



IN THE SUPREME COURT OF THE STATE OF DELAWARE

*ANTOINE L. MILLER,* )  
 )  
Defendant-Below, )  
Appellant, )  
 ) No. 654, 2015  
v. )  
 )  
*STATE OF DELAWARE,* )  
 )  
Plaintiff-Below, )  
Appellee. )

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

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APPELLANT'S AMENDED OPENING BRIEF

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## NATURE AND STAGE OF PROCEEDINGS

On October 30, 2014 shortly after 6:00 a.m., Wilmington police searched 810 West 9th Street pursuant to a search warrant issued by Justice of the Peace Court #20, and recovered purported heroin from the third floor bedroom closet of Antoine Miller ("Miller") and Felicia Pagan ("Pagan"). A handgun was collected from the back roof of the neighboring residence at 812 West 9th Street. Miller and Pagan were arrested.

On November 12, 2014, Miller and Pagan appeared for their preliminary hearing in the Court of Common Pleas. (A14). On November 24, 2014, Pagan and Miller were indicted in Superior Court. On December 22, 2014, a re-Indictment was filed against Miller, Pagan, and forty-four other co-defendants, including Andrew Lloyd. (A47).

The Indictment charged Miller with three sets of charges:

a) Criminal racketeering and conspiracy to commit racketeering between December 1, 2013 and November 23, 2014. (A48-54).

b) drug dealing, aggravated possession, and conspiracy second degree on October 16-17, 2014 (A77-78); and

c) drug dealing, aggravated possession, possession of a firearm during the commission of a felony, possession of drug paraphernalia, possession of marijuana, conspiracy second degree, possession of a firearm by

a person prohibited, and possession of ammunition by a person prohibited on October 30, 2014. (A81-83).

On July 27, 2015, Miller filed two motions: a) a Motion to Suppress the Evidence seized by Wilmington police from his residence on October 30, 2014 (A105) and b) a Motion for a Flowers hearing requesting the Court conduct an *in camera* examination of the confidential informant ("CI") who had made the allegations appearing in the affidavit of probable cause for the search warrant for Miller's residence. (A150). On August 10, 2015, the State filed a response to Miller's motion to suppress evidence and a response to Miller's motion for a Flowers hearing. (A158-197). On September 18, 2015, the Superior Court held a hearing on Miller's motions. (A204).

On October 7, 2015, the Hearing Judge advised that he was denying Miller's motions and would file a decision explaining same. (A8) On October 20, 2015, the jury trial of Miller and his co-defendant (now co-appellant) Andrew Lloyd commenced and continued until October 30, 2015. (A270-633). At trial, Miller moved for Judgment of Acquittal on the October 16-17 aggravated possession count. (A592).

On October 30, 2015, the jury returned its verdict, convicting Miller of 1) conspiracy to commit racketeering, 2) conspiracy second degree on October 16-17, and 3) aggravated possession, conspiracy second degree, and possession

of drug paraphernalia, on October 30, 2014. The jury acquitted Miller of all the other counts, including the firearm charges (A10). On November 6, 2015, Miller renewed his Motion for Judgment of Acquittal on the aggravated possession count. (A657) The State filed a written response to said motion on November 13, 2015. (A643)

On November 18, 2015, Miller appeared for sentencing. (A646) The Sentencing Judge denied Miller's Motion for Judgment of Acquittal and sentenced Miller to twenty years at Level V for Conspiracy to Commit Racketeering and twenty years at Level V for Aggravated Possession, to run concurrently. (A652) On December 4, 2015, Miller filed his Notice of Appeal.

**This is Miller's opening brief.**

## SUMMARY OF ARGUMENTS

- I. The Superior Court erred when it failed to grant Miller's Motion to Suppress.
- II. The Superior Court erred when it failed to grant Miller's Flowers Motion after Miller had shown that the CI had supplied false information to law enforcement.
- III. The Superior Court committed plain error when it allowed the racketeering charge and the conspiracy to commit racketeering charge to go to the Jury.
- IV. The Superior Court erred when it failed to adequately instruct the Jury on racketeering and conspiracy to commit racketeering.
- V. The Superior Court erred when it allowed the State to admit the plea agreements of various co-defendants for no purpose other than to bolster the State's case against Lloyd and Miller.
- VI. The Superior Court erred when it failed to grant Miller's Motion for Judgment of Acquittal as to the October 30, 2014 aggravated possession charge, given that the State failed to offer any forensic analysis of the material seized and its weight.



**VII. The Superior Court's sentence of Miller to twenty years of incarceration for conspiracy to commit racketeering, and twenty years for aggravated possession, was excessive.**

## STATEMENT OF FACTS

The facts relevant to Miller are best appreciated as they developed chronologically in the record. That record developed as follows:

- 1) October 28, 2014, probable cause affidavit and search warrant application;
- 2) November 12, 2014 preliminary hearing;
- 3) September 18, 2015 suppression hearing; and
- 4) October 20-30, 2015 Trial.

### 1. October 28, 2014 probable cause affidavit.

On October 28, 2014, Wilmington Police Detective Joseph Leary and Delaware State Police Detective Michael Terranova submitted a ninety-nine paragraph probable cause affidavit requesting search warrants for ten different residences, including 810 West 9th Street, the home of appellant Antoine L. Miller and Felicia Pagan. (A115-38)

Miller and Pagan were referenced in paragraphs 81 through 89 of said affidavit. (A134-36) Those paragraphs are reproduced below:

"(81) Your Affiants are aware that a maroon 2006 Dodge Caravan displaying Delaware temporary registration XC994600, VIN#: 2D4GP44L96R711946 is registered to Felicia Pagan (Unknown Female), 810 W. 9th Street, Wilmington, Delaware.

(82) Your Affiants are aware that Andrew LLOYD utilizes a maroon 2006 Dodge Caravan displaying

**Delaware temporary registration XC994600, VIN#: 2D4GP44L96R711946 registered to Felicia Pagan of 810 West 9th Street, Wilmington, Delaware to distribute controlled dangerous substances.**

**(83) Your Affiants have been investigating the Andrew LLOYD drug trafficking organization since January, 2014. During the investigation Andrew LLOYD has orchestrated the transportation of illegal narcotics by means of a maroon 2006 Dodge Caravan displaying Delaware temporary registration XC994600. VIN#: 2D4GP44L96R711946 registered to Felicia Pagan (Unknown Female), 810 W. 9th Street, Wilmington, Delaware. This information has been corroborated by the use of surveillance units and confidential sources.**

**(84) During the first two weeks of July, 2014, your affiants obtained information from a past proven and reliable CI involving Andrew LLOYD. The CI advised he/she observed a maroon Dodge Caravan (with an unknown PA registration) at a meet location in the city of Philadelphia, Pennsylvania. The CI advised the driver of the vehicle was an unknown Hispanic male.**

**(85) During the course of the investigation in September, 2014 a past proven and reliable CI that advised while he/she was on his way to the predetermined meet location, he/she observed a maroon Dodge Caravan stationary in the 2600 block of North Market Street, Wilmington, Delaware and in front of the flower shop. The CI advised he/she observed Andrew LLOYD exit the front passenger seat of the van.**

**(86) During the course of the investigation, in the first two weeks of October, 2014, Detective Leary observed the maroon 2006 Dodge Caravan displaying Delaware temporary registration XC994600, VIN#:**

**2D4GP44L96R711946 registered to Felicia Pagan of 810 West 9th Street, Wilmington, Delaware XC994600 parked in the area of B and Bradford Streets located in Wilmington, Delaware. It should be noted the van was observed during a controlled delivery of heroin with Andrew LLOYD.**

**(87) Your Affiants were made aware from, a past proven and reliable confidential informant reported Felicia Pagan and Andrew LLOYD's girlfriend previously resided together in Claymont, Delaware. Pagan and LLOYD's girlfriend would store large quantities of heroin for Andrew LLOYD in the Claymont, Delaware residence. The confidential informant advised that he/she transported "ROCK" and "LITTLE B" to Felicia Pagan residence to pick up "ROCK'S" van. The confidential informant advised that he/she observed "ROCK" and "LITTLE B" at the door of 810 West 9th Street, Wilmington, Delaware.**

**(88) Your Affiants obtained information from Detective Dewey Stout, of the Delaware State Police, who contacted the Pennsylvania State Police and learned the maroon 2006 Dodge Caravan displaying Delaware temporary registration XC994600, VIN#: 2D4GP44L96R711946 registered to Felicia Pagan of 810 Wet 9th Street, Wilmington, Delaware, was owned, prior to 10/01/14, by Yvonne Johnson of 2305 South Bucknell Street, Philadelphia, Pennsylvania. Your Affiants can truly state a confidential source reported the source of Andrew LLOYD's illegal narcotic supply was from Philadelphia, Pennsylvania and the car was recently sold to the Andrew LLOYD Drug Trafficking Organization by the source of supply.**

**(89) Your Affiants are aware that a confidential source revealed Andrew LLOYD and Felicia PAGAN were communicating regarding possible retaliation**

involving "RATCHET". Your Affiants know "RATCHET" is Diamere Fairley BMN 031292 of 602 Pilgram Road, New Castle, Delaware. Your Affiants know Felicia PAGAN resides at 810 West 9th Street, Wilmington, Delaware. Your Affiants furthermore know Antoine MILLER (AKA "FLOCK") BMN 012480 resides at 810 West 9th Street, Wilmington, Delaware. Your Affiants know "RATCHET" and "FLOCK" have had suspected violent encounters involving firearms within the past. Your Affiants received information from a confidential source that "RATCHET" was attempting to seek violent revenge on "FLOCK" as recent as October 27, 2014."

The requested search warrant for 810 West 9<sup>th</sup> Street was issued by Justice of the Peace Court No. 20 on October 28, 2014. (A115)

On October 30, 2014, shortly after 6 a.m., members of the Wilmington Police Department executed the search warrant for 810 West 9th Street. Items seized from 810 West 9th Street included "bundles" of purported heroin and cash in the closet of the master bedroom, which was occupied by Miller and Pagan. A loaded Baretta 9mm was seized from the back roof of the neighboring residence at 812 West 9th Street.

## 2. November 12, 2014 Preliminary Hearing

At the preliminary hearing of November 12, 2014, Detective Leary testified that, as of October 28, 2014, Pagan had not been observed being involved in any drug transactions involving the maroon 2006 Dodge van referenced in the probable cause affidavit (A30) The van had been seized and

searched and had "no aftermarket type of secret compartments or traps."  
(A31) Pagan was never observed involved in any drug transactions prior to the  
October 30 search. (A31)

Similarly, Detective Leary was unaware of "Miller ever being seen by law  
enforcement in connection with any drug runs in that vehicle." (A36) Leary  
testified that he was unaware of any drug activity that Miller was involved in  
that gave rise to the search warrant. (A37)

### 3. September 18, 2015 Suppression Hearing

On July 27, 2015, Miller filed a motion to suppress the October 30, 2014  
search on the basis that the October 30, 2014 probable cause affidavit was  
fundamentally flawed and insufficient. (A105) In particular, Miller's Motion  
to Suppress:

- 1) identified allegations in the probable cause affidavit that were  
false; and
- 2) challenged the nexus between the criminal activity described in the  
affidavit and the place to be searched—810 West 9th Street.

Miller also filed a Flowers Motion requesting that the Superior Court  
conduct an *in camera* examination of the confidential informant ("CI") who  
had supposedly made the allegations detailed in the probable cause affidavit.  
(A150)

Miller's Flowers Motion also pointed to allegations in the probable cause affidavit that were demonstrably false and requested that the Court conduct an *in camera* examination of the CI regarding all of the CI sourced allegations referenced in the probable cause affidavit.

On September 18, 2015, Superior Court held a hearing on Miller's motions. (A204) At the outset, the State acknowledged that "normally in a search warrant case, of course, we have a four corner review," but requested leave to ask a few background questions of Delaware State Police Sergeant John Lloyd, head of the Delaware State Police drug unit, to "help color the veracity of the warrant." (A210) [Sergeant Lloyd explained that "We were independently running investigations. Delaware State Police was concentrating their efforts on Jarrell Brown and his source of supply, as Wilmington Police was concentrating their efforts on Andrew Lloyd and their source of supply."]  
(A210) Sgt. Lloyd acknowledged that one search warrant application was authored for searches at eight locations. (A211-12) He did none of the authoring of the search warrant application. (A213) Although Lloyd testified at the hearing as to observations he had made about Miller and the 2006 maroon Dodge Caravan, none of those observations were in the probable cause affidavit. (A213-14)

Sergeant Joseph Leary of the Wilmington Police Department testified that he began investigating a heroin trafficking organization led by Andrew Lloyd in January 2014. (A214) Sgt. Leary was one of the co-affiants for the search warrant for 810 West 9th Street. (A215) On direct, Leary explained that he did not make any personal observations of the 2006 maroon Dodge caravan through September 2014:

"Q. Let's talk for a moment about that. Did you make observations of the red, maroon, the vehicle in question, the 2006 maroon Dodge Caravan prior to September, so actually in the Summer of 2014?

A. I never made any personal observations, everything was from the CI at that point.

Q. What was the—were there controlled purchases during the summer of 2014, through use of that same CI?

A. Yes.

Q. And what was—what was his information as to the van to you?

A. That he just—he just drove past—more or less, not exact words, that he just drove past "Rock" on 26th Street, that whatever he had—or at 26th and Market and "Rock" saw him as he was getting out of the maroon-in-color Dodge Caravan. That he would have to hurry up and call him because "Rock" would expect him to call him right away when he saw him. (A216)"



Leary explained that the information in paragraph 89 of the affidavit was not from the CI but instead a wiretap:

"So 89, this is the actual wiretap itself, the source. And this is a conversation between Andrew Lloyd and Felicia Pagan in reference to Felicia being concerned for her safety because of actions that he defendant had earlier taken against somebody that he believed had shot him earlier that year.

Q. So in Paragraph 89, the confidential source is actually referring to the wiretap?

A. Yes, sir.

Q. Did you hear these wire communications between Felicia Pagan and Andrew Lloyd?

A. I did.

Q. How is this—can you read how this is set forth in the warrant itself, that paragraph?

A. Yes, sir.

Q. Felicia Pagan, your affiant's are aware that a confidential source revealed Andrew Lloyd and Felicia Pagan were communicating regarding possible retaliation involving "Ratchet."

He was identified as Dymere Fairly of 602 Pilgrim Road. Felicia Pagan resides at 810 West 9th Street. Your affiant's further note Antoine Miller, a/k/a/ "Flock," resides at 810 West 9th Street. Your affiant's know "Ratchet" and "Flock" have been involved in violent encounters involving firearms within the past. Affiant's received information from a confidential source that "Ratchet" was attempting to

seek violent revenge on "Flock" as of recent as of October 27, 2014." (A216-172)

A decision was made to execute the search warrants "sooner" based on the information in paragraph 89:

"Q. One question about wiretaps themselves: How does it work if you suspect imminent violence on a wire; in terms of the obligations of police?

A. Well, we would be obligated to tell him that—there is no way he would be aware of it. Obviously, his wife is the other person concerned for this information, so for her not to pass that information onto him, it would be almost not—or I would assume that there's no way that she would not tell him that this guy is making these threats or that he's not aware of what threats are safety concerns.

Q. Was part of the decision to execute the search warrants when you did based on this information Paragraph 89?

A. Sooner, yes." (A217)

On cross-examination, Leary testified that until he and the CI drove past the maroon 2006 Dodge Caravan, parked at 810 West 9th Street in October 2014, said address had not appeared in the investigation. (A218-19)

The following information developed regarding paragraph 85 of the affidavit:

"Q. Officer, let's turn to Paragraph 85?

A. Okay.

**Q. Was this the same CI who gave information in Paragraph 85?**

**A. Yes.**

**Q. Okay. It says, "During the course of investigation in September 2014 a past, proven and reliable CI advised that while he/she was on his way to the predetermined meeting location, he/she observed a maroon Dodge Caravan stationary in the 2600 Block of North market Street, Wilmington, Delaware in front of the flower shop." Correct?**

**A. Correct.**

**Q. "The CI is going to a predetermined meet location." Was that for a controlled transaction?**

**A. That was to meet with us to prepare to do a controlled purchase, yes.**

**Q. Okay. And was that in fact done that day?**

**A. Controlled purchase was not done that day.**

**Q. Why is that?**

**A. Because a different type of transaction occurred.**

**Q. How do you mean?**

**You're looking at Mr. Denney for some reason.**

**MR. DENNEY:**

**Can I meet with counsel? (Discussion held between counsel off the record.)**

**BY MR. HALEY:**

**Q. Is that somehow disclosing the identity of the informant by answering that question?**

**A. Yes.**

**Q. Has a transaction of that date been charged in the indictment, Officer, or no?**

**A. Yes.**

**Q. It has been.**

**Officer, the only September transactions I see charged in the indictment are dated September 10, 2014; does that sound right to you as a date that transaction you're referring to occurred?**

**A. I don't recall.**

**Q. All right. But whatever happened on that date was charged in the indictment, you're telling me that; correct?**

**A. I—I know that that day that there was an arrest made and that's—I don't recall the exact date.**

**Q. All right. Taking it roughly, chronologically as the State has organized the indictment, it appears to be Counts 42 and 43 are September 5, 2014; Count 44, 45 are September 2014; Counts 46, 47, 48 and 49 are September 10, 2014.**

**Besides that, are there any other September dates charged in the indictment, Officer, that you're aware?**

**A. I don't know, sir.**

**Q. But this transaction you're talking about in Paragraph 85, meet location where the CI saw this, that was a charged transaction in this indictment?**

**A. I believe so.**

**Q. All right.**

**A. I know the person was charged." (A223)**

Detective Leary was then confronted with the fact that the 2006 Dodge Caravan could not have been located in Wilmington on the September date that the CI had said it was:

**"Q. Okay. It relates to this question ultimately— ultimately, we'll get to this point in the close, but as I understand it the Dodge Caravan did not make its way to Delaware until about September 23rd, September 24th, 2014 that was purchased by Ms. Pagan and a Parking Authority Officer; are you aware of that, Officer?**

**A. I'm sorry?**

**Q. Are you aware that that Dodge Caravan was impounded from early August until late September 2014 by the Philadelphia Parking Authority and wasn't off that lot until September 24, 2014 when Felicia Pagan brought it to Delaware.**

**Are you aware of that, Officer?**

**A. It wasn't off the lot from—**

**Q. From Philadelphia?**

**A. In September? I'm unaware.**

**Q. Okay. So let's say, for the record, if that lot—if that van did not come to Delaware, you know, in Felicia Pagan's possession until September 24, 2014, what would that suggest to you about Paragraph 85 which says that that van was seen some time before that date on 2600 Block of North Market Street?**

**A. I'm going by strictly the source, the confidential informant's information that that was the car identified at that night; that's how we identified that vehicle as the source vehicle.**

**Q. Does it suggest to you the fact that that source is not reliable?**

**A. I'm sorry?**

**Q. Does it suggest to you the fact that that source was not reliable if that van was in fact impounded when he or she said they saw it on North Market Street earlier that—**

**A. That a maroon van was not involved?**

**He didn't have the tag or anything like that to say it was exact.**

**Q. But he always spoke about these vans being the same, the one he saw in Philly and the one he saw on West 9th Street was the same van; correct?**

**A. That we believed it to be the same van, yes.**

**Q. Well, he communicated that to you folks; right?**

**A. Well, he communicated that it was the same van.**

**Q. Right. And he said that was the same van that he saw back in September 2014 also; correct?**

**A. Yes.**

**Q. On one of the dates charged in the indictment?**

**A. Yes.**

**Q. And are you aware, as you sit here today, when that van came out of Philadelphia off the Parking Authority impound lot?**

**A. No, sir, I am not." (A224)**

**Regarding paragraph 87 of the affidavit, Leary testified:**

**"Q. Paragraph 87, Sergeant, the same CI told you about background between Ms. Pagan and Mr. Lloyd's girlfriend; is that right?**

**Is this off the wire or is this off of that same CI?**

**A. No, that's the same CI.**

**Q. Okay.**

**Did the CI say when Ms. Pagan and Mr. Lloyd's girlfriend had previously lived together in Claymont, Delaware?**

**A. He did not know the exact date. He knew that it was—that it had been in the past.**

**Q. Okay. As far as how far in the distant past it had been, did you probe and get that information, Officer?**

**A. I did not.**

**Q. So if it had been 2007 they last lived together in that area, you couldn't say whether that was or wasn't?**

**A. I could not.**

**Q. Do you probe to try to get how current information is or how stale it may be in your investigations, Officer?**

**A. I just asked him how he knew the relationship between Andrew Lloyd and Felicia Pagan was and that's how we came up with that information." (A224)**

**Regarding the CI's observation of 810 West 9th Street:**

**"Q. Okay, And this CI said he had seen "Rock" and "Little B" at the door of that residence also; is that right?**

**A. Yes.**

**Q. The CI shared no current information about "Rock" and Ms. Pagan doing anything currently; correct?**

**A. Not that I'm—**

**Q. He observed no transactions at 810 West 9th Street?**

**A. He did not.**

**Q. He observed no deliveries or pickups at 810 West 9th Street?**

**A. He did not." (A225)**

**Regarding paragraph 88 of the affidavit, Leary testified:**

**"Q. Paragraph 88, Officer, refers to Yvonne Johnson as being the prior owner of that van; correct?**

**A. Yes.**



**Q. And she is a Philadelphia resident at 2305 South Bucknell Street?**

**A. Oh, I don't know if she is currently, but that was the address that was on the registration received from the Pennsylvania State Police.**

**Q. Right. And that's what you put in your affidavit; correct?**

**A. That's correct.**

**Q. Was there any investigation done of Ms. Yvonne Johnson, Officer?**

**A. No.**

**Q. So whether she was actually a source of supply or anyone associated with her marketing heroin out of her van in Philadelphia beforehand that was not investigated?**

**A. No." (A225)**

**Regarding the sale transaction described in paragraph 88:**

**"Q. Last paragraph—last sentence, excuse me, of Paragraph 88, Officer. That sentence states: "Your affiant's can truly state a confidential source reported the source of Andrew Lloyd's illegal narcotic supply was from Philadelphia, Pennsylvania and the car was recently sold to the Andrew Lloyd Drug Trafficking Organization by the source of supply."**

**Correct?**

**A. Yes.**

**Q. All right. As I read that sentence it communicates to me a transaction between one individual, source of supply, and someone here, Felicia Pagan; correct?**

**A. I'm sorry?**

**Q. Sure. As I read that sentence, it says that the source of supply sold this 2006 Dodge Caravan referenced in that same paragraph sentence above to Felicia Pagan?**

**A. Well, it says the Andrew Lloyd Drug Organization.**

**Q. Okay. And Ms. Pagan—as I understand from the paragraph—is somehow the front, the straw purchaser, the owner of this van so Andrew Lloyd can do drug trafficking; correct? That's what's being communicated here, isn't it?**

**A. Yes.**

**Q. All right. And was it the same CI who said to you that the source of supply sold this to the Andrew Lloyd Organization?**

**A. Yes. He believed that that's what occurred or that he had been told. I'm not sure.**

**Q. So, how well the source knew that you did not make any notes whether you saw that or observed that or heard that from somebody else on the street or anything like that?**

**A. I'm assuming that he got it from Andrew Lloyd.**

**Q. You can't assume here, Officer?**

**A. Well, no I don't know where he got the information from.**

**Q. You didn't probe it to find out—**

**A. No, sir, I did not." (A225-226)**

**Leary acknowledged the correctness of his November 12, 2014 preliminary hearing testimony that he was unaware of any drug activity that Miller had involvement in prior to the October 30 search. (A230)**

**Yvonne Johnson testified that she had lived at 2305 South Bucknell Street in Philadelphia for the previous four years, while employed at Thomas Jefferson Hospital. She had acquired the maroon 2006 Dodge Caravan in December 2012 and had lost it in August 2014. She would use it to go back and forth to work and to take care of family business. (A231) The only people living with Ms. Johnson at 2305 South Bucknell in 2014 were her 15 year-old son with cerebral palsy and her teenage daughter. (A232) Neither child was a licensed driver, and Ms. Johnson had the only set of keys. (A232 ) The keys were out of her possession only one time between 2012 and 2014:**

**"Q. All right. Over the time period that you had the keys to that van, 2012 to 2014, August, who else did you give keys to use?**

**A. Nobody, just one time.**

**Q. What time was that?**

**A. The day of August the 14th—I mean August 2014 when the van got taken. I had gave it to my neighbor to go food shopping for me because I was sick that day.**

**Q. What was your neighbor's name?**

**A. His name is Judas Knight.**

**Q. Had your neighbor ever taken that vehicle before?**

**A. No.**

**Q. What happened to him on August 14, 2014?**

**A. Well, I think I had a brake light out and the cop pulled him over, and I didn't know he had a suspended license.**

**Q. So what happened?**

**A. So they took my car because his license was messed up.**

**Q. Your vehicle got towed?**

**A. Yes, Parking Authority—well, the cops towed it, but Parking Authority came and picked it up.**

**Q. What happened to the van after that?**

**A. I guess they sold it to the auction. I didn't pick up the van because it was a piece of junk, it needed a lot of work to it, so I didn't want it no more. I let them keep it." (A232)**

**Johnson was not impeached on cross-examination. (A233)**

**Detective Dewey Stout of the Delaware State Police testified:**

**"Q. Your name is specifically mentioned in Paragraph 88 of the relevant search warrant to today's proceedings, a search warrant for 810 West 9th Street. It reads: "Your affiant's obtained information from Detective Dewey Stout of the Delaware State Police who contacted the Pennsylvania State Police who learned the maroon Dodge Caravan displaying Delaware XC 994600 with the VIN number registered to Felicia Pagan of 810 West 9th Street in Wilmington was owned before October by Yvonne Johnson of 2305 Bucknell Street in Philadelphia."**

**Is all that true?**

**A. Yes, sir.**

**Q. How do you know that?**

**A. I placed a request with Sergeant Skahill of the Pennsylvania state Police. He's a contact I use whenever I need information out of the State of Pennsylvania, and he returned—I made the request to him and he returned that information to me via e-mail." (A234)**

**On cross-examination, Detective Stout continued:**

**"Your Pennsylvania State Police contact told you that the prior owner of that Dodge Caravan was Yvonne Johnson of 2305 South Bucknell Street; correct?"**

**A. There were two prior owners listed, I believe, one was—it showed that the vehicle was in possession of a Philadelphia Parking Authority and then there was also an owner listed as Ms. Johnson.**

**A. No, it was a chain of e-mails. I believe Sergeant Skahill requested the vehicle be looked into by a member—by a detective that works auto theft to do a workup on it and then they just e-mailed me that**

information. There was no printout from any database or anything like that, it was just e-mail communication.

**BY MR. HALEY:**

**Q. Is the e-mail in front of you right now, Detective?**

**A. Yes, this is what was forwarded to me from Pennsylvania.**

**Q. An e-mail chain?**

**A. Yes, sir.**

**Q. Okay. And—let's see. So it begins, I guess, from you to Officer Garrett Wattford at 7:42 a.m.; is that the first e-mail?**

**A. Sir, I gave the information to what would be listed there as Sergeant Skahill, he then forwarded the request to Garrett Wattford.**

**Q. I see, Skahill is you—**

**A. That's my contact that I deal with.**

**Q. In PA?**

**A. In PA, yes, sir.**

**Q. I gotcha, okay.**

**Then Wattford reported back to Skahill by e-mail; correct?**

**A. Yes, sir.**

**Q. That same day, Tuesday on 4/21, 9:39 a.m.**

**MR. HALEY:** This is Exhibit B, by the way, Your Honor, in the State's response. And he says that the Philadelphia Parking Authority had a court order and this vehicle was sole to Felicia Pagan; correct?

**A.** That's what it says on the e-mail, yes, sir.

**Q.** Okay. And the previous owner was Yvonne Johnson?

**A.** Yes, sir.

**Q.** Okay.

Did you share this complete e-mail, Officer, with a Sergeant Leary or Sergeant Terranova from the Wilmington Police Department?

**A.** Sergeant Leary or--

**Q.** Right here.

**A.** I'm from the Delaware State Police, I believe I gave it—I believe it was Sergeant Leary that I gave the information to, yes." (A234-5)

Felicia Pagan testified that she had been married to Antoine Miller for four years. (A241) She was also familiar with Andrew Lloyd and his girlfriend Tiara White. (A241) Ms. White had lived with Pagan in Edgemoor at 23 Polk Drive for a couple of months, 10 years ago. (A241-2) She had never lived in Claymont. (A241)

Her October 2014 phone call to Andrew Lloyd concerned a threat on her life. (A242)

#### 4. October 20-30 Trial Testimony

Trial commenced on October 20, 2015 and continued for eight days. A brief review of the facts relevant to Miller follows. On October 20, the State's witnesses said nothing about Miller. Miller objected to the State calling co-defendant Devonte Lewis for no purpose other than to put his criminal racketeering plea into evidence and to point out that Miller and Lloyd were his co-defendants on that charge. (A284-286)

Seven law enforcement officers testified on October 21. None of them said anything pertaining to Miller. Co-defendant Zechariah Palmer and co-defendant Rakeem Mills were called for no purpose other than to put their racketeering pleas into evidence. (A 306-324)

Co-Defendant Wanda Lloyd, sister of Andrew Lloyd, testified that she lived at the residence referred to as the "White House" in Claymont. (A310) Antoine Miller was never there, nor was Felicia Pagan. (A313).

Co-Defendant Kimwanya Allen testified that Andrew Lloyd "Had a group of people selling drugs. (A317) Antoine Miller had no role in this activity. (A323 )

Co-Defendant Galen Collins testified that he had known Antoine Miller since middle school. Miller was not part of the circle selling drugs. (A333 )



**Co-Defendant Demetrius Brown testified that he knew of Antoine Miller, and Miller was not part of the circle selling drugs. (A342 )**

**On October 22, co-defendant Brian Miller testified that he had been in the drug trade in Wilmington for ten years and he did not know Antoine Miller and had never come across him. (A360 )**

**Co-Defendant Jarrell Brown testified that he and Andrew Lloyd were "business associates on the streets... basically, like, we sold, -- we kind of, like, sold drugs together." (A368) Regarding Antoine Miller, Brown testified:**

**"A. I told Officer Lloyd that I didn't necessarily know Antoine Miller on the streets. But I told him also that one time Rock said that he was going to defer the business to him, but he never did so.**

**Q. So Rock meaning –**

**A. Rock said basically he said he was going to stop. He was going to fall back for a little while. And he said I was going to be dealing with Flock, but that never happened." (A382)**

**Co-Defendant Janelle Lloyd - Andrew Lloyd's sister - testified that Andrew Lloyd came to her house three or four times with heroin. "Flock" (Miller) came once, and was just sitting at the table. (A411)**

**Police Sergeant Andrew Lloyd testified that on October 16, 2014, while undercover, he and cooperating witness Steven Roscoe went to the Walmart parking lot to conduct a controlled transaction with Co-Defendant Andrew**

Lloyd, who was driving a white minivan. Miller was seated in the back seat of the white minivan. (A421) Sergeant Lloyd drove Roscoe into the City of Wilmington, following defendant Lloyd's white minivan, as instructed. During this trip, Sergeant Lloyd observed Miller looking back at his vehicle, "trying to see if other vehicles were following us." (A422)

Co-defendant and cooperating witness Steven Roscoe testified to the October 16, 2014 meeting with Andrew Lloyd at the Walmart parking lot, also. Antoine Miller was in the back seat of the white minivan. (A442) Roscoe had known Miller for ten years. (A442) He had also seen Miller with Andrew Lloyd in September 2014. (A443) He had no dealings with Miller. (A 453-454)

Co-defendant LaKenya Howard testified she had never seen Miller with drugs. (A487) Co-defendant Kareem Keyes testified that Miller was "like a soldier, trooper they all hang out together." (A498)

Felicia Pagan testified regarding a threat on her life on October 26, 2014. (A508) Wilmington Police Detective Jose Cintron testified that he had participated in the search of 810 W. 9th Street in the early morning of October 30, 2014, and had found apparent heroin in a backpack, in the closet, in the master bedroom. (A515) He had also found money in an orange jacket in that closet. (A515)

Wilmington Police Sergeant Leary testified that his unit counted the baggies removed from the backpack found in the master bedroom closet, and had counted 1,428 baggies. (A522) They did not attempt to weigh the baggies. (A523)

Officer Thomas Lynch of the Wilmington Police Department testified that during the early morning search of October 30, 2014, he was positioned in the rear of the 800 block of W. 9<sup>th</sup> Street and had seen an object thrown from the third floor bedroom window of 810 W. 9<sup>th</sup> Street onto the roof of 812 W. 9<sup>th</sup> Street, as the search commenced. (A548)

On October 28, Sergeant Lloyd testified that the 20 bundles, or 260 baggies of heroin seized in September 2014 had been analyzed by forensic expert Ashley Long of the Division of Forensic Science, and weighed 3.028 grams per her admitted report. (A572 )

The prosecutor then led Sgt. Lloyd through some math:

"Q. If 20 bundles—let's round it down, 20 bundles is Three grams, how much is 40 bundles?

A. Six grams.

Q. How about 50?

A. 50 bundles would be seven-and-a-half grams.

Q. Congratulations." (A573)

Sergeant Lloyd acknowledged that no DEA report was in evidence regarding the substance in the 1,428 baggies seized on October 30 at 810 W. 9<sup>th</sup> Street. (A574) Finally, Sgt. Leary testified that until the search of 810 West 9<sup>th</sup> Street, he knew of "no drug activity" involving Miller. (A583).

In the defense case, Miller called Mark Weber, a private investigator, retired from the New Jersey State Police with twelve years in narcotics investigation, who had investigated the scene of the 800 block of W. 9<sup>th</sup> Street at Miller's request. (A576-7) Weber and another investigator videotaped "the rear and front and inside of 810 W. 9<sup>th</sup> Street" and that video was played for the jury (A577-579).

The video showed that the third floor bedroom window of 810 W. 9<sup>th</sup> Street could not be seen from the position where Officer Lynch had testified that he was stationed, several houses down from the from the back of 810 W. 9<sup>th</sup> Street, discrediting Lynch's testimony. (A579-80)

Miller moved for an acquittal on the October 30 heroin count. (A592, 662) As the Court directed, counsel and the Court also exchanged e-mail regarding jury instructions, and the defense proposed a particular racketeering instruction. (A666)

## ARGUMENT I

The Superior Court erred when it failed to grant Miller's Motion to Suppress.

### A. QUESTION PRESENTED

Did the Superior Court err when it failed to grant Miller's Motion to Suppress Evidence after the suppression hearing record made clear that:

- 1) the probable cause affidavit supporting the warrant was fundamentally flawed;
- 2) there was no nexus between any criminal activity and the place to be searched—810 West 9<sup>th</sup> Street? (A 105)

### B. STANDARD AND SCOPE OF REVIEW

This Court reviews the denial of a Motion to Suppress for an abuse of discretion. *Morgan v. State*, 962 A.2d 248, 252 (Del. 2008) Recently, this Court has explained:

"In assessing ...(defendant's)..challenge to the... Warrants on the grounds they violated the Fourth Amendment to the United States Constitution and Article I, § 6 of the Delaware Constitution, we review such alleged constitutional violations *de novo*. We also apply *de novo* review to the Superior Court's legal conclusions when reviewing the denial of motion to suppress. "We review the Superior Court's factual findings to determine 'whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous.' "

C. MERITS

Miller's Motion to Suppress

Miller moved to suppress the search of his home at 810 West 9<sup>th</sup> Street on two bases: 1) False allegation in the probable cause affidavit; and 2) the lack of a nexus between criminal activity described in the affidavit and the place to be searched—810 West 9<sup>th</sup> Street.

False Allegations in the Affidavit of Probable Cause

As this Court has explained:

"Under the United States and Delaware Constitutions, a search warrant may be issued only upon the showing of probable cause. "An affidavit in support of a search warrant must, within the four-corners of the affidavit, set forth facts adequate for a judicial officer to form a reasonable belief that an offense has been committed and the property to be seized will be found in a particular place." In determining whether probable cause exists to obtain a search warrant, our courts \*1108 apply a "totality of the circumstances" test. We have explained that this test requires the court to examine factors such as the reliability of the informant, the details contained in the informant's tip and the degree to which the tip is corroborated by independent police surveillance and information. If an informant's tip is sufficiently corroborated by independent police work, the tip may form the basis for probable cause even though nothing is known about the informant's credibility."

*LeGrande v. State*, 947 A.2d 1103, 1107-08 (Del. 2008) Where the defendant has raised a fair challenge to the facts in the probable cause affidavit, a Franks hearing is appropriate:

"Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to a finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.' (citation omitted)

Thus, in the so-called reverse-*Franks* situation, if the defendant establishes by a preponderance of the evidence that the police knowingly and intentionally, or with reckless disregard for the truth, omitted information material to a finding of probable cause, the reviewing court will add the omitted information to the affidavit and examine the affidavit with the newly added information to determine whether the affidavit still gives rise to probable cause." *Sisson v. State*, 903 A.2d 288, 300 (Del. 2000)

Miller showed that the alleged "facts" appearing in paragraphs 81 to 89 of the affidavit were unreliable. Those paragraphs communicated a broad

theme to the Magistrate that Andrew Lloyd had been using a 2006 maroon Dodge caravan, registered to Felicia Pagan at 810 West 9<sup>th</sup> Street, to transport illegal narcotics. Paragraphs 84 and 85 stated that the CI reported seeing the maroon Dodge Caravan at a "meet location" in Philadelphia, and then subsequently in September 2014 in the 2600 block of North Market Street with Andrew Lloyd. Detective Leary testified that the September 2014 sighting with Andrew Lloyd occurred on the date of a controlled transaction that had led to an arrest and to a transaction charged in the indictment.

The only September dates for which charges were brought in the Indictment were September 5, 10, and 17 (i.e Counts 42 through 49) (A66-68). But until September 2014, the 2006 maroon Dodge Caravan was sitting on the Philadelphia Parking Authority impound lot, having been towed there on August 21 and not auctioned until September 23. To state the obvious: the 2006 maroon Dodge Caravan could not have been at the streets of Wilmington on September 5, 10 and 17.

Additionally, and inaccurately, paragraph 88 of the affidavit reported: "The maroon 2006 Dodge Caravan was recently sold to the Andrew Lloyd drug trafficking organization by the source of supply." In fact, the facts available to law enforcement at the time showed that said allegation was untrue. First, the State has never contended that the Philadelphia Parking



Authority was the "source of supply" and part of the alleged criminal racketeering of the 'Andrew Lloyd Trafficking Organization.'" Furthermore, law enforcement knew that the change of ownership of the maroon 2006 Dodge caravan had gone from Yvonne Johnson to the Philadelphia Parking Authority and could only have been purchased by Felicia Pagan from the Parking Authority. It failed to include the Parking Authority information at paragraph 88 of the affidavit. Instead, the affiants misled the Magistrate into believing that "the car was recently sold to the Andrew Lloyd Drug Trafficking Organization by the source of supply."

Regarding paragraph 87 of the affidavit, Miller showed through the testimony of Felicia Pagan that Pagan had never resided in Claymont, Delaware, and had last resided with Andrew Lloyd's girlfriend ten years earlier. Nothing about the staleness of this information was communicated to the Magistrate.

Finally, the affiant and chief investigator Leary unequivocally testified at the preliminary hearing, suppression hearing, and at trial, that prior to the October 30, 2014 search, he knew of no involvement of Felicia Pagan and Antoine Miller in drug activity.

This was not communicated to the Magistrate. (Per Franks, the inaccurate facts of paragraphs 84, 85, 87 and 88 must be stricken.

Additionally, the reviewing Court must consider the newly added information that Felicia Pagan had purchased the 2006 maroon Dodge caravan at a Philadelphia Parking Authority auction, and that as of October 28, 2014, Detective Leary had no awareness of any criminal drug activity involving Pagan and Miller. Given that paragraph 89 communicates nothing more than that Detective Leary feared that Miller would become the victim of violence, probable cause to search 810 West 9<sup>th</sup> Street based on the four corners of the affidavit, vanishes when viewed in a post-Franks context.

No Nexus of Criminal Activity Between 81 West 9<sup>th</sup> Street and Criminal Activity

The probable cause affidavit describes no criminal activity at 810 West 9<sup>th</sup> Street and instead, as outlined above, describes only unfounded suspicions regarding the "2006 maroon Dodge caravan."

Paragraph 87 of the affidavit describes the unreliable CI transporting "Little B" and "Rock" to 810 West 9<sup>th</sup> Street to pick up "Rock's" van, but no pick up of drugs or money at 810 West 9<sup>th</sup> Street is described. "Rock" and "Little B" are described as being observed at the "door of 810 West 9<sup>th</sup> Street," but are not described entering same. No criminal activity or exchange is described at 810 West 9<sup>th</sup> Street.

It is axiomatic that "for probable cause to exist, 'a nexus between the items to be sought and a place to be searched' must be established." *Hooks v.*

*State*, 416 A.2d 189, 203 (Del. 1980) Detective Leary repeatedly testified that, as of October 28, 2014, he had no evidence of any criminal activity involving the residents at 810 West 9<sup>th</sup> Street—Felicia Pagan and Antoine Miller.

Once the affidavit is corrected to remove all of the misinformation from this CI, and to include Leary's awareness of no criminal activity involving Pagan and Miller as of October 28, 2014, any arguable nexus of criminal activity with 810 W. 9<sup>th</sup> Street vanishes. Post a Franks hearing, there appears to be nothing left of the affidavit, hardly "reasonable suspicion," let alone "probable cause."

## ARGUMENT II

The Superior Court erred when it failed to grant Miller's Flowers Motion after Miller had shown that the CI had supplied false information to law enforcement.

### A. QUESTION PRESENTED

Once Miller showed that the CI had supplied false information to law enforcement, which false information had formed the basis for probable cause to search Miller's home, should the Court have granted Miller's Flower's Motion and conducted an *in camera* examination of the CI? (A150)

### B. STANDARD AND SCOPE OF REVIEW

The Supreme Court will "review a trial court's denial of a Flowers motion for abuse of discretion." *Kennard v. State*, 2007 WL 2523022 (Del. Supr)\*3

### C. MERITS

As outlined above,

Miller established that the CI had delivered false information to law enforcement, which false information had ended up in the affidavit of probable cause. Specifically, the 2006 maroon Dodge caravan had not been sold to the "Andrew Lloyd Drug Trafficking Organization by the "source of supply." Felicia Pagan had purchased the vehicle not from "Yvonne

Johnson," but from the Philadelphia Parking Authority at an auction. That 2006 maroon Dodge caravan had not been in the 2600 block of North Market Street during the first few weeks of September 2014, during a controlled and indicted drug transaction, because it was sitting on the Philadelphia Parking Authority impound lot at that time.

Yvonne Johnson testified that no one but herself drove her 2006 maroon Dodge Caravan for the four years she owned it back and forth to her job at Thomas Jefferson Hospital. It had no secret "traps" in it.

Felicia Pagan testified that she had never lived in Claymont and had last lived with Andrew Lloyd's girlfriend in Edgemoor ten years earlier.

In sum, Miller showed that little of what the CI had told law enforcement, that had ended up in paragraphs 81-89 of the affidavit, was true. Only two logical conclusions followed: either the CI was embellishing, or Detective Leary was embellishing. Only an *in camera* examination of the CI could disclose for sure, which is exactly the truth-seeking and constitutionally-necessary defense investigation and preparation that Flowers meant to protect:

"Even where the privilege is strictly applicable, the trial court may compel disclosure if it appears necessary in order to avoid the risk of false testimony or in order to secure useful testimony."

Had the Court conducted the *in camera* examination of the CI, testing the CI on the falsehoods revealed by Miller, then the CI's credibility or Sgt. Leary's credibility would have been shredded even more, further undermining the probable cause affidavit at issue in Miller's pending suppression motion and farther warranting suppression. The Hearing Judge had no discretion to deny Miller's Flowers motion.

### ARGUMENT III

The Superior Court committed plain error when it allowed the racketeering charge and the conspiracy to commit racketeering charge to go to the Jury.

#### A. QUESTION PRESENTED

Given that the evidence showed nothing more than several defendants buying and selling drugs over less than a year's time, did the State fail to show sufficient evidence of an "enterprise existing separate and apart from the criminal acts of the defendants" to justify the racketeering charge, and the conspiracy to commit racketeering charge going to the Jury? (This question was not specifically preserved below, so this Court reviews for plain error. The interests of justice exception of Rule 8 requires plain error review, as Miller's racketeering conspiracy conviction, and twenty-year sentence, should not rest on evidence insufficient to prove racketeering or conspiracy to racketeer.)

#### B. STANDARD AND SCOPE OF REVIEW

"The standard of review in assessing an insufficiency of evidence claim is 'whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find [a] defendant guilty beyond a reasonable doubt.'" *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995)

C. MERITS

Applicable law

Delaware's prohibition against criminal racketeering appears at 11 Del.

C. § 1503, which states:

"(a) It shall be unlawful for any person employed by, or associated with, any enterprise to conduct or participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity or collection of an unlawful debt.

(b) It is unlawful for any person, through a pattern racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property or personal property, of any nature, including money.

(c) It is unlawful for any person who has received any proceeds derived, directly or indirectly, from a pattern of racketeering activity in which such person has participated, to use or invest, directly or indirectly, any part of such proceeds or any proceeds derived from the investment or use thereof, in the acquisition of any interest in, or the establishment or operation of, any enterprise or real property.

(d) It is unlawful for any person to conspire or attempt to violate any of the provisions of subsection (a), (b), or(c) of this section."

Resort to some standard to evaluate the "enterprise" element of racketeering is necessary. As stated in *Stroik v. State*, 671 A.2d 1335. (Del 1996):



"The trial judge used the standard announced by the United States Supreme Court in *United States v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L.Ed.2d 246 (1981), as refined by the Third Circuit in *United States v. Riccobene*, 3d Cir. 709 F.2d 214 (1983), to determine whether the requisite showing of association-in-fact enterprise had been made. Limited strictly to the facts of this case, the Court approves of the trial judge's use of the *Turkette-Riccobene* standard." Stroik at 1341.

Per *Turkette* and *Riccobene*, an enterprise is demonstrated where the State proves:

"(1) that the enterprise is an ongoing organization with some sort of framework for making or carrying out decisions;

(2) that the various associates function as a continuing unit; and

(3) that the enterprise be separate and apart from the pattern of activity in which it engages."  
(Citations omitted) Stroik at 1341.

The Stroik Court offered further guidance regarding proof of the third element of the "enterprise" proof:

"The *Lemm* court held that an enterprise exists separate and apart from the criminal acts of its principals if the "association could have conducted its activities without committing the predicate felonious acts." *Lemm*, while not a perfect approach, provides manageable criteria for the trial court to use in determining whether an enterprise exists "separate and apart" from the pattern of racketeering. Reliance on the *Lemm* approach is therefore appropriate in this limited factual context." *Stroik* at 1341.

Andrew Lloyd's business was not complicated. Several witnesses explained that he simply sold drugs. He neither created, nor operated, any enterprise apart from that.

The State submitted no evidence that Lloyd's activity consisted of anything more than buying heroin at a wholesale rate, repackaging it, and then selling it to other middle men. The co-defendants who entered into conspiracies with Lloyd to facilitate those drug sales did not create, or function, in any "enterprise" apart from their buying and selling heroin. The fact showed that Lloyd had a network of customers and used co-defendants, as needed, to facilitate his trade of "buying low" and "selling high." Such activity cannot constitute racketeering without a showing of another "enterprise" separate and apart from Lloyd's criminal activity. No such "separate enterprise" evidence appeared.

Given the absence of evidence of an enterprise "separate and apart" from buying and selling heroin, an indispensable element of racketeering and conspiracy to commit racketeering was missing, and said charges should not have reached the Jury.

## ARGUMENT IV

The Superior Court erred when it failed to adequately instruct the Jury on racketeering and conspiracy to commit racketeering.

### A. QUESTION PRESENTED

Did the Trial Judge commit prejudicial error when he refused the defense request for a racketeering instruction that fully explained the elements of the offense and instead gave an instruction that failed to explain the elements of racketeering? (A654, 666)

### B. STANDARD AND SCOPE OF REVIEW

The Superior Court's denial of a requested jury instruction is reviewed de novo. *Gutierrez v. State*, 842 A.2d 650, 651 (Del. 2004)

### C. MERITS

The racketeering instruction given by the Court explained the "enterprise" element of racketeering as follows:

"Under the law, an "enterprise" includes a group of people associated in fact for a common purpose."  
(A657)

Miller objected to the Court's proposed instruction and requested an instruction, consistent with Stroik that gave the jury some idea of the limits of the word "enterprise" (i.e. that it was something separate and distinct from the association to conduct illegal drug sales). (A654)

Given the difficulty faced by the Stroik Court in grappling with the elements of the racketeering statute, it was readily apparent that a jury, like the Trial Judge referred to in Stroik, needed a detailed instruction defining and explaining the elements of the racketeering statute.

As the Court well knows, a conspiracy can also include "a group of people associating for a common purpose". The racketeering instruction, though, failed to explain that an "enterprise" had to be something "separate and apart" from the heroin-dealing conspiracies. The instruction gave a vague description of what an enterprise included, but did not explain that the enterprise had to be something other than the merely associating for criminal activities. By failing to give the "enterprise" element any boundaries, it had no real meaning and could not be measured by the jury. The instruction allowed the juror to think: "That Andrew Lloyd sure had a real good enterprise going selling heroin, that must be racketeering."

Although the trial judge in Stroik had turned to the Turkette-Riccobene standard to assess the racketeering evidence before him, the Trial Judge below gave the jury no standard. By failing to give the jury any standard to assess whether the State had proven the elements of the racketeering statute, the Trial Judge left the jury completely uninformed about the nature of racketeering and unable to assess whether either Miller or

**Lloyd had formed the intent or acted to commit racketeering or the intent to commit conspiracy to racketeer.**

## ARGUMENT V

The Superior Court erred when it allowed the State to admit the plea agreements of various co-defendants for no purpose other than to bolster the State's case against Lloyd and Miller.

### A. QUESTION PRESENTED

Was it reversible error when the Trial Judge allowed the State to admit the plea agreements of co-defendants for no purpose other than to bolster the State's racketeering case against Miller and Lloyd? (A286, 315, 505)

### B. STANDARD AND SCOPE OF REVIEW

Rulings on the admission evidence are reviewed for abuse of discretion. *Wright v. State*, 25 A.3d 747, 752 (Del. 2011)

### C. MERITS

The Trial Judge allowed the State to call co-defendants for the sole purpose of putting their plea agreements into evidence, without those witnesses offering any other substantive testimony. The State engaged in the procedure with the following witnesses: 1) co-defendant Davonte Lewis (A 284); 2) co-defendant Zechariah Palmer (A 306); 3) co-defendant Blayton Palmer (A 315); 4) co-defendant Rakeem Mills (A 324); and 5) co-defendant Brian Palmer, Sr. (A 505).

Miller objected to the State calling witnesses to put their plea agreements into evidence with nothing more. (A286, 315, 505)

The Trial Judge repeatedly approved of the State bolstering its case with co-defendant plea agreements. (A286, 505)

In *Allen v. State*, 878 A.2d 447 (Del. 2005), this Court ruled:

"Evidence of a co-defendant's conviction is not generally admissible in the trial of his or her fellow accused. The same is true that a co-defendant's plea agreement to the same offense arising out of the same set of circumstances is also generally inadmissible against his or her fellow defendants. We join in this prevailing view. Thus, a co-defendant's plea agreement may not be used as substantive evidence of a defendant's guilt, to bolster the testimony of a co-defendant, or to directly or indirectly vouch for the veracity of another co-defendant who pled guilty and then testified against his or her fellow accused." *Allen* at 450

The Trial Judge disregarded this Court's specific rule in *Allen* and explicitly approved of the State's use of co-defendant plea agreements to bolster the State's weak racketeering cases against Lloyd and Miller. In light of *Allen*, the trial judge had no discretion to allow the State to use the co-defendants' plea agreements as he did.

## ARGUMENT VI

The Superior Court erred when it failed to grant Miller's Motion for Judgment of Acquittal as to the October 30, 2014 aggravated possession charge, given that the State failed to offer any forensic analysis of the material seized and its weight.

### A. QUESTION PRSENTED

Did the Trial Judge commit reversible error when he failed to grant judgment of acquittal on the October 30, 2014 aggravated possession charge given that there was no forensic analysis to prove the nature of the material seized and its weight? (A 637)

### B. STANDARD AND SCOPE OF REVIEW

Denial of a motion for judgment of acquittal is reviewed to determine "whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt". *Gibbs v. State*, 130 A.2d 312, 314 (Del. 2015)

### C. MERITS

In order to convict Miller of aggravated possession of heroin on October 30, 2014, the jury was required to find, beyond a reasonable doubt, that:

"1) The material that was possessed was heroin or a mixture containing heroin; and 2) Defendant had that



**material in his possession, . . .; and 3) Defendant acted knowingly, . . .; and 4) Defendant possessed 5 grams or more of heroin or a mixture containing heroin." (Jury Instructions A620, 626)**

**Before the Court instructed the jury, Miller moved for Judgment of Acquittal on the basis that there was no expert opinion that the material seized on October 30, 2014 was heroin. (A592, 637, 662)**

**The only piece of circumstantial evidence suggesting a link to heroin was the October 30, 2014 baggies were stamped "El Che", like other baggies of heroin purportedly sold by co-defendant Andrew Lloyd also stamped "El Che". Given that there was no course of dealing evidence submitted regarding Miller, the mere stamp "El Che" on the baggies, should not be sufficient to prove, beyond a reasonable doubt, that those baggies contained heroin.**

## ARGUMENT VII

The Superior Court's sentence of Miller to twenty years of incarceration for conspiracy to commit racketeering, and twenty years for aggravated possession, was excessive.

### A. QUESTION PRESENTED

In light of the evidence against Miller, was the Superior Court's sentence of twenty years of incarceration for conspiracy to commit racketeering, and twenty years for aggravated possession, excessive? (A 648)

### B. STANDARD AND SCOPE OF REVIEW

The Supreme Court reviews sentencing of a defendant in a criminal case under an abuse of discretion standard. *Fink v. State*, 817 A.2d 781, 790 (Del. 2003).

### C. MERITS

As outlined in the Statement of Facts above, the incriminating evidence that the jury may have found against Miller consisted of:

- 1) being seen at a residence where there was heroin on the table;
- 2) turning his head from side to side, and looking at Sergeant Lloyd, while seated in the back seat of the white minivan that Andrew Lloyd was driving on October 16, 2014; and

3) having 1,428 baggies of purported heroin in his bedroom on October 30, 2014.

Conspiracy to commit racketeering and aggravated possession are both class B felonies, each carrying a minimum statutory sentence in the range of two to twenty-five years.

In light of the minimal acts engaged in by Miller, there was no justification for the Superior Court to sentence Miller to twenty years for conspiracy to commit racketeering and twenty years for aggravated possession of heroin.

**CONCLUSION**

The Court should reverse the decision below, suppressing the evidence seized on October 30, directing the Superior Court to enter judgment of acquittal on the conspiracy to commit racketeering charge, and further directing that Miller be given a new trial on the October 16 conspiracy second degree charge.

**/s/ James J. Haley, Jr.**  
**James J. Haley, Jr., Esquire**  
**I.D. No. 2997**  
**FERRARA & HALEY**  
**1716 Wawaset Street**  
**Wilmington, DE 19806-2131**  
**(302) 656-7247**  
**Attorney for Antoine L. Miller**  
**Defendant Below-Appellant**

**June 8, 2016**

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

STATE OF DELAWARE

VS.

ANTOINE MILLER

Alias: See attached list of alias names.

DOB: 01/24/1980

SBI: 00330520

CASE NUMBER:

1411011958

CRIMINAL ACTION NUMBER:

IN14-12-1894

RACKETEERING (F)

IN14-12-1885

TIER 5 POSS (F)

IN14-12-1883

CONSP. 2ND (F)

IN14-12-1889

CONSP. 2ND (F)

IN14-12-1887

POSS DRUG PARAP (M)

COMMITMENT

Nolle Prosequi on all remaining charges in this case

SENTENCE ORDER

NOW THIS 18TH DAY OF NOVEMBER, 2015, IT IS THE ORDER OF  
THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged.  
The defendant is to pay the costs of prosecution and all  
statutory surcharges.

AS TO IN14-12-1894- : TIS  
RACKETEERING

The defendant is to pay a fine in the amount of \$25000.00  
of which \$25000.00 is suspended (see attachment).

Effective October 30, 2014 the defendant is sentenced  
as follows:

- The defendant is placed in the custody of the Department  
of Correction for 20 year(s) at supervision level 5

Level 5 shall run concurrent to any Level 5 now serving.

AS TO IN14-12-1885- : TIS  
TIER 5 POSS

\*\*APPROVED ORDER\*\*

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November 23, 2015 16:11

CERTIFIED AS A TRUE COPY

ATTEST SHARON AGNEW

BY



STATE OF DELAWARE  
VS.

ANTOINE MILLER  
DOB: 01/24/1980  
SBI: 00330520

- The defendant is placed in the custody of the Department of Correction for 20 year(s) at supervision level 5

Level 5 shall run concurrent to any Level 5 now serving.

AS TO IN14-12-1883- : TIS  
CONSP. 2ND

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

- Suspended for 2 year(s) at supervision level 4 DOC DISCRETION

- Suspended after 6 month(s) at supervision level 4 DOC DISCRETION

- For balance to be served at supervision level 3

- Hold at supervision level 3

- Until space is available at supervision level 4 DOC DISCRETION

AS TO IN14-12-1889- : TIS  
CONSP. 2ND

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

- Suspended for 2 year(s) at supervision level 3

Probation is concurrent to criminal action number IN14-12-1883 .

AS TO IN14-12-1887- : TIS  
POSS DRUG PARAP

- The defendant is placed in the custody of the Department of Correction for 6 month(s) at supervision level 5

- Suspended for 1 year(s) at supervision level 3

Probation is concurrent to criminal action number IN14-12-1889 .

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE

VS.

ANTOINE MILLER

DOB: 01/24/1980

SBI: 00330520

CASE NUMBER:

1411011958

Have no contact with ANY AND ALL CODEFENDANTS

Pursuant to 29 Del.C. 4713(b)(2), the defendant having been convicted of a Title 11 felony, it is a condition of the defendant's probation that the defendant shall provide a DNA sample at the time of the first meeting with the defendant's probation officer. See statute.

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

Be evaluated for substance abuse and follow any recommendations for counseling, testing or treatment deemed appropriate.

Defendant may not possess a cellular telephone, blackberry, pager or any other electronic device commonly used to facilitate drug dealing.

NOTES

Defendant's life-long unconcern for the criminal justice system is astounding. Defendant's life has been all about drugs, guns and violence. Today, Defendant is a threat to the public and this sentence reflects that fact. If Defendant is released soon, he will get arrested again for serious felony(s). It is unclear who Defendant will be 5-10 years from now. Defendant could do better. If Defendant has good disciplinary record, he works to further his education in prison and he has a solid, verified plan for work and life after release, he should get serious consideration. As bad as his history is, he actually has shown improvement over the years. But, he is still angry and most comfortable with drug related associates. Court retains jurisdiction. This sentence should be seriously reviewed in 5 years.

STATE OF DELAWARE  
VS.  
ANTOINE MILLER  
DOB: 01/24/1980  
SBI: 00330520

JUDGE FRED S SILVERMAN



FINANCIAL SUMMARY

STATE OF DELAWARE  
VS.  
ANTOINE MILLER  
DOB: 01/24/1980  
SBI: 00330520

CASE NUMBER:  
1411011958

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	.00
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	100.00
PROSECUTION FEE ORDERED	100.00
VICTIM'S COM ORDERED	4500.00
VIDEOPHONE FEE ORDERED	5.00
DELJIS FEE ORDERED	5.00
SECURITY FEE ORDERED	50.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	75.00
SENIOR TRUST FUND FEE	
AMBULANCE FUND FEE	
<hr/>	
TOTAL	4,835.00

\*\*APPROVED ORDER\*\*

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November 23, 2015 16:11

SURCHARGES

STATE OF DELAWARE  
VS.  
ANTOINE MILLER  
DOB: 01/24/1980  
SBI: 00330520

CASE NUMBER:  
1411011958

<u>CRIM ACTION #</u>	<u>DESCRIPTION</u>	<u>AMOUNT</u>
IN14-12-1894	VCF	4500.00

LIST OF ALIAS NAMES

STATE OF DELAWARE  
VS.  
ANTOINE MILLER  
DOB: 01/24/1980  
SBI: 00330520

CASE NUMBER:  
1411011958

ANTOINE L MILLER  
FLOCK MILLER  
ANTIONE L MILLER

IN THE SUPREME COURT OF THE STATE OF DELAWARE

*ANTOINE L. MILLER,* )  
 )  
 Defendant-Below, )  
 Appellant, )  
 ) No. 654, 2015  
 v. )  
 ) On Appeal from the Superior  
 *STATE OF DELAWARE,* ) Court of the State of  
 ) Delaware in and for  
 Plaintiff-Below, ) New Castle County  
 Appellee. )

CERTIFICATE OF SERVICE

I, James J. Haley, Jr., attorney for Appellant, do hereby certify that I caused the attached Appellant's Amended Opening Brief to be served by File & ServeXpress on June 8, 2016 upon:

Elizabeth McFarlan, Esquire  
Deputy Attorney General  
Department of Justice  
Carvel State Office Building  
Seventh Floor  
820 North French Street  
Wilmington, DE 19801

/s/ James J. Haley, Jr.  
James J. Haley, Jr., Esquire  
I.D. No. 2997  
FERRARA & HALEY  
1716 Wawaset Street  
Wilmington, DE 19806-2131  
(302) 656-7247  
Attorney for Antoine L. Miller  
Defendant Below-Appellant

Dated: June 8, 2016