



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

**THE STATE OF DELAWARE,** )  
)  
    **Plaintiff Below –** )  
    **Appellant.** )  
) **Supreme Court No. 692, 2015**  
**v.** )  
)  
**DAMONE FLOWERS,** )  
)  
    **Defendant Below –** )  
    **Appellee,** )  
)

**APPELLEE’S ANSWERING BRIEF**

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## NATURE AND STAGE OF PROCEEDINGS

On October 30, 2003, Flowers was convicted of Murder in the First Degree and Possession of a Firearm During the Commission of a Felony, and subsequently sentenced to life in prison, plus 10 years. The Delaware Supreme Court affirmed the convictions on direct appeal.<sup>1</sup> On May 3, 2005, Flowers filed a *pro se* motion for postconviction relief. The Superior Court denied this motion on December 13, 2005.<sup>2</sup> An appeal to the Delaware Supreme Court was dismissed as untimely on April 4, 2006. Flowers filed a postconviction claim in federal court which was denied on September 22, 2008.<sup>3</sup>

Flowers filed a second *pro se* motion for postconviction relief on May 14, 2012. He obtained counsel and filed an amended and superseding motion for postconviction relief on April 25, 2013. The motion was referred to a Superior Court Commissioner consistent with 10 Del. Code Section 512 (b) and Superior Court Criminal Rule 62 for proposed findings of fact and conclusions of law. The Commissioner issued a Report and Recommendation on April 23, 2015 recommending that the Defendant's

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<sup>1</sup> *Flowers v. State*, 858 A.2d 328 (Del. 2004).

<sup>2</sup> *State v. Flowers*, Del. Super., ID No. 9908026980, Johnston, J. (Dec. 13, 2005)(Order)(State's Exhibit C).

<sup>3</sup> *Flowers v. Phelps*, 2008 WL 4377704 (D. Del. September 22, 2008).

motion be granted.<sup>4</sup> On May 4, 2015, the State filed objections to the Commissioner's Report and Recommendation. After considering the Commissioner's Report and Recommendation, as well as the State's objection and the Defendant's response, the Superior Court issued a decision adopting in part and denying in part the Commissioner's Report and Recommendation.<sup>5</sup>

The State filed an appeal and submitted its Opening Brief. This is the Defendant's Answering Brief.

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<sup>4</sup> *State v. Flowers, Del. Super., ID 980800280A, Manning, Comm'r (April 23, 2015)(Rpt. and Rec.)(State's Exhibit B).*

<sup>5</sup> *State v. Flowers, 2015 WL 7890623(Del. Super. Ct., November 20, 2015)(State's Ex.A).*



## SUMMARY OF ARGUMENT

- I. Denied. Superior Court did not abuse its discretion in granting Flowers' postconviction relief. The Superior Court properly determined that no procedural bars existed to prevent it from considering the merits of Defendant's claims.

The Superior Court did not abuse its discretion in granting relief on a Sixth Amendment Confrontation Clause violation properly raised by Flowers. The core of the State's evidence was five pretrial taped statements admitted under 11 Delaware Code §3507. This Court has held that the statute permitting admission of out-of-court statements must be construed narrowly in order to preserve a defendant's confrontation rights. This Court's rulings have made it clear that a witness must testify as to the truthfulness of their out-of-court statement in order to establish a foundation for its admission. Since the State did not make the truthfulness inquiry, and since Trial Counsel did not object, all five taped statements were improperly admitted causing a violation of Defendant's Sixth Amendment confrontation right. Without the five section 3507 statements, the State's case would have been much weaker. The improper admission

of the five Section 3507 statements amounted to a constitutional violation that undermined the fundamental integrity and fairness of the trial justifying the relief granted.

## STATEMENT OF FACTS

The historical facts which led to Flowers' convictions are summarized in the Court's decision in his direct appeal as follows:

On August 1, 1998, Alfred Smiley drove a car with two passengers in the area of 22<sup>nd</sup> and Lamont Streets in Wilmington. At some point, Smiley became involved in an argument with several people on the street. A gunshot fired from the sidewalk next to the car struck Smiley in the chest area. The car careened out of control on the street and came to rest against a utility pole. Wilmington police responded to the call and took Smiley to the hospital where he died from a gunshot wound.

The State charged the Damone Flowers with Smiley's murder and presented five witnesses at trial who were alleged to have been present at the scene of the shooting. **Most of the incriminating evidence was presented through pretrial tape statements.**<sup>6</sup> (Emphasis added).

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### **Taped statements-Section 3507 foundation**

The State admitted the pretrial taped statements of five witnesses pursuant to 11 Delaware Code §3507. A review of the testimony of Vernon Mays,<sup>7</sup> Matthew Chamblee,<sup>8</sup> Ronetta Sudler,<sup>9</sup>

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<sup>6</sup> *Flowers v. State*, 858 A.2d 328 (2004).

<sup>7</sup> (B-1-16)

<sup>8</sup> (B-35-45)

<sup>9</sup> (B-17-34)

Tysheik McDougall,<sup>10</sup> and Othello Predeoux<sup>11</sup> reveals the extent of the foundation to support admission of the taped statements under Section 3507. None of the witnesses testified whether their taped statement was true.

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<sup>10</sup> (B-46-50) (B-74-78)

<sup>11</sup> (B-51-74)

**I. SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY GRANTING FLOWERS POSTCONVICTION RELIEF.**

**Question Presented**

Whether the trial court abused its discretion by granting relief in a Superior Court Criminal Rule 61 motion for postconviction relief.<sup>12</sup>

**Standard and Scope of Review**

A Superior Court’s decision on a motion for postconviction relief is reviewed for abuse of discretion.<sup>13</sup> An abuse of discretion occurs when the trial judge “exceeds the bounds of reason in view of the circumstances and has so ignored recognized rules of law or practice so as to produce injustice.”<sup>14</sup> The Court reviews questions of law *de novo*.<sup>15</sup> When addressing the Superior Court’s decision on a motion for postconviction relief, this Court must first consider the procedural requirements of Rule 61 before addressing any substantial issues.<sup>16</sup>

**Merits**

**A. Flowers’ claims are not procedurally defaulted.**

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<sup>12</sup> *State v. Flowers*, 2015 WL 7890623 (Del. Super. Ct. Nov. 20, 2015). (State’s Ex.A).

<sup>13</sup> *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

<sup>14</sup> *Charbonneau v. State*, 904 A.2d 295, 304 (Del. 2006).

<sup>15</sup> *Dawson*, 673 A.2d at 1190. (Citation omitted).

<sup>16</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

Rule 61(i) provides that a claim is procedurally barred if: (1) the motion for postconviction relief was filed more than one year after the final judgment of conviction; (2) the claim was not asserted in a previous postconviction proceeding, unless consideration of the claim is warranted in the interest of justice; (3) the claim was not asserted in the proceedings leading to conviction, unless the movant shows cause for relief from the procedural default and prejudice from violation of the movant's right; or (4) the claim was formally adjudicated, unless reconsideration of the claim is warranted in the interest of justice. Former Rule 61 (i)(5) - which still applies to this case - provided that consideration of claims barred by Rule 61(i)(1), 61(i)(2), or 61(i)(3) was limited to claims that the court lacked jurisdiction or to "a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."<sup>17</sup>

Defendant claims a deprivation of his Sixth Amendment right to counsel and his Sixth Amendment due confrontation protections.

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<sup>17</sup> Rule 61 (i) (5) was amended on June 4, 2014, after Defendant filed the motion in this case. The Court applies the version of the Rule that existed at the time Flowers filed his Rule 61 motion. *Brochu v. State*, 2016 WL 690650, at \*4 n.24 (Del. Feb.19, 2016).

These specific claims were not raised in his direct appeal, or in previous postconviction claims. Cause for his procedural default under Rule 61 is due to ineffective assistance of counsel under Rule 61(i)(3) and the “miscarriage of justice” or “fundamental fairness” exception contained in Rule 61(i)(5).

Rule 61 (i)(5) “is a general default provision, and permits a petitioner to seek relief if he or she was otherwise procedurally barred under Rule 61 (i)(1)–(3).” The “miscarriage of justice” or “fundamental fairness” exception contained in 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 a direct appeal.” This exception may also apply to a claim that there has been a mistaken waiver of fundamental constitutional rights, such as a mistaken waiver of rights to trial, counsel, confrontation, the opportunity to present evidence, protection from self-incrimination and appeal.<sup>18</sup> In this case, Defendant asserts a mistaken, unknowing and involuntary waiver of his fundamental constitutional right of confrontation by virtue of the ineffective assistance of his counsel, and that the constitutional violations undermined the fundamental reliability, integrity and fairness of the proceedings leading to the judgment of conviction. Stated otherwise, Defendant did not knowingly waive his Sixth

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<sup>18</sup>*State v. McKamey*, 2003 WL 22852614, *affd*, 847 A. 2d 1121 (2004), *citing Webster v. State*, 605 A.2d 1364, 1365-1366 (Del. 1992).

Amendment rights to counsel and confrontation when his counsel unreasonably failed to object to the admission of incriminating taped statements based upon a lack of foundation under 11 Del. Code section 3507.

The State is incorrect in its claim that the Defendant did not present a freestanding claim that his rights under the Confrontation Clause were violated. Ground 1 of Defendant’s Rule 61 motion for postconviction relief includes the claim that “the failure to meet the requirements for admission of the statements under 11 Delaware Code section 3507 result[ed] in a violation of his Sixth Amendment due process confrontation right.”<sup>19</sup> The first sentence under the heading “Rule 61 Procedural Predicate” provides that “defendant claims a deprivation of his Sixth Amendment right to counsel and his Sixth Amendment due process confrontation protections.”<sup>20</sup> Defendant further explains that he “asserts a mistaken, unknowing and involuntary waiver of his fundamental constitutional right of confrontation.....” and that he “did not knowingly waive his Sixth Amendment right to counsel and confrontation when his counsel unreasonably failed to object to the admission of incriminating taped

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<sup>19</sup> (DKT 130, p.4).

<sup>20</sup> (DKT 130, p.5).



statements based upon a lack of foundation under 11 Del. Code §3507.<sup>21</sup> Next, he provides that “This claim implicates Defendant’s Sixth Amendment right to confrontation.”<sup>22</sup> Finally, Defendant states in Ground 5 that he “claims a deprivation of his Sixth Amendment right to counsel, and Sixth Amendment due process confrontation rights.”<sup>23</sup> With respect to Ground 5 he further provided that he “asserts a mistaken, unknowing and involuntary waiver of his fundamental constitutional right of confrontation.....” and that he “did not knowingly waive his Sixth Amendment right to counsel and confrontation when his counsel unreasonably failed to object to the admission of incriminating taped statements based upon a lack of foundation under 11 Del. Code section 3507. Thus, Defendant did assert a constitutional violation supporting the lower court’s consideration of the merits of his claim under Rule 61 (i) (5).

The Superior Court properly determined that no procedural bars existed to prevent it from considering the merits of Defendant’s claims, finding that the bars to relief under Rule 61(i)(1)-(3) are inapplicable because Flowers raised a colorable claim that there was a miscarriage of justice caused by a constitutional violation that undermined the fundamental

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<sup>21</sup> (DKT 130, p. 6).

<sup>22</sup> (DKT. 130, p. 11).

<sup>23</sup> (DKT. 130, p. 33).

legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.<sup>24</sup>

The Superior Court did not abuse its discretion by finding that a mistaken waiver of his Sixth Amendment protections constitutes a colorable claim that there was a miscarriage of justice caused by a constitutional violation. The Superior Court cited *Blake v. State* for the proposition that the “Sixth Amendment requires an entirely proper foundation if the prior statement of a witness is to be admitted under Section 3507 as an independent substantial evidence against an accused.”<sup>25</sup> “When a petitioner makes a colorable claim to a mistaken waiver of important constitutional rights Rule 61(i)(5) is available to him.”<sup>26</sup>

Defendant rejects the State’s argument that the Superior Court erred by applying the Rule 61(i)(5) exception based upon considering the “motion as a whole” as opposed to a freestanding Confrontation Clause violation. Defendant has demonstrated that a freestanding Confrontation Clause claim was made and preserved by the multiple references indicating that the improper admission of the section 3507 statements implicated his Sixth Amendment confrontation rights.

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<sup>24</sup> *State v Flowers*, 2015 WL 7890623 (Del. Super.)(*State’s Ex. A*, pgs.4,5).

<sup>25</sup> 3 A.3<sup>rd</sup> 1077, 1083 (Del. 2010).

<sup>26</sup> *Webster v. State*, 605 A. 2d 1364, 1366 (Del. 1992).

Further, Defendant rejects the State's claim that had a freestanding confrontation claim been made it would have been barred as previously adjudicated in his first postconviction motion in 2005. The errors raised in that motion were not addressed in the context of a Sixth Amendment confrontation violation by either trial or appellate counsel. Thus, Rule 61(i)(4) does not apply. If this Court deems this claim as previously adjudicated, then Defendant submits that reconsideration of the claim is warranted in the interest of justice.

## **B. Section 3507 and the Sixth Amendment Confrontation Clause**

The Superior Court did not abuse its discretion by finding that the improper admission of five section 3507 statements constituted a violation of Defendant's Sixth Amendment right to confront witnesses against him. A review of the evolution of section 3507 analysis demonstrates that the State's failure to meet its foundational requirements resulted in a violation of Defendant's Sixth Amendment right to confrontation.

The Sixth Amendment Confrontation Clause guarantees a criminal defendant the right to confront hostile witnesses at a criminal trial. The Confrontation Clause serves to facilitate the truth seeking function of a trial by "ensuring the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing" in the adversarial proceedings.<sup>27</sup> Reliability can be promoted by providing the defendant with the opportunity to directly encounter and cross-examine those witnesses who testify against him. When cross-examining a witness, the defendant must be permitted to test both the credibility of the witness, as well as the witnesses' knowledge of the facts.<sup>28</sup>

11 Del. Code section 3507 was designed to allow the use in a criminal prosecution of a voluntary out-of-court prior statement of a witness

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<sup>27</sup> *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

<sup>28</sup> *Olden v. Kentucky*, 488 U.S. 227, 231 (1988).

who was present and subject to cross-examination as affirmative evidence with substantive independent testimonial value by allowing the admission into evidence of the out-of-court statements of the “turncoat” witness.<sup>29</sup> 11

Del. Code section 3507 provides as follows:

- (a) In a criminal prosecution, 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.
- (b) The rule in subsection (b) of this section shall apply regardless of whether the witnesses' in court testimony is consistent with the prior statement or not. The rule shall likewise apply with or without a showing of surprise by the introducing party.

In *Stevens v. State*,<sup>30</sup> the Court repeated that the statute permitting the admission of a voluntary out-of-court prior statement of a witness who was present and subject to cross-examination must be construed *narrowly* in order to preserve a defendant's rights to confront and cross-examine witnesses providing testimonial evidence. In *Woodlin v. State*,<sup>31</sup> the Court reviewed the foundational requirements of Section 3507 and the clarifications of the rule. It noted that in *Keys v. State*,<sup>32</sup> the Court held that “in order to offer the out-of-court statement of a witness, the statute requires

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<sup>29</sup> *Collins v. State*, 212 WL 5828598 (2012).

<sup>30</sup> 3 A. 3rd 1070 (2010)

<sup>31</sup> 3 A. 3rd 1084 (2010)

<sup>32</sup> 337 A.2d 18 (1975)

the direct examination of the declarant by the party offering the statement, as to both the events perceived or heard and the out-of-court statement itself.” In *Hatcher v. State*,<sup>33</sup> the Court held that the trial judge “must be satisfied that the offering party has shown by a preponderance of the evidence that the statement was voluntarily made, and must render an explicit determination on the issue before admitting it for the jury's consideration.” In *Johnson v. State*,<sup>34</sup> the Court clarified that a witnesses' statement may be introduced under Section 3507 *only* if the two-part foundation identified in *Keys* is first established: *by having the witness testify about both the events and whether or not they are true*. In *Ray v. State*,<sup>35</sup> the Court elaborated that in order to conform to the Sixth Amendment's guarantee of an accused's right to confront witnesses against him, the declarant must also be subject to cross examination on the content of the statement as well as its truthfulness. In *Ray* the Court further explained that “Section 3507 requires the State to elicit testimony from the victim on direct examination as to the contents of her out of court statements and whether those statements were true.” In *Feleke v.*

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<sup>33</sup> 337 A.2d 30, 32 (1975)

<sup>34</sup> 338 A.2d 124 (1975)

<sup>35</sup> 587 A.2d 439, 443 (1991)

*State*,<sup>36</sup> the Court affirmed that “**first, the witness must testify as to the truthfulness of the statement.**” (Emphasis added).

The State’s claim that the section 3507 foundation error in this case did not constitute a confrontation clause violation is baseless. It relies on the Delaware Supreme Court’s holding in *Moore v. State*<sup>37</sup> for the proposition that at the time of defendant’s trial, Section 3507 did not require “that the witness either affirm the truthfulness of the out-of-court statement or offer consistent testimony.”<sup>38</sup>

The Superior Court found that the State’s reliance upon *Moore* was misplaced:

“The foundational requirements of section 3507 are well settled. While the case law discussing section 3507 has evolved over the years, the language of section 3507 has not changed. With respect to the truthfulness prong, the *Moore* Court held: “[T]here is no requirement that the witness either affirm the truthfulness of the out-of-court statement, or offer consistent trial testimony.” *Moore v. State*, 1995 WL 67104, at \*2 (Del. Super.) In so finding, the *Moore* Court relied on the holding in *Ray v. State*, 587 A.2d 439 (Del. 1991). In *Ray*, the Delaware Supreme Court held that the witness must testify as to whether or not the events discussed in the out-of-court statement are true. A witness is not required to affirm that the prior out-of-court statement is true. Rather, testimony must

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<sup>36</sup> 620 A.2d 222, 226–27 (1993)

<sup>37</sup> 1995 WL 67104 (Del. Super.)

<sup>38</sup> *Id.* at 2.

be elicited inquiry whether or not the prior statement was true. *Id.* at 443.”<sup>39</sup>

The Superior Court elaborated that the actual answer from the witness has no bearing on the required foundation for admission of a statement under section 3507. Inquiry into the truthfulness of the statement is important for a credibility evaluation by the jury.<sup>40</sup> The defendant’s credibility must be assessed “in the light of all circumstances presented, including any claim by the witness denying the prior statement, or denying memory of the prior statement on operating events, or changing his report of the facts.”<sup>41</sup>

The Superior Court properly rejected the State’s argument denying a Sixth Amendment violation for a Section 3507 foundation deficiency:

“Further, the Supreme Court has held: “[I]n order to conform to the Sixth Amendment’s guarantee of an accused right to confront witnesses against him, the [witness] must also be subject to cross examination on the content of the statement as well as its truthfulness.” *Blake v. State*, 3 A.3d 1077, 1083 (Del. 2010). Because the State failed to inquire into the truthfulness of each of the five out-of-court statements, the proper foundation was not established. Defendant was deprived of his Sixth Amendment right to confront the five witnesses with respect to the truthfulness of their respective statements. Therefore, the five Section 3507 statements should not have been admitted.”<sup>42</sup>

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<sup>39</sup> *State v. Flowers*, 2015 WL 7890623 (Del. Super.)(*State’s Ex. A*, p. 7).

<sup>40</sup> *Blake v. State*, 3 A.3d 1077, 1082 (Del. 2010).

<sup>41</sup> *State v. Flowers*, 2015 WL 7890623 (Del. Super.)(*State’s Ex. A*, p. 8)., citing *Johnson v. State*, 338 A.2d 124, 127 (Del. 1979).

<sup>42</sup> *State v. Flowers*, 2015 WL 7890623 (Del. Super.)(*State’s Ex. A*, p. 8).



The Delaware Supreme Court has held that “[T]he Sixth Amendment requires an entirely properly laid foundation if the prior statement of a witness is to be admitted under section 3507 as independent substantial evidence against an accused.”<sup>43</sup> While *Blake* was decided after Defendant’s trial, it merely reiterates a legal principle previously established by the Court in *Johnson v. State*.<sup>44</sup> The legal predicate for this argument existed prior to Defendant’s trial.

Thus, the lower court properly formulated the legal issues, applied well established legal precedent, and found that a constitutional violation occurred under the facts existing in this case.

### C. Flowers’ postconviction claims

**Claim 1. Flowers’ former attorney was ineffective under *Strickland v. Washington* in failing to object to the admission of taped statements of five State’s witnesses based upon the failure to meet the requirements for admission of the statements under 11 Delaware Code Section 3507 resulting in a violation of his Sixth Amendment due process confrontation right.**<sup>45</sup>

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<sup>43</sup> *Blake v. State*, 3 A.3d 1077, 1083 (Del. 2010).

<sup>44</sup> 338 A.2d 124, 127 (Del. 1975).

<sup>45</sup> Since the State has not accurately provided the Defendant’s Ground 1 argument from his Rule 61 motion, it is provided here verbatim.

Defendant repeats and incorporates by reference the record establishing a claim of a Sixth Amendment Confrontation Clause violation based upon the failure to establish the proper foundation for admission of five section 3507 statements. The State glosses over the plain language of Defendant's Ground 1 claim to support an argument that he did not present a freestanding confrontation clause argument.

**Superior Court abused its discretion by not finding that Trial Counsel was ineffective for failing to object to the admission of five section 3507 statements for inadequate foundation.**

The Superior Court did not abuse its discretion by finding a Sixth Amendment Confrontation Clause violation. While the Superior Court found a Sixth Amendment Confrontation Clause violation, it did not find that Trial Counsel was ineffective for failing to object to the admission of the five section 3507 statements based upon his purported strategy. The Superior Court accepted Trial Counsel's statement that his strategy was to thoroughly cross-examine witnesses regarding inconsistencies between the taped statements and live testimony, and that if he had objected to the State's failure to inquire into the truthfulness requirement for section 3507

statements, he would have “risked undermining his credibility with the jury.”<sup>46</sup>

Superior Court abused its discretion in its evaluation of Trial Counsel’s effectiveness. Since the State’s case rested primarily upon the substance of the section 3507 statements, it follows that a reasonable strategy was to preclude the admission of those statements. Conversely, it was unreasonable not to object to the admission of those statements since there was a valid basis supporting the objection. The facts in this case lead to the ineluctable conclusion that Trial Counsel was ineffective by failing to object to the admission of the out-of-court statements due to an insufficient foundation.

First, there is nothing in Trial Counsel’s affidavit that indicated that he identified the specific foundational deficiency and consciously chose to forego the argument, but rather that he failed to recognize the argument and attempted to rationalize his neglect. Even if Counsel’s failure to object was strategic, it was based upon a misapprehension of the law as revealed in his erroneous statement that “at the time that this trial took place, the law on prior voluntary out-of-court statements was more favorable to the State than

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<sup>46</sup>*While trial counsel’s strategy may be to establish inconsistencies between their respective taped statements and trial testimony, logic dictates that a much stronger strategy would have been to attempt to bar the admission of the §3507 statements altogether.*

it is now.”<sup>47</sup> A strategy based upon an erroneous understanding of the law is objectively unreasonable.

Second, there is no reasonable basis to support the weak claim that making a valid objection would have undermined “his credibility with the jury.” The substance of the objection could have been addressed at side-bar if there was any concern about his “credibility.” Moreover, the standard jury instruction provides that it is the duty of a lawyer to make objections and a jury should not be prejudiced in any way against an attorney who made objections or against the party that the attorney represents.

Next, counsel has a duty to object to inadmissible evidence, and the taped statements were inadmissible due to the lack of a proper foundation under the law as it existed at the time of trial.<sup>48 49</sup> Counsel may have been able to prevent the admission of the most damaging portion of the State’s case (5 taped statements) if objections made.

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<sup>47</sup> (A-109).

<sup>48</sup> *State v. Flowers*, 2015 WL 7890623 (Del. Super.)(State’s Ex. A, p.7). (The State previously acknowledged that it did not lay the proper foundation for the five section 3507 statements because it did not ask the witnesses whether or not the events in their out of court statements were true).

<sup>49</sup> *State v. Flowers*, Del. Super., ID 980800280A, Manning, Comm’r (April 23, 2015)(Rpt. and Rec.)(State’s Exhibit B. p. 14). (The “fact remains that the Delaware Supreme Court’s rulings in *Keys*, *Ray*, *Moore*, and *Feleke*, were all in existence prior to the trial in 2003.”)

Finally, if the State responded to the objection by asking the witnesses about the truthfulness of their out of court statements, it is likely that one or more witnesses would have provided a response favorable to the defense, consistent with their respective trial testimony. That result would have bolstered Counsel's stated strategy.

There was no downside to making the objection. The likely consequences were either that the statements would not be admitted, or that one or more witnesses would likely deny the truthfulness of those statements. Either result would have favored the defense.

It is also likely that it was the State's strategy not to engage in the truthfulness inquiry in order to avoid the likely unfavorable responses from one or more of the witnesses. Trial Counsel should have recognized the State's attempt to gloss over this element and held the State to the well-established requirements for admission of each statement. Allowing the State to admit §3507 statements without inquiring into the truthfulness of those statements from the witnesses - most of whom were hostile - was helpful to the State and damaging to the defense.

Counsel's concern over his credibility with the jury was groundless, especially considering that a jury is instructed that it is an attorney's duty to

make objections and especially when weighed against the powerful benefits from excluding the statements.

Flowers incorporates the reasoning in the Commissioner's Report and Recommendation in support of the claim that Trial Counsel was ineffective by failing to object to the admission of five section 3507 on foundational grounds.<sup>50</sup>

At the time of this trial, the state of the law was that to provide a proper foundation for the admission of a section 3507 statement, the State must establish that the out-of-court statement was voluntary; the witness must testify about the content of the prior statement and whether or not it is true; and the witness must be available for cross-examination. Defense counsel knew, or should have known, of the foundational predicate for admission of a statement under Section 3507, and should have taken steps to prevent the admission of prior taped statements until all requirements were met.

In this case, there was a substantial failure to comply with the foundational requirements for introduction of any of the Section 3507

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<sup>50</sup> *State v. Flowers, Del. Super., ID 980800280A, Manning, Comm'r (April 23, 2015)(Rpt. and Rec.)(State's Exhibit B, Pgs. 13-15). ("Trial counsel could have, and should have, objected to the incomplete foundation prior to the admission of the five Section 3507 statements.... There appears to be no reasonable tactical explanation for trial counsel to have not objected... .... And, "seems to have missed the frontal attack available to him on the foundational issue of truthfulness.")*

statements. Trial counsel knew, or should have known, that the foundational requirements for admission of the section 3507 statements had not been met, and was required to object to the admission of those statements. Trial Counsel's failure to object to the admission of the taped statements constitutes ineffective assistance of counsel resulting in prejudice affecting the outcome and reliability of this proceeding.

### **Actual Prejudice**

Defendant adopts and incorporates by reference both the Superior Court and Commissioner's well-reasoned prejudice analysis under *Strickland* in this case.

The Superior Court properly concluded that prejudice resulted from this constitutional violation<sup>51</sup>:

Without the five section 3507 statements, each of which implicate Defendant as the shooter, the State's case is much weaker. The record reveals that no gun was recovered, no ballistic tests were conducted, no fibers were collected or tested, no fingerprints were lifted, and no DNA was recovered and compared to Defendant's DNA. The eyewitnesses presented by the State were forgetful, uncooperative, and gave conflicting and inconsistent testimony. (Citation omitted).

Three of the five witnesses who gave section 3507 statements – McDougall, Predoux, and Sudler – failed to identify Defendant as a shooter in their in-court

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<sup>51</sup> *State v. Flowers*, 2015 WL 7890623 (Del. Super. Ct., November 20, 2015) (State's Ex.A, pgs. 9-10)

testimony. The remaining two witnesses who gave section 3507 statements, Chamblee and Mays, did identify Defendant as the shooter in their in-court testimony. However, the two testified that they could not be entirely sure that Defendant was the shooter. Chamblee testified that he never saw the shooter's face, but could still identify the shooter as the Defendant. (Citation omitted). Mays testified that he did not see who shot the gun. (Citation omitted). However, Mays picked Defendant out of the photo lineup and testified that the photo he selected resembled the shooter, but he could not be sure that it was definitely the shooter. (Citation omitted).

Defendant's sister, Dawson, also testified for the State. Dawson testified that Defendant lived with her "on and off for years" prior to the shooting. (Citation omitted). She stated that after August 1, 1998, the date of the shooting, Defendant ceased living with her. (Citation omitted). However, Dawson also testified that defendant did not have a stable address prior to the shooting. (Citation omitted). Detective Brock testified that defendant was located in North Carolina in November 1999 and subsequently was extradited to Delaware. (Citation omitted).

It cannot be determined with complete certainty whether the jury still would have returned a guilty verdict based on the in-court testimony by Chamblee, Mays, Dawson, and Brock. However, it is reasonable to infer that the jury relied heavily on the five section 3507 statements in returning a guilty verdict against Defendant. The Court is convinced that improper admission of the five section 3507 statements constitutes a constitutional violation that undermined the fundamental integrity and fairness of the trial.



The Commissioner outlined in detail a similar analysis leading to a finding of prejudice.<sup>52</sup>

Actual prejudice is demonstrated in this case by virtue of the fact that if defense counsel objected to the five section 3507 statements based upon inadequate foundation those statements would not have been admissible. The absence of the taped statements would have substantially undermined the State's case and the reliability of the verdict. Consequently, the outcome would have been different but for counsel's error.

A review of the evidence shows that the State's case was based primarily on the testimony of the five witnesses, and the credibility of those witnesses. However, Ronetta Sudler, Tysheik McDougall and Othello Predeoux gave testimony on direct examination either denying a present recollection of the events surrounding the shooting and/or that Defendant was the shooter, Vernon Mays was unsure if Defendant was the shooter, and even Matthew Chamblee conceded that he may be wrong about whether the Defendant was the shooter. Therefore, it was essential for the State to admit the taped statements of its witnesses because their direct testimony did not support Defendant's guilt.

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<sup>52</sup> *State v. Flowers, Del. Super., ID 980800280A, Manning, Comm'r (April 23, 2015)(Rpt. and Rec.)(State's Exhibit B, Pgs. 15-24).*

On direct, Sudler stated that she didn't remember details of the shooting or who had the gun.<sup>53</sup> She repeated that she did not know if the Defendant was the shooter.<sup>54</sup> Sudler's substance abuse was significant and affected her memory.<sup>55</sup> While she recalls talking to Detective Brock, she was not aware that her statement was being taped.<sup>56</sup> Detective Brock confirmed that Sudler was not aware that her statement was being taped.<sup>57</sup> Sudler was never asked on direct by the prosecutor whether the statement she made to Detective Brock was true or not.

Tysheik McDougall denied a present recollection of the circumstances of the shooting. While she had a vague recollection of her discussion with Detective Brock, she did not recall what she said to him.<sup>58</sup> She testified that she did not see anything, "I wasn't there, so I didn't see anything."<sup>59</sup> McDougall did not know if anyone had a gun.<sup>60</sup> She repeated that that she did not remember much about what she said to Brock.<sup>61</sup> Later, she testified that she did not remember speaking to Brock.<sup>62</sup> There was no testimony that

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<sup>53</sup> (B-17, 18, T-117-124).

<sup>54</sup> (B-32; T-46, 47).

<sup>55</sup> (B-28, 29; T-31, 34, 35).

<sup>56</sup> (B-19; T-125).

<sup>57</sup> (B-21(a); T-142).

<sup>58</sup> (B-47, 48; T-44, 45).

<sup>59</sup> (B-48; T-45).

<sup>60</sup> (B-49; T-50).

<sup>61</sup> (A-48; T-48).

<sup>62</sup> (A-49; T-51).

McDougall was aware that she was being taped. McDougall was never asked on direct by the prosecutor whether any taped statement she made to Detective Brock was true or not.

On direct, Othello Predeoux acknowledged speaking to Brock about the shooting, but stated “I didn't see who was shooting.”<sup>63</sup> He remembered speaking to Brock in Smyrna while he was incarcerated, and remembered telling him what he had just testified to – that he didn't see who was shooting.<sup>64</sup> Predeoux said he didn't remember anything else other than what he testified to.<sup>65</sup> Predeoux was never asked on direct by the prosecutor whether the statement he made to Detective Brock was true or not.

Vernon Mays testified on direct that he denied seeing who shot the guy– “I can't really tell you I saw a lot.”<sup>66</sup> He continued that he did not get a good look at the individual who fired the shots, and he was not sure if the Defendant was the shooter.<sup>67</sup> Mays was never asked on direct by the prosecutor whether any tape statement he made to Detective Brock was true or not.

Matthew Chamblee was the only person who testified on direct that he had a good recollection of the events pertaining to the shooting and

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<sup>63</sup> (A-54; T-70).

<sup>64</sup> (A-54; T-74).

<sup>65</sup> (A-55; T-74).

<sup>66</sup> (A-3; T-63).

<sup>67</sup> (A-5; T-18).

identified the Defendant as holding the gun at the time of the shooting.<sup>68</sup> However, he admitted that the shooter could not be the Defendant.<sup>69</sup> He remembered giving a statement to the police and he testified about the statement that he gave.<sup>70</sup> Chamblee's direct testimony was consistent with the substance of his taped statement. Chamblee was never asked on direct whether the tape statement he made to Detective Brock was true or not.

In view of the exculpatory direct testimony of Sudler, McDougall, Predeoux and Mays, the State needed to move the admission of the taped statements of these witnesses as substantive evidence implicating the Defendant. The State was compelled to counter their direct testimony denying a present recollection of the circumstances of this crime and/or that Flowers was not the shooter. Without the section 3507 statements of Sudler and McDougall, the direct testimony from both witnesses would not have implicated the Defendant. The same is true for the taped statement of Predeoux as his direct testimony did not implicate Flowers. Vernon Mays was uncertain as to the identity of the shooter.

Therefore, since the taped statements of Sudler, McDougall, Predeoux and Mays were damaging to the Defendant, and essential to the State's case,

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<sup>68</sup> (A-39; T-82, 83).

<sup>69</sup> (A-45(a); T-29).

<sup>70</sup> (A-40; T-85-87).

it was incumbent upon Trial Counsel to object to the admission on foundational grounds. Trial counsel's failure to object to the five section 3507 statements taped statements resulted in the erroneous admission of extremely harmful evidence against the Defendant. Trial Counsel's failure to enforce the foundational requirements for admission of the five statements implicated Defendant's Sixth Amendment confrontation right.

The taped statement of Matthew Chamblee was admitted in violation of the requirements of section 3507. While the taped statement was consistent with Chamblee's direct testimony, prejudice was created by the admission of that statement because it served to bolster his in-court testimony, and was merely cumulative evidence.

If defense counsel's performance was not deficient, there was a reasonable probability that the result in this case would have been different. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Griffith v. Johnston*<sup>71</sup> The reviewing court must be confident that at least one juror's verdict would not have been different if the error had not been committed. The reasonable probability standard is less than a preponderance of the evidence, more than a mere showing of some conceivable effect on the outcome. Defendant adamantly submits that Trial

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<sup>71</sup> 899 F.2d 1427 (5<sup>th</sup> Cir. 1990).

Counsel's deficient performance resulted in the improper admission of five section 3507 statements undermining his defense and affecting the outcome of this trial.

The State speculates that had counsel objected, the prosecutor would have simply asked the additional question and the statements would have been admitted. That assumes that the prosecutor was aware of the requirement to make the truthfulness inquiry. If the prosecutor was aware of that requirement, it is reasonable to assume that he would have made an effort to satisfy that requirement in order to comply with well-established law. The fact that the prosecutor did not comply with the law leads to the conclusion that either he was not aware of the specific requirement, or he chose not to comply with it. The prosecutor may have deliberately chosen not to engage in the truthfulness inquiry for fear of unfavorable responses from hostile, uncooperative witnesses. If that is the case, then Trial Counsel facilitated the State's strategy.

Finally, the State attempts to minimize the foundational requirement to inquire into the truthfulness of the out-of-court statement. This is contrary to the multiple decisions of the Delaware Supreme Court which has repeatedly enunciated that the statute permitting the admission of a voluntary out-of-court prior statement of a witness who was present and subject to cross

examination must be construed narrowly in order to preserve a defendant's right to confront and cross examine witnesses providing testimonial evidence.<sup>72</sup>

**Claims 2-4. Trial counsel was ineffective for failing to: object to the admission of section 3507 statements as cumulative; object to the jury having the section 3507 videotaped statements available during deliberation; call five allegedly exculpatory witnesses at trial.**

The Commissioner recommended that claims two, three, and four of Defendant's Motion for Postconviction Relief be denied. Superior Court adopted the Commissioner findings as to those claims. Defendant does not contend that Superior Court abused its discretion in adopting the Commissioner's findings.

**Claim 5- Appellate counsel was ineffective for failure to raise claims of plain error due to the errors relating to the admission of Section 3507 statements during trial, and possession of the taped statements during jury deliberations.**<sup>73</sup>

**A. Defendant did not waive his claims of error under the Sixth Amendment.**

The State contends that Defendant waived any Sixth Amendment appellate claim relating to the admission of the section 3507 statements at

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<sup>72</sup> *Stevens v. State*, 3 A. 3d 1070 (2010)

<sup>73</sup> *Since the State has not accurately stated the Defendant's argument in his Rule 61 motion, it is provided here verbatim.*

trial.<sup>74</sup> There is a distinction between “waiver” and “forfeiture” for appellate review purposes. “[W]aiver is accomplished by intent, [but] forfeiture comes through neglect.”<sup>75</sup> Waiver is the “intentional relinquishment or abandonment of a known right.”<sup>76</sup> Counsel’s failure to object constitutes a forfeiture, subject to plain error review.<sup>77</sup>

Defendant maintains that trial counsel acted unreasonably in failing to object at trial for the reasons previously stated. There is nothing in Trial Counsel’s affidavit indicating that he deliberately considered the unraised issue and made a conscious decision to forego it. This conclusion is consistent with his admission reflecting a misunderstanding of the law and supports a finding of ineffectiveness.<sup>78</sup> At best, Trial Counsel’s failure to object was more acquiescence based upon a misunderstanding of the law as opposed to a deliberate, strategic decision. Therefore, this error is more accurately classified as a forfeiture leading to plain error review.

Even if Trial Counsel’s decision not to object was reasonable, it does not follow that appellate counsel must ratify that strategy when it leads to an

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<sup>74</sup> See, *United States v. Teague*, 443 F.3d 1310, 1314 (10<sup>th</sup> Cir. 2006) (holding that a party who has waived the right is not entitled to appellate review).

<sup>75</sup> *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10<sup>th</sup> Cir. 2000), quoting *United States v. Staples*, 202 F.3d 992, 995 (7<sup>th</sup> Cir. 2000).

<sup>76</sup> *United States v. Olano*, 507 U.S. 725, 733 (1993).

<sup>77</sup> See *Teague*, 443 F.3d at 1314 (holding that in cases of forfeiture, the defendant may obtain appellate review on a plain error standard).

<sup>78</sup> (A-109) (“at the time that this trial took place, the law on prior voluntary out-of-court statements was more favorable to the State than it is now”).



error of constitutional magnitude undermining the fundamental legality, reliability, integrity or fairness of the trial proceedings. Trial Counsel's decision not to object to the admission of five section 3507 statements does not preclude a claim of plain error on direct appeal when the admission of that evidence is the result of a constitutional violation.<sup>79</sup>

In *Haney*, the defendant was charged with two crimes: attempted escape from prison and possession of escape paraphernalia, and was convicted only on the latter charge. The question on appeal was whether he should have been permitted and instruction on a duress defense. The District Court was told repeatedly that Haney did not assert a duress defense to any claim that he was attempting to escape.<sup>80</sup> Counsel explicitly stated that the defendant was raising a duress defense only with regard to potential aiding and abetting liability on the escape charge. When the government represented to the court that it would not seek aiding and abetting liability, the judge stated that the duress question was a nonissue. Nonetheless, citing *Jones v. United States*,<sup>81</sup> the en banc court unanimously concluded that this was a case of forfeiture, and applied plain error review:

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<sup>79</sup> *United States v. Haney*, 318 F.3<sup>rd</sup> 1161, 1166-67 (10<sup>th</sup> Cir. 2003). *United States v. Arviso-Mata*, 442 F.3<sup>rd</sup> 382 (5<sup>th</sup> Circ. 2006).

<sup>80</sup> *Id.* at 1166.

<sup>81</sup> 527 U.S. 373, 388 (1999),

Mr. Haney was not entitled to assert a duress defense and receive a duress instruction based upon his actions as a principal. The District Court was not presented with that defense. To the contrary, the District Court was told repeatedly that Mr. Haney did not assert a duress defense to any claim that he was attempting to escape. Thus, his theory on appeal is forfeited. The rule concerning forfeiture encourages resolution of issues that are often factually dependent at the District Court and avoids inconsistent strategy on appeal.

That said, we still may review for plain error. *See Jones*, 527 U.S. at 388, 119 S.Ct. 2090. To notice plain error under Fed.R.Crim.P. 52(b), the error must be (1) an actual error that was forfeited; (2) plain or obvious; and (3) affect substantial rights, in other words, in most cases the error must be prejudicial, i.e. it must have affected the outcome of the trial. *See Olano*, 507 U.S. at 733-34, 113 S.Ct. 1770. Even if these requirements are met, this court's power to correct the error is permissive, not mandatory. Our discretion should be exercised in those comparatively rare instances where the error "seriously affects fairness, integrity, or public reputation of judicial proceedings." *Id.* at 732, 113 S.Ct.1170.<sup>82</sup>

This is a case where the Court's discretion should be exercised because of the magnitude of the constitutional errors at issue and how they impacted the outcome of this trial.

The State's fear -- that by finding that counsel acted reasonably in failing to object at trial, but objectively unreasonable for the same behavior

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<sup>82</sup> *Haney*, 318 F.3rd at 1165.

on appeal -- that the stage has been set for manipulating the appeal process, is specious. In this case, there are no facts to support a claim of sandbagging.

**B. Appellate counsel was ineffective for failing to raise plain error in the direct appeal.**

Defendant argued that his Sixth Amendment right to effective assistance of counsel was violated because Appellate Counsel failed to argue on direct appeal that the five Section 3507 statements were admitted without a proper foundation. Since this issue was not raised at trial or on direct appeal, it is procedurally barred under Rule 61(i)(3), unless defendant can establish (1) cause for his failure to have raised the earlier; and (2) actual prejudice.

Applying the two-pronged test set out in *Strickland v. Washington*,<sup>83</sup> the Superior Court correctly found that cause for the procedural default under Rule 61 was due to ineffective assistance of counsel under Rule 61(i)(3) and the “miscarriage of justice” or “fundamental fairness” exception contained in Rule 61(i)(5).

The Superior Court did not abuse its discretion by finding that Appellate Counsel was ineffective based upon the failure to raise the Section 3507 issue on direct appeal because his conduct fell below an objective standard of result reasonableness, and constitutes error on appeal.

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<sup>83</sup> 466 U.S. 668 (1984)

The Superior Court did not abuse its discretion by finding that the “miscarriage of justice” or “fundamental fairness” exception contained in Rule 61(i)(5) was met based upon a finding that improper admission of five section 3507 statements constituted a violation of Defendant’s Sixth Amendment right to confront witnesses against him. The Superior Court’s analysis clearly demonstrated the magnitude of this constitutional error and the prejudice it created.

The Superior Court did not abuse its discretion in finding that Defendant suffered actual prejudice because of Appellate Counsel’s failure to raise the section 3507 issue on direct appeal. Without the five section 3507 statements, the State’s case against defendant was much weaker. The Superior Court did not abuse its discretion by finding that on “direct appeal, it is likely that, if presented with the issue of the improper foundation for the admission of the five Section 3507 statements, the Supreme Court would have reversed Defendant’s convictions in 2004.” The Superior Court did not abuse its discretion by finding that defendant suffered actual prejudice because of Appellate Counsel’s failure to raise the issue regarding the improper foundation for admission of the five Section 3507 statements on direct appeal.

Defendant rejects the State's claim that Superior Court was legally wrong in applying the law and abused its discretion in granting relief because "Flowers could not have raised an ineffective assistance of appellate counsel claim at trial or on direct appeal under Rule 61(i)(3). As noted by Superior Court, although "the *Strickland* test was developed to evaluate trial counsel, it also may be applied 'to evaluate appellate counsel's performance.'"<sup>84</sup>

Alternatively, whether the failure to appeal a meritorious issue amounts to ineffective assistance of appellate counsel as defined by *Strickland*, three factors must be examined. A defendant must demonstrate that: (1) the issue not raised was significant and obvious; (2) the issue not raised was clearly stronger than the issues raised on appeal; and, (3) the decision not to raise an issue on appeal lacked an articulable strategy. *Gray v. Greer*.<sup>85</sup> If the response to each of these factors is in the affirmative, the first prong of *Strickland*, i.e., deficient performance, is satisfied. If the first prong is satisfied, the Defendant must still satisfy the second prong of *Strickland*. He must demonstrate that there is a reasonable probability that but for appellate counsel's unprofessional errors, the result of the trial would

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<sup>84</sup> *State v. Flowers*, 2015 WL 7890623 (Del. Super. Ct., Nov. 20, 2015) (State's Exhibit A, p. 12 citing *Ploof v. State*, 75 A.3d 811, 831 (Del. 2013).

<sup>85</sup> 800 F.2d 644, 646 (1986).

have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case.

Even under the test above, Appellate counsel was ineffective by failing to identify, consider and raise the constitutional issues relating to the admission of five section 3507 statements on direct appeal which formed the foundation of the State's case.

**(1) The issue not raised was significant and obvious.**

The admission of the five section 3507 statements – without inquiring into truthfulness – directly violates the language of the statute. The Supreme Court decisions establishing the foundational requirements of section 3507 existed well before the trial in this case. The State has previously acknowledged that it did not satisfy the truthfulness inquiry under Section 3507. Therefore, this factor has been met.

**(2) The issue not raised was clearly stronger than the issues raised on appeal.**

The issues not raised relating to the five section 3507 statements were clearly stronger than the issues raised on direct appeal because they involved errors of constitutional magnitude involving the core evidence of the State's case. As noted, the State's case against Defendant was much weaker without the five section 3507 statements. Moreover, it is beyond dispute that there was an improper foundation for admission of those statements. Issues of

constitutional error relating to the most damaging aspect of the State's case dwarfs the issues actually raised on direct appeal in terms of strength and magnitude.

**(3) The decision not to raise an issue on appeal lacked an articulable strategy.**

In his affidavit, Trial Counsel relied on his explanation for not objecting to the section 3507 statements as his basis for not raising this issue on direct appeal. Defendant incorporates by reference his argument why Trial Counsel's decision was unreasonable and not strategic. Moreover, if there was a strategy, it was based upon a misapprehension of the law, and therefore was unreasonable. To the extent that Trial Counsel continued to operate under the erroneous understanding that "at the time that this trial took place, the law on prior voluntary out-of-court statements was more favorable to the State than it is now" then it follows that any strategy not to raise this issue was based upon a misunderstanding of the law, and was therefore unreasonable.<sup>86</sup>

Flowers asserts that the centrality and prejudicial nature of the taped Section 3507 statements should have caused Appellate Counsel to focus on the multiple legal errors in the admission of the taped statements based upon insufficient foundation. Appellate counsel's ultimate choice of issues for

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<sup>86</sup> (A-109).

appeal fell below “an objective standard of reasonableness.” Therefore, there is a sufficient record to support the Superior Court’s finding of ineffective assistance of appellate counsel.

**C. The constitutional error was not “de minimus.”**

Lastly, the State continues to minimize the nature and extent of this error by claiming that any failure by the prosecutors to engage in the truthfulness inquiry is “de minimus” and not a Confrontation Clause violation.<sup>87</sup> This is contrary to the analysis and conclusions made by the Superior Court, as well as the Commissioner. Flowers incorporates the factors supporting actual prejudice stemming from this constitutional error previously highlighted herein.

For the reasons stated, the failure to meet a well-established foundational requirement for the admission of five witness statements under section 3507 constitutes plain error and/or error under the *Strickland* cause and prejudice test. Consequently, Flowers lost an opportunity for review of the errors relating to the admissibility of the taped statements under section 3507, under a plain error standard on direct appeal. Defendant was compelled to pursue these issues under a more formidable legal standard. Consequently, actual prejudice is demonstrated by the failure to raise

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<sup>87</sup> (*State Op. Br.*, p. 39).



meritorious legal claims on direct appeal which probably would have resulted in a reversal of Defendant's convictions.

## CONCLUSION

Defendant respectfully requests this Court to grant the following relief based upon the facts and authorities presented herein:

1. Affirm the Superior Court's decision granting, in part, Defendant's Rule 61 motion for postconviction relief.

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Dated April 4, 2016