answer questions."[32] The State overlooks the fact that more than a dozen times, the detectives told Michael that that he would not be "done" and that he could not "walk out the door" unless he told them what they wanted to hear.[33] And throughout the interrogation, Michael clearly indicated that he wanted to leave. He pleaded with the detectives, "[w]hy I am here? I don't understand, why am I here?" (A285; A293); he repeatedly asked for his mother (A293, A326, A328), and at one point, he begged the detectives to just let him take a lie detector test (A311). Looking at the totality of the circumstances, it is inconceivable that Michael thought he could leave.

As to the detectives threatening Michael with going to prison for the rest of his life for the barbershop shootings, the State argues that the detectives "made no such specific threat."[34] The State relies on the detectives not having used those exact words. The detectives, however, were unequivocal that if Michael did not

[32] Answering Br. at 34.

[33] *See, e.g.*, A293 ("[W]e need to hear it from you, and you're walking out the door!"); A294 ("Michael, just tell your story and we're done."); A322 ("I want you to tell us because I want you to walk out the door . . . ."); A344 ("I'm sorry for . . . finish the sentence for me Mike and we're done. Finish it man, go ahead."). For additional examples, *see* Starling Br. at 38-39.

[34] Answering Br. at 33.

tell them that Starling said he was sorry about the little boy that he would be charged with the homicide and go to prison for it.[35]

The State argues that "[i]mportantly, the detectives also told Michael multiple times that he was not a suspect in anything, or being charged." The State's argument merely plucks a few lines out of context. The detectives were not reassuring Michael that he would not be charged. Instead, they told Michael that although he was not a suspect or being charged, he nevertheless would be charged if he did not tell them what they wanted to hear.

For example, the State cites the detectives' statement that "you are not a suspect in anything," but overlooks the rest of the sentence—"but don't get dragged into something that you weren't there for cause that's what's gonna happen." (A284). The State also refers to the detective saying "I'm not charging you Michael!" But moments later the detectives threaten Michael, "the thing is don't involve yourself in a double murder investigation. You got no reason to ruin your life Michael." (A290). Read in context, the detectives' statements that Michael was not a suspect or being charged were simply part of the detectives' coercion. The detectives were letting Michael know that though he had done nothing wrong, if he did not tell them what they wanted him to say, they would charge him anyway.

[35] *See* Starling Br. at 35-36.

Third, the fact that the police didn't handcuff Michael, deny him food and water, or physically lock the door to the interview room does not render Michael's statement voluntary, as the State argues.[36] Doing any of those things would have added to the coercive nature of the interrogation. But the fact that they did not do those specific things does not render the interrogation non-coercive or make Michael's statement voluntary. The issue is not what additional coercive tactics the police might have used, but what coercive tactics they did use.

c) **It was not reasonable trial strategy for Trial Counsel to not object to the admission of the Michael Starling statement.**

Despite the failure of the State to meet any of Section 3507's requirements, the State argues that it was reasonable strategy for Trial Counsel not to object to the statement as involuntary so he could argue to the jury that the statement was involuntary. The State offers two explanations to justify its circular reasoning: (1) Trial Counsel thought the statement was "legally voluntary" but not actually voluntary, so he engaged in a strategy to demonstrate to the jury that the statement was involuntary,[37] and (2) the "damaging evidence" was already before the jury. The State is wrong on both accounts.

First, there is no evidence that Trial Counsel believed the Michael Starling statement was "legally voluntary." Trial Counsel never used the phrase "legally

[36] *See* Answering Br. at 34.

[37] *See id.* at 35.

voluntary"—that is the State's term. The State bases its assertion entirely on Trial Counsel's testimony that he believed that the statement was *admissible* under Section 3507.[38] At the evidentiary hearing, Trial Counsel was asked if he thought the statement was admissible under Section 3507, to which he generally responded, "I believe that it would have been admissible, yes." (A1806 (Malik Tr. 20:5-8, Jan. 9, 2013)). But it does not follow that Trial Counsel believed the statement was "legally voluntary." In fact, Trial Counsel testified to the exact opposite (*Id.* at 16:16-22); he thought the interview was "very, very suggestive, very coercive." *(Id.).* When asked if he would characterize the statement as "the product of police suggestion, that it wasn't a knowing statement, that it wasn't a voluntary and intelligent description of the alleged events," he testified "[i]t was—I'll agree with that." (*Id.*). In other words, Trial Counsel believed that the Michael Starling statement met the very definition of involuntary under Section 3507.[39]

Trial Counsel's belief that the statement was admissible but also involuntary and highly coerced is significant. Trial Counsel could not have understood that Section 3507 allows the admission of only *voluntary* statements. If he had, Trial Counsel would have realized the statement was inadmissible. Trial Counsel's

[38] *See id.* at 21.

[39] *Taylor v. State*, 23 A.3d 851, 853 (Del. 2011) ("A statement is involuntary if the totality of the circumstances demonstrate that the witness's will was overborne.").

misunderstanding of the law does not render his representation effective; indeed, it establishes that his representation was ineffective.[40]

The State goes further with its flawed reasoning, arguing that because Trial Counsel believed the Michael Starling statement was admissible, it was reasonable trial strategy to play the entire statement to the jury to show that it was involuntary.[41] The State's argument—a transparent attempt to latch onto the deference afforded to an attorney's trial strategy under *Strickland*—evades the actual issue, which is whether Trial Counsel acted unreasonably in failing to object to the admission of the Michael Starling statement, not whether it was reasonable to use the statement at trial. The only reason Trial Counsel used the statement was to show that it was involuntary. Had he moved to exclude it, as a reasonable and effective attorney would have, the statement would never have been admitted in the first place. Thus, there would have been no reason for Trial Counsel to try to demonstrate its involuntariness to the jury, because the jury would have never heard it. If the motion to exclude had been denied, Trial Counsel still could have argued involuntariness to the jury, just as he did.

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[40] *See Kimmelman v. Morrison*, 477 U.S. 365, 384-85 (1986) (upholding the district court's grant of habeas for an ineffective assistance of counsel claim where "[c]ounsel's failure to request discovery, again, was not based on 'strategy,' but on counsel's mistaken beliefs [about the State's discovery obligations]").

[41] Answering Br. at 30-32.

To be clear, the Michael Starling statement was not helpful to Starling in any way. There was absolutely no benefit in having the jury hear it; nor is there any evidence that Trial Counsel believed there was. In fact, Trial Counsel testified that he believed the statement was the single most damaging piece of evidence—it "was the biggest problem with the defense case . . . and that was the best part of the prosecution's case." (A1800-01). Trial Counsel's failure to object to the statement's admission was not rendered reasonable trial strategy by his decision to then play the entire recording.

Second, the State is wrong in contending that the "damaging evidence was already before the jury."[42] As explained in Starling's opening brief, the most significant prejudicial statements were (a) Michael's statement that Starling said he was sorry about the little boy and (b) the detectives' repeated statements that Vickie Miller had corroborated Gaines. Neither of those two statements was before the jury other than through the wrongly admitted recording.

Michael never testified that Starling said he was sorry about the little boy. Nevertheless, without citation, the State misleadingly represents that Michael Starling testified that Starling went to Vickie Millers house and "said he was sorry," implying that he was referring to the little boy. The State's sleight of hand ignores that Michael did not testify that Starling made any such statement.

[42] *Id.* at 39.

Michael testified only that Starling had told Michael that he was "sorry"—sorry because he and his brother had been in an argument. (A571 ("He said [I'm sorry] and he was also laughing . . . ."); A623-24 ("I told them the story about me and my brother having, like, an argument.") ("I talked to him, had an argument with him.")). There is obviously a world of difference between Michael testifying that Starling said he was sorry about the little boy and Michael testifying that Starling told Michael he was sorry over an argument between the two of them. The State does not even acknowledge, much less address, that difference.

Nor was there any evidence—besides the Michael Starling recording—that Vickie Miller had corroborated Gaines's story about the night of the shooting. Though the State claims that all of the damaging evidence from the statement was already before the jury, the State does not identify any other evidence that Miller had corroborated Gaines. In fact, as explained in detail in Starling's opening brief, Miller had expressly contradicted Gaines about the night of the shooting.

To be clear—the admission of the Michael Starling statement was the only way that the jury heard Michael state that Starling said he was "sorry about the little boy" and that Miller had corroborated Gaines. The State has not and cannot show otherwise.

III. The Vicki Miller Statement

As explained in Starling's opening brief,[43] Vicki Miller told police that the only thing Starling ever said about the Barbershop shootings was "that's fucked up . . . They need to catch that mother fucker." (A191). That statement specifically contradicted what Gaines told the police Starling had allegedly said in front of Miller, which was, "I fucked up . . . I shot a little boy!" (A224).

Because the State withheld Miller's exculpatory statement, Trial Counsel was unable to introduce it as a Section 3507 statement and did not call Miller as a witness because of his concerns about what she told police. Greatly compounding the prejudice to Starling, the State introduced the Michael Starling recording, in which detectives repeatedly stated that Miller had corroborated Gaines. Thus, not only did the jury not hear Miller's statement contradicting Gaines, they heard the exact opposite—that Miller had corroborated Gaines.

Because it cannot refute either the fact that Miller's statement was exculpatory or that the State withheld it, the State instead argues (1) the argument is procedurally barred because this Court already considered it or because Trial Counsel failed to raise it on direct appeal; and (2) Starling was not prejudiced because he had access to Miller. Each of those arguments fails.

[43] *See* Starling Br. at Section III.

a) Starling's claim regarding the Miller statement is not procedurally barred.

First, as the Superior Court found, (A2405 (9/5/2015 Order at 6)), no Court has ever considered Vicki Miller's statement that the only thing Starling ever said about the shootings was "that's fucked up . . . . They need to catch that mother fucker."

The only portion of Miller's recorded police interview that was put at issue on direct appeal was her statement that she did not remember whether Starling was at her house the night of the Barbershop shootings.

This Court's opinion on direct appeal is clear that the only Miller statement considered was the statement that she did not remember whether Starling was at her house on the night of the shootings. "Miller's statement indicated only that she could not remember seeing Starling on the night of the shooting."[44] Had this Court also considered Miller's statement that the only thing that Starling said about the barbershop shootings was that the shooter needed to be caught, the Court's statement would not make sense.

The State has not pointed to any evidence that this Court ever considered, much less ruled upon, any other element of Miller's statement. Instead, the State appears to suggest the Court should be deemed to have considered the issue

[44] *Starling v. Delaware*, 882 A.2d 747, 756 (Del. 2005).

because the Court had access to the entire audio recording of the Miller interview. The State's argument severely overreaches. If the State was correct, it would mean that courts would be deemed to have considered and ruled upon every potential legal issue related to any evidence that may have been seen or heard.

Second, Starling's claim related to the Miller statement is not procedurally barred under Rule 61(i)(3), as the State argues in the alternative.[45] The State's argument is that because Trial Counsel failed to raise the statement on direct appeal, Starling is forever barred from having the claim addressed. In fact, the State did not produce the Miller statement until *after* trial. To the extent that Trial Counsel should have identified and raised the issue under those circumstances, Trial Counsel provided ineffective assistance of counsel.[46] Moreover, the State is wrong in asserting that Starling "has presented no reason to have it reviewed again in the interest of justice."[47] Post-conviction relief cannot be procedurally barred when the *Brady* rule is violated because *Brady* violations "strike at the core of a fair trial . . . ."[48] Therefore, Starling's *Brady* claim cannot be procedurally barred.

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[45] Answering Br. at 70.

[46] *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (stating that the *Strickland* standard applies to appellate counsel).

[47] Answering Br. at 70.

[48] Starling Br. at 14 (citing *Wright v. State*, 91 A.3d 972, 985-86 (Del. 2014).

b) Starling was prejudiced by the State's failure to disclose the Miller statement.

The State does not argue, nor can it, that Miller's statement that the only thing Starling said about the shootings was that the shooter needed to be caught is not exculpatory. As explained in Starling opening brief,[49] Miller's statement directly contradicts Gaines's statement that Starling had said, in front of Miller, that he "fucked up" and shot a little boy.

The State's only argument for why Starling was not prejudiced by the State's failure to disclose the exculpatory statement is that Trial Counsel's investigator had also interviewed her.[50] The State's failure to disclose Miller's statement is not excused by the investigator's interview of her.

First, the State glosses over the obvious prejudice to Starling independent of whether Trial Counsel interviewed Miller. Because the State did not disclose the recorded Miller statement to Trial Counsel prior to trial, Trial Counsel could not introduce the statement at trial under Section 3507. All the State says in response is that Starling's contention that he would have introduced Miller's statement under Section 3507 is "merely unsupported self-serving hindsight."[51] The State is right that Starling's position is hindsight—necessarily so, because the State only

[49] *See* Starling Br. at Section IV.

[50] Answering Br. at 71.

[51] *Id.* at 72.

produced the Miller statement *after* trial. The State however is wrong that Starling provided no support that he would have introduced the Miller statement under Section 3507. As explained in detail in his opening brief, the Miller statement was exculpatory by directly contradicting Gaines.[52] There was no reason for Trial Counsel not to introduce the statement, had the State timely disclosed it.

Second, Miller's statement to Trial Counsel's investigator was not substantively the same as her statement to the police. Miller told the police that the "only thing" Starling ever said about the barbershop shootings was that the shooter needed to be caught.[53] In arguing that Trial Counsel was aware of the "exact statements" that Miller gave police, the State points to the investigator's note that Miller told him that "she was watching the news with Starling and Starling said, 'whoever did it deserves to die.'"[54] Although the statement that Miller gave the investigator is consistent with Miller's statement to the police, it is simply not the same statement. The statement Miller gave police—that the *only* thing Starling said about the shootings was the shooter needed to be caught—directly contradicts Gaines. The statement Miller gave Trial Counsel's investigator—that Starling said the shooter deserves to die—did not do that.

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[52] Starling Br. at 52-55

[53] *See id.* at 53-54.

[54] Answering Br. at 71.

Third, as explained in Starling's opening brief, Trial Counsel chose not to call Miller as a witness because he feared she had told the police something that corroborated Gaines.[55] In opposition, the State merely makes the conclusory statement that Starling's argument is "nothing more than a convenient after the fact argument." The State ignores the detailed facts set forth in Starling's opening brief, including Trial Counsel's testimony that "the damn good reason" he did not call Miller to testify was because he was concerned "what, if anything [Miller] may have said to the police when she was interviewed." (A1901).

For all these reasons, Starling should be granted a new trial because the State's failure to have produced the Miller recording violated *Brady*, or, alternatively, because Trial Counsel's failure to identify and raise the issue constituted ineffective assistance.[56]

[55] Starling Br. at 59-60.

[56] Trial Counsel was also ineffective with respect to the pre-trial investigation, mitigation case, and failure to object to the State's use of anti-social personality disorder as an aggravating factor, as explained in Starling's opening brief. *See* Starling Br. at 84-86; 95-99. The State has not shown otherwise, and Starling relies on his opening brief with respect to those arguments.

IV. Frink's Phone Records

The State does not contest that the Superior Court ignored Starling's claim that the State committed a *Brady* violation by failing to produce the cellphone records belonging to Starling's co-defendant, Richard Frink, nor does it deny that the State suppressed these records. Instead, the State argues that Starling's claim with respect to Frink's cellphone records fails because the Superior Court held that *all* of Starling's *Brady* claims were procedurally barred and that, in any event, Starling has failed to demonstrate prejudice. The State is wrong on both counts.

First, as explained in Starling's opening brief, the Rule 61 procedural bars do not apply to *Brady* claims.[57] Further, because the State did not produce Frink's cellphone records to Starling until post-conviction discovery, Starling was denied the opportunity to raise his *Brady* claim prior to the judgment of conviction.

Second, the State offers several arguments that do not refute Starling's evidence but merely present the State's own interpretation of the evidence that the jury did not hear because of the State's *Brady* violation.

Starling contends that Frink's cellphone records would have impeached the State's theory that the reason Starling repeatedly called Frink's cellphone prior to the barbershop shooting was because Starling wanted Frink to meet him and

[57] *See* Starling Br. at 15.

Gaines back at Frink's car.[58] In response, the State argues that "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."[59] The State's argument only underscores Starling's claim, which is that Starling's conclusions are a reasonable inference drawn from Frink's cellphone records, and impeached the State's *only* explanation for why Starling would have been calling Frink's cellphone during the period when Gaines had claimed that Starling and Frink were in the same car. The State had every right to counter Starling's argument with its own interpretation of the evidence, but it did not have the right to prevent Starling from presenting the evidence to the jury.

Starling also claims that Frink's cellphone records impeached Gaines's testimony that he was with Starling and Frink immediately before the barbershop shooting.[60] In response, the State argues that because Starling used his phone five times during the period when Gaines claimed no one was talking, the fact that Frink was also using his cellphone five times during this period "adds very little."[61] The State is wrong. Frink's cellphone records are essential to impeaching Gaines's testimony. According to Gaines, sometime after 8:00 pm, the following events

[58] *See id*. at 64-68.

[59] *See* Answering Br. at 80 (emphasis added).

[60] *See* Starling Br. at 68-70.

[61] *See* Answering Br. at 80-81.

occurred: Frink, Starling and Gaines drove past the barbershop; Starling and Frink debated whether Evans was there; Starling placed a *single* cellphone call to someone; Frink drove several blocks, turned around, and headed back by the barbershop; Starling and Frink had a discussion about shooting Evans; and Frink drove away from the barbershop, made a U-turn, drove back behind the barbershop and parked the car.[62] All the while, except for Starling's one cellphone call and Frink and Starling allegedly debating whether Evans was in the barbershop and whether to shoot him, Gaines claimed no one was talking.[63] Because the barbershop shooting occurred at 8:40 pm and Gaines claimed that Starling was away from Frink's car for 15-20 minutes,[64] all of the activity described above had to have occurred between approximately 8:00 pm and 8:30 pm, during which time either Starling or Frink was on his cellphone. Frink's cellphone records are critical for two reasons. First, they fill in the gaps between Starling's cellphone calls during which the State could have argued the alleged activity occurred. Second, Gaines *never* mentioned Frink using his cellphone during this period. The fact that Frink used his cellphone *five* separate times during this period is compelling evidence that Gaines had no idea what Frink was doing prior to the barbershop

[62] *See* Starling Br. at 68-69.

[63] *See id*. at 69.

[64] *See* A534 (Trial Tr. 75:12-17, Oct. 16, 2003).

shooting because he was *not* in Frink's car. Again, any arguments the State wished to make in response to this evidence should have been made to the jury.

Starling separately argues that Frink's cellphone records impeached Gaines's testimony that Frink was speaking on his cellphone the entire 15-20 minutes that Starling was allegedly away from the car and then returned and confessed to the shooting.[65] The State's response is that "although Frink's cellphone records *could be used to impeach Gaines's testimony on what Frink was doing while Starling was committing murder*, it does not lead to a reasonable probability that the outcome of the trial would have been different if the jury was aware of Frink's cellphone records."[66] Again, the State ignores the significance of the evidence. Gaines testified that he knew Starling went to the barbershop to shoot someone.[67] A reasonable juror would expect that a witness would be able to remember what was happening during the period he was waiting in a car while an acquaintance was off committing murder. Gaines's testimony was that Frink was on the cellphone during this critical period.[68] Frink's cellphone records prove that

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[65] *See* Starling Br. at 70-71.

[66] *See* Answering Br. at 83 (emphasis added).

[67] *See* A533-A534 (Trial Tr. 71:13-72:9, Oct. 16, 2003).

[68] The State claims that Gaines never testified that Frink was on the phone the entire time Starling was out of the car. *See* Answering Br. at 82. The State is wrong. *See* A534 (Trial Tr. 75:21-76:10, Oct. 16, 2003). Gaines also told the police that Frink was still talking on his cellphone when Starling allegedly returned to the car and confessed. *See* A214 (Gaines Tr. 23:Q&A208-09, Apr. 25, 2001).

Gaines was wrong. It is that simple. And if the jury believed that Gaines was lying about being with Frink at the time of the barbershop shooting, there is a reasonable probability that the jury would have rejected his testimony completely.

Finally, the State argues that using Frink's cellphone records to impeach Gaines's testimony would not have changed the outcome of the trial because Trial Counsel "also attacked the believability of Gaines's testimony based on a number of other issues."[69] However, as the State concedes, Trial Counsel was forced to cross-examine Gaines almost entirely on the lack of any evidence corroborating Gaines' story.[70] On the other hand, the State's *Brady* violation prevented Trial Counsel from cross-examining Gaines with documentary evidence that directly impeached critical aspects of his testimony—such as that Gaines was even with Starling and Frink the night of the barbershop shooting. The jury never saw that evidence because the State improperly suppressed it. As a result, this Court must grant Starling a new trial.

[69] *See* Answering Br. at 83.

[70] *See id*. at 83-84.

V. Flonnory Identification

As explained in Starling's opening brief, the Superior Court erred in ruling that Trial Counsel was not ineffective for failing to object to (1) Flonnory's unreliable identification of the shooters eyes, and (2) the lead prosecutor's argument during closing that the image of the shooter was "seared" or "burned" into Flonnory's memory, because it was not based on any evidence. The State has refuted neither of these claims.

a) Trial Counsel should have objected to the Flonnory identification as inadmissible because it was unreliable.

The State misses the point in arguing that because law enforcement was not responsible for Flonnory viewing Starling's arrest on the news, pre-screening of the identification was not required.[71] Starling recognizes that pre-screening of the Flonnory identification under the Sixth Amendment, which was the issue in *Perry v. New Hampshire*,[72] was not required here because law enforcement was not responsible for the suggestive circumstances on which Flonnory based her identification.[73] But pre-screening is not the issue here. The issue is whether Trial Counsel was ineffective for failing to object to the Flonnory identification at trial. Trial Counsel should have objected to Flonnory's in-court eye identification as

[71] *See* Answering Br. at 46-47.

[72] 132 S. Ct. 716 (2012).

[73] Prior to trial, Trial Counsel was not even aware that Flonnory would be making an in-court identification, since the State had represented that there were no identification witnesses.

unreliable under Delaware Uniform Rule of Evidence 403, irrespective of whether law enforcement had anything to do with the suggestive circumstances leading to the identification. Indeed, the Supreme Court in *Perry* recognized that "state and federal statutes and rules ordinarily govern the admissibility of evidence . . . ."[74]

b) **The Flonnory eye identification was unreliable.**

The State does not deny that until trial, more than 2 ½ years after the Barbershop shootings, Flonnory never proclaimed that she could identify the shooter's eyes. The State also does not deny that Flonnory only decided that she could identify the shooter's eyes after seeing on the news that Starling and his co-defendant had been arrested. Instead, the State argues that her identification was reliable nonetheless because (1) she "had a good opportunity to observe the shooter," (2) "there can be no doubt that her attention was completely devoted to the incident at the time of the shooting"; (3) Flonnory's description "made to the police within about an hour of the shooting, was accurate"; and (4) Flonnory did not hesitate at trial.[75] These assertions do not demonstrate reliability.

- First, Flonnory did not have a "good opportunity to observe the shooter." She was crouched on the floor and conceded that she had only observed the shooter for a matter of seconds during the shootings. (A591; 597).

[74] *Perry*, 123 S. Ct. at 723.

[75] Answering Br. at 48-50. The State also notes that Flonnory's identification came more than 2 ½ years after the shooting. *Id*. at 49. Presumably, the State is not arguing that the 2 ½ year lapse favors reliability.

- Second, while Flonnory's attention may have been "completely devoted to the incident at the time of the shooting," it was not devoted to identifying remarkable characteristics of the shooter's eyes. At trial, Flonnory could not describe *any* characteristics about the shooter's eyes. (A595 (Q. "Was there any specific characteristic of the shooter's eyes that you remember, Ms. Flonnory?" A. "No.")).

- Third, Flonnory's statement to the police within an hour of the shooting demonstrates that her in-court identification was unreliable. In her statement to police, when her memory was the freshest, Flonnory never indicated that she could identify or describe the shooter's eyes. (See generally A55 (Flonnory March 9 Statement)). In any event, Flonnory's description to the police was not accurate. She was the *only* witness who did not observe the shooter fire a shot into the Barbershop door before entering the Barbershop. (A597).

c) **Trial Counsel's failure to object to the Flonnory identification was not a strategic decision—he just "didn't think of it."**

In trying to argue that Trial Counsel made a strategic decision not to object to the Flonnory eye identification, the State misconstrues his testimony. The State asserts that Trial Counsel "believed there was no legal basis to object to her identification and that, by objecting, he would only highlight the significance of Flonnory's identification."[76] That is inaccurate. As Trial Counsel admitted at the evidentiary hearing, the reason he did not objection is that he did not realize at the time that he had a basis to object. (*See* A1895 (testifying that it was a "legitimate point" but "I didn't think of it at the time. And I suppose I could have renewed that application but I didn't think of it at the time.")). Trial Counsel observed, "I

[76] Answering Br. at 44.

think it's a legitimate point that [Starling] makes." (A1896). Trial Counsel acknowledged that due to the surprise nature of the Flonnory eye identification, he simply "didn't think of any of that, so, that wasn't going through my mind. So I didn't raise it." (*Id.*). That hardly constitutes a knowing strategic decision.

d) **Trial Counsel should have objected to the prosecutor's claim that the shootings had been so traumatic that "the image of the shooter's eyes had been "seared" or "burned" into Flonnory's memory.**

At trial, the State did not introduce any expert testimony, or any evidence at all, that the circumstances of the shooting caused Flonnory to form a more accurate memory of the shooter. The prosecutor simply invented that proposition to add credibility to Flonnory's otherwise unreliable identification.[77]

During closing, the lead prosecutor argued that Flonnory formed a more accurate memory during the shooting because of the stress of the situation. (*See* A663). The State argues that the lead prosecutor's argument was a "reasonable inference" based on Flonnory's testimony that she "replayed the shooting in her head every day."[78] The fact that Flonnory subsequently "replayed the shooting in her head" has nothing to do with the accuracy of the memory Flonnory formed at the time of the shooting—she could have replayed an inaccurate recollection of the shooting in her head. The lead prosecutor simply made up the premise.

[77] Starling Br. at 92.

[78] Answering Br. at 50.

Not only was the lead prosecutor's contention not based on any evidence, it was flatly wrong. The New Jersey Supreme Court recently considered in depth the vast scientific research concerning witness identifications and concluded that (1) "[e]ven under the best viewing conditions, high levels of stress can diminish an eyewitness' ability to recall and make an accurate identification" and (2) "[w]hen a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit."[79] The lead prosecutor argued precisely the opposite during closing. Trial Counsel agreed that it was error on his part not to have objected to the prosecutor's contention. (A1751).

Trial Counsel's ineffective assistance in failing to object to the Flonnory identification and the prosecutors' improper argument to the jury requires a new trial.[80]

[79] *See New Jersey v. Henderson*, 27 A.3d 872, 903-04 (2010).

[80] The State also argues that Starling's claim is procedurally barred under Rule 61(i)(3). Answering Br. at 50. Ineffective assistance of counsel claims however are not subject to Rule 61(i)(3)'s procedural bars.

VI. Prosecutorial Misconduct

In his opening brief, Starling showed that the lead prosecutor committed prosecutorial misconduct when he improperly argued to the jury that Starling ignored incoming calls to his cellphone records because he was committing the barbershop shooting.[81] In response, the State argues that the argument was a fair inference based on the cellphone records and that, regardless, Starling was not prejudiced.[82] The State's arguments mischaracterize the evidence.

According to the State, an alternative "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 the voicemail message*."[83] The State is wrong. According to the State's new theory, the cellphone company would have billed Starling once for the incoming calls he ignored and a second time when Starling called his phone and listened to his voicemail. The State has never offered any evidence to support the existence of such an unethical double-billing scheme. The State's new voicemail theory also contradicts the evidence. According to the State, the fact that Starling called his voicemail at 9:13 pm is proof that the incoming calls to his cellphone at 8:33 pm,

[81] *See* Starling Br. at 74-82.

[82] *See* Answering Br. at 85-90.

[83] *See id*. at 87 (emphasis in original).

8:41 pm, 8:45 pm, and 8:49 pm were ignored and went to voicemail.[84] A closer inspection of Starling's cellphone records proves that voicemail messages *do not appear* on Starling's cellphone bill. For example, on March 8, 2001, the day before the barbershop shooting, Starling checked his voicemail at 3:11 pm and 4:00 pm, even though Starling's cellphone bill does not show any *incoming calls* prior to him calling his voicemail.[85] Thus, the only calls that show on Starling's invoice as incoming calls were calls that Starling *answered.*

The State also argues that Starling has failed to show prejudice because "Starling could have answered each of the listed calls *and* committed the murders."[86] The State cannot have it both ways. The State argued at trial that the incoming calls on Starling's cellphone records were evidence of Starling's guilt because the shooter had to have ignored these calls in order to commit the murders. It cannot now deny that these same incoming calls were evidence of Starling's innocence because he did something the shooter never would have done: answered his cellphone. Starling need not prove his innocence. Starling was prejudiced because the lead prosecutor took exculpatory evidence, mischaracterized it, and argued to the jury that it was evidence that inculpated him in the murders.

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[84] *See id.*

[85] *See* A100 (lines 725-741).

[86] *See* Answering Br. at 87 (emphasis in original).

VII. Lawrence Moore

In his opening brief, Starling established that the Superior Court erred when it denied Starling's claim that he was denied a fair trial because Trial Counsel failed to introduce exculpatory testimony from Lawrence Moore, the owner of the barbershop, who would have testified that Starling was not the shooter.[87] In response, the State argues that Trial Counsel was not ineffective and that Starling failed to show prejudice.[88] Neither of these arguments has merit.

First, although the State concedes that Trial Counsel "had intended, but forgot, to ask Moore" about his prior statement that neither of the men whose photographs appeared in the newspaper (one of which was Starling) resembled the shooter, it offers no support for its assertion that Trial Counsel's error did not amount to ineffective assistance of counsel.[89] Trial Counsel's failure to elicit Moore's testimony clearly amounts to ineffective assistance. Trial Counsel possessed a highly exculpatory statement from a State witness that he simply forgot to introduce on cross-examination. The mistake was so obvious and significant that Trial Counsel attempted to subpoena Moore to return to the trial during the defense's case in order to elicit the exculpatory testimony.[90] The fact

[87] *See* Starling Br. at 93-95.

[88] *See* Answering Br. at 51-56.

[89] *See id.* at 51-52.

[90] *See* A1840-42 (Malik Tr. 54:18-56:12, Jan. 9, 2013).

that Trial Counsel attempted (unsuccessfully) to rectify his mistake does not render his representation effective.

Second, the State argues that Starling was not prejudiced because Trial Counsel's cross-examination "allowed him to argue that Gaines was the killer" and because "[t]here is no reason to believe [Moore] would have testified consistently as to his recollections regarding the newspaper photographs."[91] The State's arguments miss the point. Starling was prejudiced because Moore would have testified that the shooter did not resemble *Starling*. Starling did not have the burden of proving that Gaines or anyone else was the actual barbershop shooter; thus, Trial Counsel's attempt to suggest that Gaines was the killer is irrelevant. Furthermore, on cross-examination, Moore reviewed the statement he provided to the private investigator, recalled the interview, and confirmed that the statements were accurate.[92] Thus, contrary to the State's assertion, there is every reason to believe that Moore's testimony would have been consistent with what he told the private investigator, which is that neither of the men in the newspaper photographs (including Starling) was the shooter.

[91] *See* Answering Br. at 53.

[92] *See* A498 (Trial Tr. 114:22-116:22, Oct. 15, 2003).

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July 2015, I caused a true and correct copy of the foregoing to be served by File and Serve Express and hand-delivered a copy to the following counsel of record:

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