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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| LUIS G. CABRERA, JR., | ) | |
| | ) | |
| Defendant Below, | ) | |
| Appellant. | ) | |
| | ) | No. 372, 2015 |
| v. | ) | |
| | ) | On Appeal from the |
| STATE OF DELAWARE, | ) | Superior Court of the |
| | ) | State of Delaware in and for |
| Plaintiff Below, | ) | New Castle County |
| Appellee. | ) | Cr. ID No. 9904019326 |

# REVISED OPENING BRIEF
# OF APPELLANT LUIS G. CABRERA, JR.

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## PRELIMINARY STATEMENT REGARDING CITATIONS

All emphasis herein is added unless otherwise indicated. Internal quotation marks and footnotes may be omitted when to do so does not affect the meaning of the quotation. The Appendix to this brief is cited as "A___."

The Superior Court's June 22, 2015 revised Opinion granting in part and denying in part Mr. Cabrera's Motion for Post-Conviction Relief is attached hereto as Exhibit 1. The Superior Court's August 7, 2008 Memorandum Opinion denying Mr. Cabrera's motion for leave to permit his counsel to contact jurors is attached hereto as Exhibit 2. The Superior Court's August 14, 2008 Memorandum Opinion denying Mr. Cabrera's motion for leave to take discovery is attached hereto as Exhibit 3. The Superior Court's October 4, 2012 Letter Opinion denying Mr. Cabrera's renewed motion for leave to take discovery is attached hereto as Exhibit 4.

This brief was originally filed on November 9, 2015. In light of the dismissal of the State's cross-appeal, this brief has been revised to remove the section regarding the constitutionality of the 1991 Delaware death penalty statute (found at pages 9-15 of the original brief). In accordance with appellant's understanding of the Clerk's instructions regarding the submission of this revised brief, appellant has not revised or otherwise updated the arguments and citations that were presented in the original brief.

## NATURE OF PROCEEDINGS

Mr. Cabrera was convicted in February 2001 of two counts of First Degree Murder, two counts of Possession of a Firearm during the Commission of a Felony and two counts of Conspiracy in the First Degree, in connection with the murders of Brandon Saunders and Vaughn Rowe, and was sentenced to death. *See State v. Cabrera*, 2002 WL 484641 (Del. Super. Ct. Mar. 14, 2002).

In 2002, Mr. Cabrera filed a motion for a new trial based on the recantation of one of the State's witnesses, Mileka Mathis, which the Superior Court denied (A739). On January 27, 2004, Mr. Cabrera's conviction and death sentence were affirmed on direct appeal. *See Cabrera v. State*, 840 A.2d 1256 (Del. 2004). In November 2004, Mr. Cabrera filed a Rule 61 petition for post-conviction relief, and filed amended petitions in March 2007 and October 2012 (A306-93).

On June 17, 2015, the Superior Court granted Mr. Cabrera's Rule 61 claim that his trial counsel provided ineffective assistance in failing to properly investigate and present mitigation evidence during the penalty phase, and vacated Mr. Cabrera's death sentence (Ex. 1). The Superior Court denied the remainder of Mr. Cabrera's post-conviction claims (*id.*). Mr. Cabrera filed a notice of appeal on July 16, 2015, and the State cross-appealed on July 23, 2015.[1]

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[1] The State voluntarily dismissed its cross-appeal on February 9, 2017, in light of the Court's decisions in *Rauf v. State*, 145 A.3d 430 (Del. 2016), and *Powell v. State*, __ A.3d __, 2016 WL 7243546 (Del. Dec. 15, 2016).

## SUMMARY OF ARGUMENT

1. The Superior Court correctly found that Mr. Cabrera's trial counsel pursued a racially-motivated strategy during jury selection, but erred in holding that actual prejudice must be shown to prevail on a *Batson* claim, and that the claim could be raised only as ineffective assistance of counsel.

2. Mr. Cabrera's trial counsel provided ineffective assistance in failing to move to suppress the gun seized from his residence based on their erroneous view that they should not suggest he had access to the gun.

3. The State's failure to disclose until the first day of jury selection its plan to introduce expert testimony on a key piece of evidence rendered the trial fundamentally unfair and violated due process.

4. The State's lead investigator suborned perjury to overcome a ruling that a key piece of evidence was inadmissible, and the State improperly refused to grant immunity to the witness who later sought to recant her perjured testimony.

5. The jury was improperly death qualified because numerous jurors were excused for cause who stated they would follow the court's instructions and decide the case according to the law despite their views on the death penalty.

6. The *Allen* charge singled out the minority jurors, focused attention on the expense of a retrial, and was unduly coercive. It also failed to include transition language regarding consideration of lesser-included offenses.

7. The State committed repeated *Brady* violations in failing to disclose impeachment evidence regarding one of the defense witnesses, and in failing to disclose exculpatory statements from the girlfriend of one of the victims and statements suggesting that someone else was responsible for the murders.

8. The jury included jurors who were prejudiced and incompetent, the trial court failed to properly investigate those issues, and trial counsel provided ineffective assistance in failing to move to strike the jurors or request a mistrial.

9. Mr. Cabrera's post-conviction counsel should have been permitted to contact the jurors to investigate significant issues concerning juror bias and incompetence, and the prohibition on counsel contacting jurors is unconstitutional.

10. Mr. Cabrera should have been permitted to take discovery concerning the warrantless seizure of the gun, the inappropriate relationship between the lead investigator and one of the State's witnesses, and the exculpatory statements made by the girlfriend of one of the victims.

## STATEMENT OF FACTS

The Superior Court's opinion granting in part and denying in part Mr. Cabrera's Rule 61 Petition sets forth the facts relevant to Mr. Cabrera's Rule 61 claims (Ex. 1). In addition, the facts underlying Mr. Cabrera's conviction and sentence are set forth in this Court's opinion on direct appeal. *See Cabrera v. State*, 840 A.2d 1256 (Del. 2004). Finally, to the extent specific facts are relevant to Mr. Cabrera's Rule 61 claims, they are discussed below in the context of each claim for relief.

## ARGUMENT

### I. MR. CABRERA'S PEREMPTORY CHALLENGES WERE EXERCISED IN A RACIALLY DISCRIMINATORY MANNER

**Questions Presented**: Whether the Superior Court erred in ruling that *Strickland* prejudice is required for a *Batson* violation, and in ruling a reverse-*Batson* claim can be raised only as ineffective assistance of counsel. This issue was preserved for appeal (*see* Ex. 1 at 32-47; A359-60).

**Standard of Review**: The Court reviews questions of law *de novo*, *Outten v. State*, 720 A.2d 547, 551 (Del. 1998), findings of fact for clear error, *Burrell v. State*, 953 A.2d 957, 960 (Del. 2008), and denial of post-conviction relief for abuse of discretion, *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010).

**Merits of Argument**: Purposeful racial discrimination in the selection of a jury violates the Sixth and Fourteenth Amendments and Article I, § 4 of the Delaware Constitution. *See Batson v. Kentucky*, 476 U.S. 79, 84 (1986). This prohibition applies to both prosecutors and defense counsel. *See Georgia v. McCollum*, 505 U.S. 42, 59 (1992). Defense counsel cannot use "assumptions of partiality based on race [to] provide a legitimate basis for disqualifying a person as an impartial juror." *Id.*

#### A. *Strickland* Prejudice Must Be Presumed For A *Batson* Violation

The Superior Court correctly found that the first prong of *Strickland* was satisfied because trial counsel's "exercise of peremptory challenges in furtherance

of the admittedly race-based juror selection strategy constituted a reverse-*Batson* error that was not consistent with prevailing professional norms" (Ex. 1 at 44). The Superior Court also correctly found that trial counsel's "reverse-*Batson* error harmed the interests of the public as well as the integrity of the criminal justice system" (*id.* at 47). The Superior Court erred, however, in holding that Mr. Cabrera must show "actual prejudice" to prevail on his claim, i.e., "but for Cabrera Trial Counsel's reverse-*Batson* error, the result of the proceeding would have been different" (*id.*). That logic should be rejected, because it requires a defendant to engage in the same impermissible racially discriminatory stereotyping to show prejudice. *See Ex Parte Yelder*, 575 So. 2d 137, 139 (Ala. 1991) ("If an outcome determinative test is used, then no black appellant could prove prejudice unless he relied on the very assumption that *Batson* condemns.").

In *Cooke v. State*, 977 A.2d 803, 849 (Del. 2009), the Court held a separate showing of prejudice was not required where counsel's conduct so undermined the functioning of the trial that it could not be relied on as having produced a just result. *See Drummond v. State*, 51 A.3d 436, 440 (Del. 2012) ("[V]iolations of the right to counsel . . . that [lead] to structural defects in the constitution of the trial mechanism itself, can never be subject to harmless error analysis.").

Like the "structural defect" in *Cooke*, the *Batson* error here is structural, and no separate showing of prejudice should be required. *See Rivera v. Illinois*, 556

U.S. 148, 161 (2009) (*Batson* is "automatic reversal precedent[]"). In *Winston v. Boatwright*, 649 F.3d 618, 632 (7th Cir. 2011), the court held that a showing of actual prejudice is not required under *Strickland* where, as here, defendant's trial counsel violated *Batson*: "Prejudice . . . is automatically present when the selection of a petit jury has been infected with a violation of *Batson* or *J.E.B.*" As the court explained, "structural errors are so intrinsically harmful as to require automatic reversal. . . . Translated into *Strickland*'s terms, . . . such errors inevitably undermine[] confidence in the outcome of a proceeding." *Id.*; *see also Forrest v. Beloit Corp.*, 424 F.3d 344, 349 (3d Cir. 2005) ("Harmless error analysis . . . does not apply to Forrest's *Batson* challenge."); *Tankleff v. Senkowski*, 135 F.3d 235, 248 (2d Cir. 1998) ("[W]e hold that a *Batson/Powers* claim is a structural error that is not subject to harmless error review.").

B. Trial Counsel's Racial Discrimination In Jury Selection Constitutes A Miscarriage Of Justice Under Rule 61(i)(5)

The Superior Court erred in holding the *Batson* claim could be presented only as ineffective assistance of counsel (Ex. 1 at 39). That is not correct. Structural errors infect the entire trial process and render a trial fundamentally unfair, *see Neder v. United States*, 527 U.S. 1, 8-9 (1999), and constitute a miscarriage of justice. In *Folks v. State*, 919 A.2d 561 (Table), 2007 WL 1214658 (Del. Feb. 26, 2007), the Court held that a *Batson* claim would satisfy the miscarriage of justice exception, if there was intentional racial discrimination:

> [B]ecause this claim was not raised in Folks' direct appeal, it is barred in this proceeding unless he can demonstrate a miscarriage of justice because of a constitutional violation. . . . Folks must demonstrate that the prosecution improperly exercised its peremptory challenges with the intention of removing African-Americans from the venire.

*Id.* at *1; *see also Guy v. State*, 999 A.2d 863 (Del. 2010). That is precisely the situation here. Because Mr. Cabrera's trial counsel engaged in intentional racial discrimination, the Superior Court should have considered the claim under Rule 61(i)(5). *See United States v. Huey*, 76 F.3d 638, 641-42 (5th Cir. 1996) ("[O]nly by repudiating all results from such a trial can public confidence in the integrity of this system be preserved . . . ."). If the Superior Court had considered Mr. Cabrera's claim under Rule 61(i)(5), it would not have had to reach the question of whether *Strickland* prejudice is required, because (as the Superior Court acknowledged) the *Batson* error here was structural, and mandated reversal.

Indeed, the miscarriage of justice here is particularly egregious because both the trial court and the prosecutor expressly recognized what was happening and took no action,[2] and it happened against the backdrop of serious concerns about racial discrimination in the criminal justice system.[3]

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[2] *See* A070 at 152:9-12 ("[T]hat's at least the third African-American the defense has stricken."); A071 at 153:1-5 ("[W]e are not alleging, nor do we ask the court to find that a prima face case of racial animus . . . has been shown by this record.").

[3] *See In re Delaware Access to Justice Commission*, Amended Order (Del. Dec. 15, 2014); Sheri Lynn Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 Iowa L. Rev. 1925 (2012).

## II. THE FAILURE TO MOVE TO SUPPRESS THE GUN WAS INEFFECTIVE ASSISTANCE OF COUNSEL

**Question Presented**: Whether the Superior Court erred in ruling that the decision not to move to suppress the gun was reasonable because trial counsel did not want to admit that Mr. Cabrera had access to the gun. This issue was preserved for appeal (*see* Ex. 1 at 55-58; A355-58).

**Standard of Review**: The Court reviews questions of law *de novo*, *Outten*, 720 A.2d at 551, findings of fact for clear error, *Burrell*, 953 A.2d at 960, and denial of post-conviction relief for abuse of discretion, *Zebroski*, 12 A.3d at 1119.

**Merits of Argument**: Trial counsel's failure to move to suppress the gun violated Mr. Cabrera's constitutional rights, including his rights under the Fourth, Sixth, Eighth and Fourteenth Amendments, and Article 1, § 7 of the Delaware Constitution. The Superior Court denied this claim because trial counsel "articulated a reasonable trial strategy" based on "the defense theory . . . that Cabrera did not have a 38 Special Gun" (Ex. 1 at 58).

A police officer must have probable cause to believe items seized during a warrantless search are evidence of a crime for the seizure to be valid. *See Arizona v. Hicks*, 480 U.S. 321, 327 (1987). Although Mr. Cabrera's father consented to a search, the police did not have probable cause to seize the gun. *See Young v. State*, 339 A.2d 723, 724 (Del. 1975) ("A search can be legal, yet the resultant seizure of property or papers discovered in the course thereof may be illegal."). The police

had no reason to think a gun was involved in the other incident they were investigating at the time of the search. The warrantless seizure of the gun and the later admission of the gun, testing of the gun, and other tainted evidence violated Mr. Cabrera's constitutional rights. Mr. Cabrera had a possessory interest in the gun and the police had no probable cause for seizing it.

Despite the lack of probable cause, Mr. Cabrera's trial counsel never moved to suppress the gun and the other evidence seized from Mr. Cabrera's residence. Trial counsel's failure was objectively unreasonable, and prejudiced Mr. Cabrera. But for their error, the result of the trial would have been different because the State would have been precluded from introducing the gun, the testing of the gun, and the other evidence seized from Mr. Cabrera's residence, including the belts and the bed sheets.

Trial counsel testified they did not move to suppress the gun because they did not want to admit Mr. Cabrera had access to the gun (A275 at 59:20-23). Trial counsel recognized, however, that evidence used by Mr. Cabrera to establish a possessory interest in the gun in support of a motion to suppress could not be used against Mr. Cabrera at trial (*id.* at 60:6-9). Indeed, it is black letter law that evidence used to support a motion to suppress cannot be used against a defendant at trial. *See Simmons v. United States*, 390 U.S. 377, 394 (1968); *see also Watts v. State*, 574 A.2d 264, 1990 WL 38279, at *3 (Del. Feb. 27, 1990) (table,

unpublished) ("*Simmons* prohibits a defendant's testimony at a pretrial suppression hearing from being used against him at trial, on the issue of guilt.").

Trial counsel's decision not to move to suppress because it would have been inconsistent with their theory of the case was objectively unreasonable, and the Superior Court erred in sanctioning that decision. Indeed, the decision was a "blunder of the first magnitude":

> The evidence was overwhelming that it was indeed Owens's house in which the crack was found. The lawyer's decision to bet his all on a denial of that fact and by doing so forfeit a compelling ground for excluding evidence essential to convict his client was therefore a blunder of the first magnitude. Had he acknowledged that it was Owen's house, the motion to suppress would have been granted and Owens would have been acquitted. . . . Apparently Owens's lawyer was not familiar with the *Simmons* rule; he should have been.

*Owens v. United States*, 387 F.3d 607, 608-09 (7th Cir. 2004); *see also Johnson v. United States*, 604 F.3d 1016, 1021 (7th Cir. 2010) ("[T]he decision not to pursue the Fourth Amendment challenge . . . was based upon a misunderstanding of the applicable law and not based on a reasonable trial strategy.").

The seizure of the gun – without a warrant and without probable cause – violated Mr. Cabrera's constitutional rights, and his trial counsel should have moved to suppress the gun and the other evidence tainted as a result of the unlawful seizure of the gun.

## III. THE STATE'S LATE DISCLOSURE OF THE BELT EVIDENCE VIOLATED MR. CABRERA'S RIGHTS

**Questions Presented**: Whether the Superior Court erred in rejecting Mr. Cabrera's claims regarding the late disclosure of the belt evidence? These issues were preserved for appeal (*see* Ex. 1 at 59-66; A350-51, 364-65, 367-71).

**Standard of Review**: The Court reviews questions of law *de novo*, *Outten*, 720 A.2d at 551, findings of fact for clear error, *Burrell*, 953 A.2d at 960, and denial of post-conviction relief for abuse of discretion, *Zebroski*, 12 A.3d at 1119.

**Merits of Argument**: Mr. Cabrera's constitutional rights, including his rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, were violated by the late disclosure of the belt evidence. The Superior Court erred in rejecting the claim under Rule 61(i)(4) (Ex. 1 at 63-64). The Superior Court should have considered the claim in the interest of justice because the late disclosure of the belt evidence rendered the trial fundamentally unfair and violated Mr. Cabrera's constitutional rights.

Mr. Cabrera's trial counsel requested discovery of any medical reports or tests, including copies of any tests performed by the State Medical Examiner, and the substance of any expert testimony to be offered at trial (A416, ¶ 3). Mr. Cabrera's trial counsel also requested discovery of any "[p]attern injury comparisons" (A425, ¶ 7). The State waited, however, until the day trial started – five years after Mr. Rowe's autopsy, almost four years after the belts were seized,

and almost a year after trial counsel made their first discovery request – to decide to obtain and present expert testimony linking the wounds on Mr. Rowe's body with a belt seized from Mr. Cabrera's residence.

On January 9, 2001, the same day jury selection began, Dr. Callery, the State Medical Examiner, conducted a comparison of the belts seized from Mr. Cabrera's residence with the photos of Mr. Rowe's injuries (*see* A430-31). During the lunch recess that day, the State told Mr. Cabrera's trial counsel that it planned to call Dr. Callery to testify about his comparison of the belts with the wounds on Mr. Rowe's body (*see* A083 at 3:12-15).

Mr. Cabrera's trial counsel moved to exclude the belt evidence, arguing that the timeliness of the State's disclosure was a discovery violation, and that there was no evidence to show that Mr. Cabrera owned the belts at the time of the murders (A086 at 13:2-22). The court agreed and ruled the belt evidence was inadmissible (A091 at 35:16-18, 36:21-23). A week later, the State told the court that it had located a witness (Mileka Mathis) who would establish that Mr. Cabrera owned the belt at the time of the murders (A104 at 8:1-11). The court ruled the belt was admissible solely based on the State's representation that the witness could authenticate it (A121 at 44:1-45:2), and recessed for a week to allow trial counsel time to rebut the new evidence (A127 at 50:12-15).

When trial resumed, the State called Dr. Callery to testify concerning the similarity between the injuries and a belt seized from Mr. Cabrera's residence (A141 at 51:13-20). Mr. Cabrera's trial counsel called Dr. Hameli, a forensic pathologist, to try to address the new evidence (A193 at 55:17-80:22).

The "late disclosure even of inculpatory evidence [can] render a trial so fundamentally unfair as to violate due process." *Lindsey v. Smith*, 820 F.2d 1137, 1151 (11th Cir. 1987). The late disclosure here was particularly egregious because the evidence was not adduced and admitted until near the end of the State's case, after trial counsel had formulated its defense strategy (A111 at 34:1-19). If the belt comparison evidence had been disclosed months earlier, counsel would have been able to account for it in formulating their defense strategy.[4] A week's continuance in the middle of the trial did not alleviate the fundamental unfairness caused by the late disclosure. *See United States v. Davis*, 244 F.3d 666, 673 (8th Cir. 2001) (even if late-disclosed evidence was admitted and defendant was given a continuance, defense would still be "forced to play catch-up").

Dr. Callery's testimony was a central part of the State's case, and the State relied on it heavily in its closing (A210 at 38:20-23). Trial counsel were unable to counter the evidence effectively given the limited timeframe. If the State had

[4] *See* Paul C. Giannelli & Kevin C. McMunigal, *Prosecutors, Ethics, and Expert Witnesses*, 76 Fordham L. Rev. 1493, 1508 (2007) ("One way to undercut the defense's ability to confront expert testimony is to delay disclosure. This abuse is not uncommon.").

properly disclosed the evidence, trial counsel would have had time to find a more effective expert, more thoroughly prepare, and adjust their theory of the case to account for the evidence. *See United States v. Lee*, 573 F.3d 155, 164 (3d Cir. 2009) ("One way a discovery violation may [result in prejudice serious enough to warrant a new trial] is by interfering with the defendant's ability to prepare for trial and develop an intelligent defense strategy.").

The Superior Court also erred in rejecting Mr. Cabrera's claims that his trial counsel provided ineffective assistance by: (1) failing to prepare for the belt evidence; (2) failing to object to the belt "lineup"; (3) failing to maintain their objection to the discovery violation; and (4) failing to challenge Dr. Callery's expert testimony under *Daubert* (Ex. 1 at 63-66).

***First***, although trial counsel knew as early as April 2000 that there were pattern injuries found on Mr. Rowe's body and that seven belts had been seized from Mr. Cabrera's residence (A420-23), trial counsel failed to prepare for the presentation of pattern injury evidence. *See Cabrera*, 840 A.2d at 1263 ("Cabrera had known for several years that the State possessed the belt."). Because trial counsel failed to prepare for this evidence, they were forced to rush around at the last minute to locate an expert, obtain the physical evidence for analysis, and have their expert prepare to testify in a matter of a few days in the middle of trial. Although the Superior Court found that trial counsel acted reasonably in stating

their objections to the belt evidence (Ex. 1 at 64), the Superior Court failed to address their lack of preparation.

***Second***, trial counsel provided ineffective assistance in failing to object to Ms. Mathis's identification of the belt because all the belts were seized from Mr. Cabrera's residence. *See Commonwealth v. Simmons*, 417 N.E.2d 1193, 1196 (Mass. 1981) ("[T]he degree of suggestiveness of an identification procedure concerning an inanimate object might rise to the level of a denial of due process."); *Commonwealth v. Spann*, 418 N.E.2d 328, 332 (Mass. 1981); *People v. Nation*, 604 P.2d 1051, 1058 (Cal. 1980) (finding ineffective assistance where counsel failed to object to "illegally suggestive pretrial identification procedures").

***Third***, inexplicably, although trial counsel initially objected to the belt evidence as a discovery violation and as inadmissible under D.R.E. 401-403 and 901 (A083-84 at 4-6), they failed to maintain their objections after the State belatedly proposed to use photographic overlays to present the belt comparison evidence to the jury (A092-93 at 40:22-41:2), and failed to object to the photographic overlays in particular as a discovery violation (A106-15).

***Fourth***, although trial counsel initially indicated they planned to file a *Daubert* motion to preclude Dr. Callery's testimony and the use of the photographic overlays (A245 at 69:16-70:1; A432-35), they decided not to file a motion and dropped their objections (A272 at 50:16-22). Trial counsel's decision

was objectively unreasonable because Dr. Callery's testimony and the photographic overlays were not proper expert evidence. They were not necessary to assist the trier of fact. *See United States v. Stevens*, 935 F.2d 1380, 1399-1400 (3d Cir. 1991) (rejecting expert testimony that was "susceptible of elucidation without specialized knowledge"). They were not the product of reliable methodologies. *See* D.R.E. 702. Dr. Callery testified one of the seized belts was "consistent" with the injuries, but he did not rule out the thousands of other belts that would have also been "consistent." His testimony also created a risk of misleading the jury by using two-dimensional photos to compare injuries caused to a three-dimensional object. *See* D.R.E. 403.

The Superior Court found that trial counsel made a strategic decision not to file a *Daubert* motion (Ex. 1 at 65). This "strategic" decision, however, was objectively unreasonable, particularly in light of trial counsel's failure to prepare in advance for the belt evidence. If trial counsel had prepared for this evidence, they could have argued that Dr. Callery's testimony was the product of unreliable methodologies, as their expert later testified (A197 at 70). Moreover, Mr. Cabrera was prejudiced as a result of his trial counsel's ineffective assistance, particularly in dropping their objections. The belt evidence was used to link Mr. Cabrera to the murders, and there is a reasonable probability that the result of the trial would have been different if it had been excluded (as the court originally ruled).

## IV. THE STATE'S PRESENTATION OF PERJURED TESTIMONY VIOLATED MR. CABRERA'S CONSTITUTIONAL RIGHTS

**Questions Presented**: Whether the State's presentation of Mileka Mathis's perjured testimony and the failure to grant her immunity to recant her testimony violated Mr. Cabrera's constitutional rights? These issues were preserved for appeal (*see* Ex. 1 at 66-81; A347-50, 351-52, 365-67, 380-85, 389-90, 391).

**Standard of Review**: The Court reviews questions of law *de novo*, *Outten*, 720 A.2d at 551, findings of fact for clear error, *Burrell*, 953 A.2d at 960, and denial of post-conviction relief for abuse of discretion, *Zebroski*, 12 A.3d at 1119.

**Merits of Argument**: The State's presentation of perjured testimony violated Mr. Cabrera's constitutional rights, including his rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. The State called Ms. Mathis to connect Mr. Cabrera to the belts seized from his residence. She testified she had been intimate with Mr. Cabrera for several years (*see* A142 at 55:3-10; A143 at 60:10-12), she was familiar with the clothing Mr. Cabrera wore at the time of the murders (A137 at 33:8-10), and a belt seized from his residence was consistent with the type he would have worn (*id.* at 36:8-14). Several months after trial, Ms. Mathis began writing to Mr. Cabrera, and said she wanted to recant her trial testimony (*see* A704; A535-695; A446-71).

In an interview taped by trial counsel, Ms. Mathis stated she fabricated her testimony at Detective Lemon's request (*see* A466, ¶ 2; A491), she did not have a

long-term relationship with Mr. Cabrera, and she was not familiar with the clothing he wore (A489-90). Ms. Mathis also stated she had had a sexual relationship with Detective Lemon (A524). During a second interview, Ms. Mathis stated Detective Lemon had intimidated her (A528).

In connection with Mr. Cabrera's new trial motion, Ms. Mathis invoked her Fifth Amendment privilege and refused to testify (A223 at 6:18-20). The State did not grant her immunity, and the court denied the new trial motion, finding that her out-of-court statements were inadmissible hearsay (A739). In connection with Mr. Cabrera's Rule 61 petition, Ms. Mathis signed a sworn Affidavit, in which she confirmed she had a sexual relationship with Detective Lemon, and that Detective Lemon had coached her "to fabricate a long-term periodic sexual relationship with Mr. Cabrera" and to lie about the clothing Mr. Cabrera wore at the time of the murders (A728-35). In response, the State moved to preclude any further evidence concerning Ms. Mathis (A395, ¶ 1), which the Superior Court granted without argument (A232 at 106:20-21; A234 at 3:14-15).

### A. Mr. Cabrera Should Have Been Permitted To Present Additional Evidence Concerning Ms. Mathis

The Court's decision to preclude additional evidence was an abuse of discretion. *See Weedon v. State*, 750 A.2d 521, 528 (Del. 2000) ("In fairness to the prosecutor, as well as to the defendant, that claim should be either proved or dispelled through direct testimony."). Mr. Cabrera's constitutional claims – the

subornation of perjury and failure to grant immunity – were not litigated previously. The same is true for Mr. Cabrera's ineffective assistance claims, which could not be raised on direct appeal. Moreover, Ms. Mathis's Affidavit was the first sworn testimony regarding the subornation of perjury by Detective Lemon. *See Blankenship v. State*, 447 A.2d 428, 435 (Del. 1982).

B. The Failure To Grant Immunity To Ms. Mathis Violated Mr. Cabrera's Constitutional Rights

Mr. Cabrera's constitutional rights were violated by the State's failure to grant immunity to Ms. Mathis. The Sixth Amendment guarantees a defendant the right to "subpoena a witness, and to have that witness available as he finds him." *United States v. Herman*, 589 F.2d 1191, 1199 (3d Cir. 1978); *see also Washington v. Texas*, 388 U.S. 14, 19 (1967). A defendant is denied his rights to compulsory process and due process when threats and intimidation cause a witness to refuse to testify and deprive the defendant of that witness's testimony. *See Webb v. Texas*, 409 U.S. 95, 97 (1972). Threats of prosecution and intimidation of a witness designed to induce the witness into invoking the privilege against self-incrimination constitute prosecutorial misconduct. *See Herman*, 589 F.2d at 1200; *United States v. Morrison*, 535 F.2d 223, 227-28 (3d Cir. 1976).

In *State v. Feaster*, 877 A.2d 229, 262 (N.J. 2005), the court held that threatening to prosecute a recanting witness for testifying at a post-conviction hearing and causing the witness to invoke his privilege against self-incrimination

violated the defendant's constitutional rights. "The suggestion that even a well-intentioned prosecutor intimidated a key defense witness in a capital case into refusing to testify at a PCR proceeding requires close examination." *Id.* at 250-51.

The Superior Court here rejected Mr. Cabrera's post-conviction claim, finding that Ms. Mathis did not testify "at the advice of counsel and not in response to any threats of prosecution for perjury" (Ex. 1 at 73). In fact, her counsel gave her that advice because the State threatened her with prosecution. *See* A224 at 10:9-13 ("I told [Ms. Mathis's counsel] that in either regard the State considered it, whether it be perjury or tampering with physical evidence and falsely reporting an incident serious, would not be willing to offer her immunity."). The State's failure to grant immunity distorted the fact-finding process. *See Feaster*, 877 A.2d at 244 ("The State may think that it alone knows the truth, but it is for the court to decide the truth, after both sides have presented their cases."). If Ms. Mathis had testified, she would have recanted her trial testimony, explained her sexual relationship with Detective Lemon, and admitted that Detective Lemon coached her to give false testimony (A728-29, ¶ 2). In addition, trial counsel's failure to argue that Ms. Mathis should be granted immunity was ineffective assistance of counsel. If Ms. Mathis had been granted immunity, there is a reasonable probability that Mr. Cabrera's new trial motion would have been granted.

On direct appeal, the Court relied on *Whitfield v. State*, 524 A.2d 13 (Del. 1987), in holding that Ms. Mathis's testimony was not necessary to authenticate the belt. *See* 840 A.2d at 1264. In that case, however, the Court held the State must trace the weapon's "continuous whereabouts . . . from the time of the commission of the underlying offense until the time of trial." *Whitfield*, 524 A.2d at 15. Here, the State relied only on Ms. Mathis's testimony to show that Mr. Cabrera owned the belt at the time of the murders. *See United States v. Mosby*, 495 A.2d 304, 306 (D.C. 1985) (affirming exclusion of shoe where "there was no evidence [defendant] even owned, much less wore, the shoes on the night that the murders were committed").

C. The State's Lead Investigator Suborned Perjury

Mr. Cabrera's constitutional rights, including his rights under the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article 1, § 7 of the Delaware Constitution, were violated because the State's lead investigator suborned perjury. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959). A conviction based on knowingly perjured evidence must be set aside if there is a reasonable likelihood the testimony could have affected the judgment of the jury. *See United States v. Agurs*, 427 U.S. 97, 103 (1976). Without the perjured testimony, the court would have excluded the belt and Dr. Callery's expert testimony. Because there is a reasonable likelihood that the perjured testimony affected the jury's

verdict, Mr. Cabrera's conviction must be overturned. *See Miller v. Pate*, 386 U.S. 1, 4-5 (1967). Although the Superior Court found this claim was procedurally barred under Rule 61(i)(3), it should have considered it under Rule 61(i)(5) because convicting a capital defendant based on perjured testimony suborned by the State's lead investigator is a miscarriage of justice. *See State v. Rosa*, 1992 WL 302295, at *4 (Del. Super. Ct. Sept. 29, 1992).

D. Ineffective Assistance Of Counsel

Trial counsel provided ineffective assistance in failing to: (1) investigate Ms. Mathis before she testified; (2) object to her trial testimony; (3) investigate corroborating evidence; and (4) argue admissibility under 11 *Del. C.* § 3507.

***First***, trial counsel failed to investigate Ms. Mathis adequately before she testified. For example, although they requested to voir dire Ms. Mathis, they dropped that request without explanation (A133 at 19:23-20:4). As a result, trial counsel failed to learn she did not have a relationship with Mr. Cabrera, could not identify the clothing he wore, and had a relationship with Detective Lemon. Their lack of preparation is particularly troubling because they ignored Mr. Cabrera's repeated statements that he had never met her (A248 at 75:12-15). *See Couch v. Booker*, 632 F.3d 241, 246 (6th Cir. 2011) ("It is particularly unreasonable to fail to track down readily available and likely useful evidence that a client himself asks his counsel to obtain.").

The Superior Court rejected this claim because trial counsel's investigator talked with Ms. Mathis before she testified (Ex. 1 at 74-75). But if trial counsel had properly investigated her, they would have learned what they found out after trial – e.g., that Ms. Mathis lied about Mr. Cabrera being her son's father. *See* A501-02 ("I just knew once I got to Court that someone was going to figure out that my son[']s age does not match anything I say."); *see also* A146 at 69:7-12. The failure to properly investigate Ms. Mathis before she testified was objectively unreasonable. But for these errors, there is a reasonable probability the outcome of the trial would have been different.

***Second***, trial counsel failed to object to Ms. Mathis's testimony and failed to move to strike her testimony (and the belt evidence). The Superior Court rejected this claim because the State presented other circumstantial evidence to link Mr. Cabrera to the belt (Ex. 1 at 76). But Ms. Mathis's testimony was the only evidence that linked the belt to Mr. Cabrera at the time of the murders, or accounted for its "continuous whereabouts . . . from the time of the commission of the underlying offense until the time of trial." *Whitfield*, 524 A.2d at 15. Trial counsel's failure to object to Ms. Mathis's testimony or to move to strike it was objectively unreasonable, and prejudiced Mr. Cabrera.

***Third***, trial counsel failed to identify evidence to corroborate Ms. Mathis's out-of-court statements. Trial counsel had almost a year (from when Ms. Mathis

first recanted until the evidentiary hearing) to locate evidence. Trial counsel never asked Ms. Mathis who else knew about her relationship with Detective Lemon, and never interviewed her family and friends. Even a limited investigation would have yielded evidence to corroborate her statements (*see* A729, ¶ 5), and caused them to be ruled admissible. But for these errors, there is a reasonable probability the outcome of the new trial motion would have been different.

***Fourth***, Mr. Cabrera's counsel provided ineffective assistance in failing to argue that Ms. Mathis's out-of-court statements were admissible under 11 *Del. C.* § 3507. Evidence that a State's witness has committed perjury at trial is "exactly the type of evidence contemplated by 11 *Del. C.* § 3507." *State v. Washington*, 1992 WL 302014, at *3 (Del. Super. Ct. Oct. 15, 1992). Section 3507(a) permits a voluntary out-of-court statement to be used if the witness is "present and subject to cross-examination." Ms. Mathis's out-of-court statements were voluntary, and she was present at the hearing and subject to cross-examination. It was only because the State threatened her with prosecution that she refused to testify. But she "was always available to the State" as a witness, if the State granted her immunity. *See Charbonneau v. State*, 904 A.2d 295, 310 (Del. 2006). The failure to argue that Ms. Mathis's statements should have been admitted under 11 *Del. C.* § 3507 was objectively unreasonable, and but for that error, there is a reasonable probability that the outcome of the new trial motion would have been different.

## V. THE JURY WAS NOT PROPERLY DEATH QUALIFIED

**Question Presented**: Whether the improper death qualification of the jury violated Mr. Cabrera's constitutional rights? This issue was preserved for appeal (*see* Ex. 1 81-85; A340-47, 362-63, 388-89).

**Standard of Review**: The Court reviews questions of law *de novo*, *Outten*, 720 A.2d at 551, factual findings for clear error, *Burrell*, 953 A.2d at 960, and denial of post-conviction relief for abuse of discretion, *Zebroski*, 12 A.3d at 1119.

**Merits of Argument**: The Superior Court rejected the claim that the jury was not properly death qualified under Rule 61(i)(3) (Ex. 1 at 82-83), and found that "the eight jurors who expressed opposition to the death penalty in question were properly excused for cause" (*id.* at 85).

Mr. Cabrera's constitutional rights, including his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article 1, §§ 4 and 7 of the Delaware Constitution, were violated because qualified jurors were excused based on their views on the death penalty. In addition, the voir dire misstated the law, caused unnecessary confusion, and eliminated individuals who indicated they could perform their duties properly.

The "proper constitutional standard" for removing a prospective juror based on their death penalty views is "whether a prospective juror's views would 'prevent or substantially impair the performance of his duties as a juror in

accordance with his instructions and his oath.'" *Lockhart v. McCree*, 476 U.S. 162, 167 n.1 (1986). "It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State." *Witherspoon v. Illinois*, 391 U.S. 510, 514 n.7 (1968). Moreover, the "systematic exclusion of qualified groups" from the jury results in "the deprivation to the accused of a cross-section of the community for decision on both his guilt and his punishment." *Id.* at 528 (Douglas, J., concurring).

During jury selection here, eight prospective jurors[5] were excused because they voiced opposition to the death penalty, even though they stated they would follow the court's instructions and their oath and decide the case according to the law. Mr. Woodward, for example, stated that his death penalty views would not interfere with his ability to serve as a juror:

> THE COURT: Would your opinions, beliefs or opposition to the death penalty prevent or substantially impair the performance of your duties as a juror to conscientiously apply the law as charged by the Court in accordance with your oath?
>
> THE PROSPECTIVE JUROR: No.

[5] The eight jurors were: Robert Barbarita, Stephen Bijansky, Rosalind Brown, Concetta Spalding, Rita Truschel, Tiffany Wilson, William McGiveny, and David Woodward.

(A074 at 129:15-130:3). Mr. Woodward stated he could weigh the evidence, perform his duty according to his oath, and follow instructions (A074-75).

The Court nevertheless asked him whether he could recommend the death penalty, a task that Delaware law does not impose on a juror, and Mr. Woodward said no (A075 at 135-36). The Court then re-asked a series of questions about whether Mr. Woodward's beliefs would interfere with his impartiality or his ability to perform his duties as a juror, and Mr. Woodward was clear that they would not (A075-76 at 136-38). The Court again asked Mr. Woodward if he could "recommend" the death penalty and he answered "no" (A076 at 137:6-12). The Court "excused [Mr. Woodward] for not recommending the death sentence" (*id.* at 140). The other seven jurors were likewise excused because they could not "recommend" the death penalty, even though they stated their beliefs would not impair their ability to decide the facts impartially and would not impair their ability to apply the law to the facts in accordance with their oath as jurors.[6]

The Superior Court rejected this claim based on *Gattis v. State*, 697 A.2d 1174 (Del. 1997) (Ex. 1 at 84). In that case, however, the Court stated that the standard for excusing a juror "is not whether, under any conceivable set of circumstances, the juror could never recommend the death penalty. Rather, the

[6] *See* A048-49 at 28:9-31:15; A051-52 at 143:9-146:10; A057 at 215:13-16; A063 at 72; A067-68 at 304:4-305:23; A079 at 243:7-244:20; A082 at 289-91.

standard is whether the juror's views render the juror unable to comply with the trial court's instructions and her oath." *Id.* at 1181. If that standard had been properly applied here, none of the eight jurors would have been excused.

The trial court improperly instructed the jurors they had to make a sentencing recommendation, asked whether they could recommend the death penalty, and excused those who said they could not. *See, e.g.*, A145 at 145:1-17 ("[T]he process is that the jury makes to me a recommendation of what the sentence would be."). That was error. The 1991 death penalty statute did not ask the jury to "recommend" a sentence. *See* 11 *Del. C.* § 4209(d) (1991) (jury is limited to answering "whether the evidence shows beyond a reasonable doubt the existence of at least 1 [statutory] circumstance," and whether a preponderance of the evidence shows that "the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist").

Indeed, numerous prospective jurors were confused by the court's instruction that they had to recommend the death penalty. When one prospective juror asked "[w]hat do you mean by recommend?" (A051 at 144:23), the court erroneously told the juror that "the jury makes to me a recommendation of what the sentence would be" (A052 at 145:9-10).

The court also persisted in questioning at least one juror to determine if he could recommend the death penalty in this particular case. Mr. Barbarita stated

that his beliefs would not impair his ability to decide facts impartially or to apply the law as instructed (A054 at 203-04). The court nevertheless asked him whether he could recommend the death penalty in this particular case if there were no testimony from the victims' families (A055 at 206). That line of questioning was unconstitutional. *See Witherspoon*, 391 U.S. at 522 n.21.

Finally, trial counsel's failure to raise these arguments constituted ineffective assistance. An improperly death qualified jury is a structural error, and a showing of actual prejudice is not required. *See Brice v. State*, 815 A.2d 314, 324 (Del. 2003). The Superior Court also should have considered this claim under Rule 61(i)(5) because permitting a capital defendant to be convicted by an improperly death qualified jury is a miscarriage of justice. *See Gray v. Mississippi*, 481 U.S. 648, 668 (1987) ("[T]he impartiality of the adjudicator goes to the very integrity of the legal system . . . .").

## VI. THE *ALLEN* CHARGE WAS UNCONSTITUTIONAL

**Questions Presented**: Whether the Superior Court erred in ruling: (1) the *Allen* charge was not unduly coercive; (2) the transition language claim was procedurally barred; and (3) trial counsel was not ineffective in excluding Mr. Cabrera from the office conference concerning the *Allen* charge. These issues were preserved for appeal (*see* Ex. 1 at 87-92; A334-37, 372-73, 386-87).

**Standard of Review**: The Court reviews questions of law *de novo*, *Outten*, 720 A.2d at 551, findings of fact for clear error, *Burrell*, 953 A.2d at 960, and denial of post-conviction relief for abuse of discretion, *Zebroski*, 12 A.3d at 1119.

**Merits of Argument**: Mr. Cabrera's constitutional rights, including his rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, were violated by the way the trial court charged the deadlocked jury.

### A. The *Allen* Charge Was Unduly Coercive

The Superior Court denied the claim regarding the *Allen* charge as procedurally barred by Rule 61(i)(3), and found no miscarriage of justice because the *Allen* charge "included language that diminished any potential coercive effect from the minority distinction" (Ex. 1 at 90).

"Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body." *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988). The *Allen* charge here was unduly coercive and violated

Mr. Cabrera's constitutional rights. The *Allen* charge improperly focused on the minority jurors, instructing them to "reconsider whether their position is reasonable" given that "it makes no effective impression on the minds of so many equally, honest, intelligent fellow jurors" (A216 at 33:16-18). The majority was not told to reexamine their views (*id.* at 33:14-34:4). The *Allen* charge also improperly focused the jury on the expense of a retrial (A215 at 31:11-22).

An *Allen* charge that directs only the minority jurors to reevaluate their position undermines the proof beyond a reasonable doubt standard by promoting a decision based on something less than each individual juror separately applying that standard. *See, e.g.*, *United States v. Fioravanti*, 412 F.2d 407, 416-17 (3d Cir. 1969) ("[T]hat the majority is right and has reached its preliminary inclination by appropriately inspired processes, and that the minority in a given group possesses attributes of spurious rationality . . . [is] an inherently faulty major premise."). And an *Allen* charge that instructs a jury that a retrial would be time consuming and burdensome is unduly coercive, because it creates the potential "that the jurors' deliberation was influenced by concerns irrelevant to their task." *United States v. Eastern Med. Billing, Inc.*, 230 F.3d 600, 613 (3d Cir. 2000).

In *Collins v. State*, 56 A.3d 1012, 1021 (Del. 2012), the Court held the use of an *Allen* charge similar to the one here was not plain error, because even though several circuits have held that the charge is unduly coercive, others have not. The

courts that have permitted a majority/minority distinction, however, have required additional protections that were not present here. *See, e.g.*, *United States v. Burgos*, 55 F.3d 933, 941 (4th Cir. 1995) ("[A] district court must incorporate a specific reminder both to jurors in the minority and those in the majority that they reconsider their positions in light of the other side's views."); *United States v. Robinson*, 953 F.2d 433, 436 (8th Cir. 1992) ("[A]n *Allen*-type instruction should contain language reflecting . . . : that the government has the burden of proof beyond a reasonable doubt, [and] that both the majority and minority should reexamine their views . . . .").

The Superior Court here held that the *Allen* charge was not unduly coercive because it told the jurors not to surrender their "conscientious convictions" (Ex. 1 at 90). But even an *Allen* charge that admonishes jurors not to surrender their "honest convictions" must be "carefully examined to determine its total effect on the jury in reaching a verdict." *Brown v. State*, 369 A.2d 682, 684 (Del. 1976). Not only was the language of the *Allen* charge here coercive, but the timing of the instruction and the length of the deliberations before and after the instruction demonstrate the actual effect was coercive. The *Allen* charge was given on a Saturday evening, after two days of deliberation without a verdict, and just before the court ordered the jury to stop deliberating for the evening. The next morning, the jury deliberated for only 90 minutes before returning its guilty verdict. *See*

*Lowenfield*, 484 U.S. at 240 ("We are mindful that the jury returned with its verdict soon after receiving the supplemental instruction, and that this suggests the possibility of coercion.").

Finally, the Superior Court erred in ruling that Mr. Cabrera's trial counsel and appellate counsel were not ineffective in failing to argue that the *Allen* charge was unduly coercive (Ex. 1 at 91-92). Moreover, trial and appellate counsel also provided ineffective assistance in failing to recognize the unduly coercive effect of the *Allen* charge after the jury rendered its verdict.

### B. The Lack Of Transition Language Created An Intolerable Risk Of An Unwarranted Conviction

The Superior Court denied Mr. Cabrera's transition language claim finding it was procedurally barred under Rule 61(i)(4) (Ex. 1 at 89). The Superior Court should have considered the claim, however, in the interest of justice.

The Superior Court found there was no need for transition language "because [the] jury instructions already included an instruction on accomplice liability" (Ex. 1 at 88-89). That instruction, however, required the jury to first agree unanimously to acquit Mr. Cabrera of First Degree Murder before moving on to other counts: "If you find the defendant did not himself shoot and kill Brandon Saunders and/or Vaughn Rowe, you should then go on to consider the following instruction on accomplice liability" (A205 at 10:10-13). That instruction "improperly interfered with the jury's deliberations by requiring agreement of all

twelve jurors to acquit the accused of the charged offense before considering a lesser offense." *People v. Hurst*, 238 N.W.2d 6, 10 (Mich. 1976).

The jury should have been instructed that, "if after reasonable effort [they were] at an impasse, and [were] unable to reach a unanimous verdict on the charge of blank, then [they could] go onto consider the lesser included offense of blank" (A212 at 20:20-23). It is unconstitutional to prohibit a jury from considering a lesser-included offense when the evidence supports such a verdict. *See Beck v. Alabama*, 447 U.S. 625, 627 (1980). If a jury is permitted to consider only the greater offense, there is an "intolerable" risk of an unwarranted conviction:

> [W]hen the evidence . . . establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense – the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

*Id.* at 637. That same intolerable risk was present here because the jury was told "the lesser offense cannot be considered unless the jury first agrees unanimously that the defendant is not guilty of the greater offense." *United States v. Jackson*, 726 F.2d 1466, 1470 (9th Cir. 1984).

Because the court instructed the jury that it must acquit Mr. Cabrera of First Degree Murder before moving on to the lesser-included offenses, Mr. Cabrera was denied his constitutional rights. Permitting a capital conviction to stand in these circumstances is a miscarriage of justice. For the same reasons, the failure of

Mr. Cabrera's appellate counsel to raise these arguments was objectively unreasonable, and prejudiced Mr. Cabrera.

### C. Mr. Cabrera Was Improperly Excluded From The Office Conference Concerning The *Allen* Charge

The Superior Court denied Mr. Cabrera's claim that he was improperly excluded from the Office Conference concerning the *Allen* charge because "the presence of a criminal defendant is not required during 'a conference or argument upon a question of law'" (Ex. 1 at 91). But, in *Bradshaw v. State*, 806 A.2d 131, 132-33 (Del. 2002), this Court held that a defendant must be present at any court conference concerning whether to give an *Allen* charge.

Trial counsel's failure to have Mr. Cabrera present at the conference was objectively unreasonable, and Mr. Cabrera was prejudiced because he was deprived of an opportunity to participate in a discussion involving a "basic question of trial objectives to which a defendant can reasonably be expected to contribute." *Id.* at 135. "From a defendant's perspective, whether to give an *Allen* charge is a basic, fundamental choice between a verdict on this trial or a new trial." *Id.* at 139. Like the defendant in *Bradshaw*, Mr. Cabrera "was prejudiced in not having the chance to consult with his counsel on those considerations," as the issues were being discussed with the court. *Id.* at 140. Mr. Cabrera's appellate counsel also provided ineffective assistance in failing to raise this issue on appeal.

## VII. THE STATE'S REPEATED *BRADY* VIOLATIONS

**Question Presented**: Whether the Superior Court erred in ruling there were no *Brady* violations given the State's failure to disclose: (a) impeachment evidence concerning Keith Powell; (b) exculpatory statements of Sparkle Harrigan; and (c) exculpatory information regarding Omar Colon's involvement in the murders. These issues were preserved for appeal (*see* Ex. 1 at 99-108; A352-54, 371-72, 390).

**Standard of Review**: The Court reviews questions of law *de novo*, *Outten*, 720 A.2d at 551, findings of fact for clear error, *Burrell*, 953 A.2d at 960, and denial of post-conviction relief for abuse of discretion, *Zebroski*, 12 A.3d 1119.

**Merits of Argument**: Mr. Cabrera's constitutional rights, including his rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, were violated by the State's suppression of favorable evidence. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). A *Brady* violation occurs where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *United States v. Bagley*, 473 U.S. 667, 682 (1985), and where the failure to disclose "undermines confidence in the outcome of the trial," *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

A. Keith Powell

Prior to trial, the State produced statements from Mr. Powell concerning the whereabouts of the victims on the night of the murders (A401-15). Mr. Powell said he was with the victims after the time when the State claimed Mr. Rowe had been beaten by Mr. Cabrera (A182 at 19:2-20:4). Mr. Cabrera's trial counsel called Mr. Powell as a witness, and he testified that he was with the victims on the night of the murders as late as 11:00 or 11:30 p.m. (*id.* at 19:2-20:21). He also testified that a woman named "Kim" was with them (*id.*), and that Mr. Rowe had not been "beaten up" (A183 at 21:13-15).

The State cross-examined Mr. Powell based on inconsistent statements he had made to the police – but which the State had not disclosed to Mr. Cabrera's trial counsel. Mr. Powell testified he was high on marijuana when he told the police he was with the victims on the night of the murders, and that his memory was not reliable (A189 at 45:4-16, 51:4-9). The State also called Kim Payne to testify she was not with Mr. Powell and the victims on the night of the murders (A202 at 161:22-163:23). This undisclosed evidence thoroughly discredited Mr. Powell's direct testimony.

The Superior Court ruled that Mr. Cabrera's *Brady* claim with respect to Mr. Powell was procedurally barred as formerly adjudicated under Rule 61(i)(4) (Ex. 1 at 101). The Superior Court should nevertheless have considered the claim

in the interest of justice. *See Weedon*, 750 A.2d at 527-28. The State's disclosure of apparently exculpatory statements made by Mr. Powell, without also disclosing Mr. Powell's inconsistent statements and other impeachment evidence, violated Mr. Cabrera's constitutional rights. Because the evidence used to impeach Mr. Powell was not discoverable by Mr. Cabrera's trial counsel, the State should have disclosed the impeachment evidence at the same time that it disclosed Mr. Powell's exculpatory statements.

The State's "sandbagging" – providing *Brady* material knowing it would destroy that evidence in front of the jury – was a constitutional violation. *See Johnson v. State*, 550 A.2d 903, 913 (Del. 1988) ("By entering the notes into evidence *after* the defendant testified, the prosecution misled the defense in a very material way."); *Bailey v. State*, 440 A.2d 997, 1000-01 (Del. 1982) (reversing conviction where State sandbagged defendant by withholding rebuttal argument). Moreover, a narrow view of *Brady* – permitting the State to disclose only the evidence favorable to a defendant and not the contrary evidence that will destroy the favorable evidence – is fundamentally inconsistent with the special role that prosecutors play in the criminal justice system. *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . . .").

In addition, trial counsel provided ineffective assistance in failing to investigate Mr. Powell adequately and in failing to use an investigator to interview him. *See Cabrera*, 840 A.2d at 1270 ("Cabrera failed . . . to investigate Powell and his credibility as a witness before calling him to testify."). The State disclosed Mr. Powell as a potential witness with *Brady* information on April 5, 2000 (A420-23; A262 at 7:17-22; A239 at 21:11-13). Mr. Cabrera's trial counsel waited almost a year, however, to interview Mr. Powell, and did not interview him until after trial had begun (A261 at 6:13-14; A238 at 19:9-15). Mr. Cabrera's trial counsel interviewed Mr. Powell without a private investigator present, and did not record the interview (A236 at 10:16-18; A262-63 at 10:17-11:2). In addition, Mr. Cabrera's trial counsel never interviewed Ms. Payne to corroborate Mr. Powell's testimony (A263 at 13:1-7).

The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) ("ABA Guidelines") are clear that Mr. Cabrera's trial counsel should have interviewed Mr. Powell immediately after receiving information regarding his testimony (§ 11.4.1.D.3.A), and should have conducted the interview in the presence of a third person to facilitate admission of the interview at trial (§ 11.4.1.D.3.C). If Mr. Cabrera's trial counsel had investigated Mr. Powell properly, they would have discovered the evidence that the State used to impeach him. Trial counsel's failure to do so was objectively unreasonable.

*See, e.g.*, *Sullivan v. Fairman*, 819 F.2d 1382, 1391-92 (7th Cir. 1987). Moreover, if trial counsel had properly investigated Mr. Powell, there is a reasonable probability that the result of the trial would have been different. Mr. Powell was one of the key witnesses called by the defense, but because he was severely impeached by his later undisclosed statements and Ms. Payne's testimony, Mr. Powell's testimony had the opposite effect – sowing seeds of mistrust in the jury's minds (A238 at 19:16-20:16).

B. Sparkle Harrigan

The Superior Court held that the claim regarding the State's failure to disclose Ms. Harrigan's statements to police was procedurally defaulted under Rule 61(i)(3) (Ex. 1 at 104). The Superior Court should nevertheless have considered the claim to prevent a miscarriage of justice. The Superior Court also erred in finding no *Brady* violation because the statements were not inconsistent with the State's timeline (*id.* at 106).

Ms. Harrigan provided statements to the police indicating she had been with Mr. Saunders from approximately 9:00 p.m. to 11:00 p.m. on the night of the murders (A220 at 66:1-4, 67:6-8), and that Mr. Rowe was also there and there was no indication that he had been beaten or suffered any injuries (A220 at 68:6-8; A221 at 72:7-10).

At trial, the State relied on the testimony of Donna Ashwell, who testified she heard a fight in the basement of the apartment building she shared with Mr. Cabrera "early in the evening," sometime before 9:30 or 10:00 p.m. (A095 at 32:4-10). Ms. Harrigan's statements were inconsistent with the State's timeline, and should have been disclosed to Mr. Cabrera's trial counsel. The failure to produce those statements undermines confidence in the outcome of the trial.

C. Carlos Rodriguez and Omar Colon

The Superior Court also erred in rejecting the *Brady* claim based on the State's failure to disclose exculpatory evidence concerning the involvement of Omar Colon in the murders. After Carlos Rodriguez and Mr. Colon were arrested on drug charges (A255 at 13:12-13), Mr. Rodriguez told the prosecutor and police that Mr. Colon was responsible for the Rockford Park murders (*id.* at 15:6-9, 15:5-16:3; *see also* A284 at 35:9-12; A290 at 79:17-22). That information was never disclosed to Mr. Cabrera's trial counsel, even though it was exculpatory and material. *See Banks v. Reynolds*, 54 F.3d 1508, 1518 (10th Cir. 1995).

The Superior Court rejected Mr. Cabrera claim because "[t]here is no evidence to corroborate the recollection of the Deputy Attorney General . . . and the record reflects that the Deputy Attorney General is not even sure if her memory was accurate" (Ex. 1 at 108). In fact, there is substantial evidence corroborating the prosecutor's testimony. *See* A279 at 41:9-12 ("Q. So you remember telling

them in response to their questions that you thought Omar could be involved [with] Rockford Park? A. Yeah, I said that."); A445 ("Carlos Rodriguez believed that Omar Colon has been involved and has knowledge of shootings."); A444 ("Carlos advised that he believes Omar . . . [was] involved with a shooting . . ."). And the prosecutor testified unequivocally that Mr. Rodriguez stated Mr. Colon was involved in the Rockford Park murders. *See* A290 at 79:17-22 ("I remembered during the proffer he linked Omar Colon to the killing at Rockford Park. . . . I remember him indicating that Omar Colon was responsible . . . .").

* * *

The State's *Brady* violations, separately and collectively, undermine the confidence in the jury verdict. *See Kyles*, 514 U.S. at 436 (*Brady* materiality is assessed "collectively, not item by item"). The State's theory of the case would have been completely undercut if Mr. Cabrera's trial counsel had been able to present evidence that another individual (Mr. Colon) had claimed responsibility for the Rockford Park murders and if they had been able to present evidence from one of the victims' girlfriends (Ms. Harrigan) that was inconsistent with the State's timeline of events.

## VIII. PREJUDICED AND INCOMPETENT JURORS SERVED ON THE JURY

**Questions Presented**: Whether Mr. Cabrera's constitutional rights were violated due to prejudiced and incompetent jurors serving on the jury, and whether trial counsel provided ineffective assistance in failing to strike the jurors or request a mistrial? These issues were preserved for appeal (*see* Ex. 1 at 85-87; A337-40, 360-62, 387-88).

**Standard of Review**: The Court reviews questions of law *de novo*, *Outten*, 720 A.2d at 551, findings of fact for clear error, *Burrell*, 953 A.2d at 960, and denial of post-conviction relief for abuse of discretion, *Zebroski*, 12 A.3d at 1119.

**Merits of Argument**: Mr. Cabrera's constitutional rights, including his rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article 1, § 7 of the Delaware Constitution, were violated because prejudiced and incompetent jurors were permitted to serve on the jury.

**Juror No. 8**: In the middle of trial, the court received a note from Juror No. 8 that she had heard another juror say that "I think he's guilty" (A150 at 3:12-4:8). The court interviewed each juror (A152-53; A159-67), and each of them said they had not expressed any opinions about Mr. Cabrera's guilt, and had not heard other jurors express an opinion (A159-67). The court made factual findings that Juror No. 8 was credible, and that one of the jurors had expressed an improper opinion about Mr. Cabrera's guilt (A169 at 77:1-4). The court, however, did not

excuse Juror No. 8 or the juror who was suspected of making the statement (A171 at 159:22-160:3; A175 at 176:22-23). Mr. Cabrera's trial counsel made no motion to have Juror No. 8 or the juror who said "I think he's guilty" struck from the jury, or to have the court declare a mistrial. Based on the trial court's factual findings, there is no question that a juror violated his or her oath by (1) making a decision as to guilt during trial, (2) announcing that decision to other jurors, (3) lying to the trial court about these matters, and (4) never acknowledging the lie.

**Juror No. 9**: After Mr. Cabrera's wife testified, Juror No. 9 told the bailiff that she "looked familiar" (A097-99 at 72:11-77:21). Mr. Cabrera's counsel told the court that Mrs. Cabrera was a teacher at Springer Middle School (A098 at 73:5, 9). Juror No. 9 said she worked at Springer Middle School, but that Mrs. Cabrera "is not a teacher at Springer" (*id.* at 75:2-7). Juror No. 9 could not explain why Mrs. Cabrera looked familiar (*id.* at 75:8-13). Neither the court nor counsel inquired as to whether the juror knew Mrs. Cabrera from Springer Middle School. Juror No. 9 remained on the jury. Mrs. Cabrera later testified she was never asked if she recognized any of the jurors (A250 at 87:23-88:4).

**Juror No. 5**: Juror No. 5 sent several notes to the court during deliberations. Juror No. 5 asked to be excused because of her mental health: "I would like to be excused from this jury. I fear my mental health is at stake" (A437). She also "refuse[d] to be part of the jury that frees this defendant" (*id.*). She also asked to

be escorted to an empty room so she might be alone (A438). She also said she had a seizure and had been taken to the emergency room (A439). There was no inquiry or discussion as to whether Juror No. 5 was physically or mentally able to serve as a juror. Trial counsel did not move to dismiss Juror No. 5, even though they conceded they had no reason for not doing so (A268 at 32:23-33:9; *see also* A269 at 36:17; A242 at 36:20-21).

The Superior Court incorrectly denied Mr. Cabrera's claims concerning these jurors as procedurally barred under Rule 61(i)(4) because they were rejected "in 2008 in connection with Cabrera's request to conduct *ex parte* interviews of the jurors" (Ex. 1 at 86). The rejection of Mr. Cabrera's motion for leave to contact jurors was not an adjudication of the claims themselves.

A criminal defendant is guaranteed a verdict by an impartial jury. *See Black v. State*, 3 A.3d 218, 220 (Del. 2010). That right is violated if even one biased juror serves on the jury. *See Flonnory v. State*, 778 A.2d 1044, 1057 (Del. 2001). Due process requires that jurors are competent during trial. *See Banther v. State*, 2000 WL 33109770, at *1 (Del. Super. Ct. 2000) ("If there is clear evidence of a juror's incompetence to understand the issues and to deliberate at the time of his or her service, the jury's verdict will be set aside."). A new trial is warranted where defendant was "identifiably prejudiced by the juror misconduct," or where there exist "egregious circumstances – i.e., circumstances that, if true, would be deemed

inherently prejudicial so as to raise a presumption of prejudice in favor of defendant." *Black*, 3 A.3d at 220. Permitting a biased juror to remain who said "I think he's guilty" and lied about making the statement was an egregious circumstance and inherently prejudicial. *See id.* at 221.

Mr. Cabrera's constitutional rights were also violated by the continued participation of a juror who was incompetent due to mental and physical issues, and who "refuse[d] to be a part of the jury that frees this defendant" (A437). *See Banther*, 2000 WL 33109770, at *1. In addition, the failure to dismiss Juror No. 9, who said Mrs. Cabrera looked familiar, was inherently prejudicial and violated Mr. Cabrera's constitutional rights.

Finally, Mr. Cabrera's trial counsel provided ineffective assistance in failing to: (a) explore bias and move to strike the juror who said Mr. Cabrera was "guilty" and in failing to move for a mistrial; (b) explore bias and move to strike a juror who said she was familiar with Mr. Cabrera's wife; and (c) explore whether Juror No. 5 was physically and mentally able to serve as a juror, and failing to move for a mistrial after she said she refused to be part of a jury that freed Mr. Cabrera.

It was the responsibility of Mr. Cabrera's trial counsel to decide whether to move to dismiss any jurors or to move for a mistrial. *See Ayers v. State*, 802 A.2d 278, 284 (Del. 2002); *see also People v. Ferguson*, 494 N.E.2d 77, 82 (N.Y. 1986). Trial counsel could not articulate any reason why they did not move to strike the

juror who said "I think he's guilty" in the middle of trial, or move for a mistrial (A241 at 29:2-30:11; A266 at 24:21-25:8). It was objectively unreasonable to permit that juror to remain on the jury.

Mr. Cabrera's trial counsel also testified that they did not ask the court to excuse Juror No. 9 because they thought it would be helpful to have someone on the jury who knew Mr. Cabrera and his family (A241 at 32:9-14). Trial counsel's decision was not objectively reasonable, however, given they did not know how the juror knew Mrs. Cabrera or what she thought of her.

Trial counsel also testified they did not ask the court to excuse Juror No. 5 after she said she "refuse[d] to be part of the jury that frees this defendant" (A437), because they wanted a hung jury. But they could not explain how keeping a pro-prosecution juror – who was refusing to deliberate – was helpful to Mr. Cabrera (A268 at 32:23-33:9; A242-43 at 36:18-37:2).

If trial counsel had moved to strike these jurors or moved for a mistrial, there is a reasonable probability that the outcome of the trial would have been different. For the same reasons, Mr. Cabrera's appellate counsel provided ineffective assistance in failing to raise these arguments on direct appeal.

## IX. JUROR INTERVIEWS SHOULD HAVE BEEN PERMITTED

**Question Presented**: Whether the Superior Court erred in denying Mr. Cabrera's motion to permit his counsel to contact jurors? This issue was preserved for appeal (*see* Ex. 2 at 1-52).

**Standard of Review**: The Court reviews questions of law *de novo*, *Outten*, 720 A.2d at 551, and findings of fact for clear error, *Burrell*, 953 A.2d at 960.

**Merits of Argument**: Mr. Cabrera's constitutional rights, including his rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article 1, § 7 of the Delaware Constitution, were violated by the Superior Court's denial of his motion to interview jurors. The Superior Court denied Mr. Cabrera's motion on the grounds that there was "no need to contact the trial jurors" (Ex. 2 at 1). Based on the juror bias and incompetence set forth above, there was a legitimate and substantial need to contact the jurors to investigate whether there was any juror bias or misconduct. The Superior Court also held that the prohibition on contacting jurors in Rule 3.5(c) of the Delaware Lawyers' Rules of Professional Conduct is not unconstitutional because judicially-supervised interviews were available (*id.*). Those interviews do not cure the violation.

Under Rule 3.5(c), a lawyer is not permitted to "communicate with a juror . . . unless the communication is permitted by court rule." The Rule violates

Mr. Cabrera's constitutional rights because it forecloses any post-trial investigation that could uncover juror bias or misconduct. *See Flonnory*, 778 A.2d at 1057.

Rule 3.5(c) is also an impermissible restraint on counsel's right to free speech under the First Amendment and Article 1, Section 5 of the Delaware Constitution. In 2003, the Court adopted the ABA Model Rules, but chose not to adopt ABA Model Rule 3.5(c), which permits a lawyer to communicate with jurors after the jury has been discharged on certain conditions. Instead, the Court adopted the Rule as it is currently written, which prohibits communication between attorneys and jurors "unless the communication is permitted by court rule."

The ABA changed Model Rule 3.5(c) in 2002 in response to a decision that the prior rule, which included a blanket prohibition on post-verdict communication with jurors (like Delaware's Rule 3.5(c)), was unconstitutional. *See* Ellen J. Bennett et al., Annotated Model Rules of Prof'l Conduct § 3.5 (ABA, 8th ed. 2015). In *Rapp v. Disciplinary Board of the Hawaii Supreme Court*, 916 F. Supp. 1525 (D. Haw. 1996), the court held that Hawaii's rule prohibiting contact with jurors "except as permitted by law" was unconstitutionally vague and overbroad:

> [T]his court has not found any Hawaii case law which either sets forth an exception to Rule 3.5(b) in circumstances where counsel suspect that jury misconduct has occurred or a procedure that an attorney needs to follow if that attorney does have such suspicions. . . . [N]o Hawaii case has discussed what might amount to good cause warranting jury interviews, if good cause is the applicable standard.

*Id.* at 1536-37. Delaware's Rule 3.5(c) is unconstitutional for the same reasons.

## X. DISCOVERY SHOULD HAVE BEEN PERMITTED

**Question Presented**: Whether the Superior Court erred in denying Mr. Cabrera's motion for leave to take discovery? This issue was preserved for appeal (*see* Ex. 3 at 1-13; Ex. 4 at 1-3).

**Standard of Review**: The Court reviews a denial of discovery for abuse of discretion. *See Hopkins v. State*, 893 A.2d 922, 927 n.5 (Del. 2006).

**Merits of Argument**: Mr. Cabrera sought discovery relating to: (1) the basis for the seizure of the gun from his residence; (2) the inappropriate relationship between Detective Lemon and Ms. Mathis; and (3) the out-of-court statements by Ms. Harrigan and Mr. Powell (*see* Exs. 3 & 4).

Mr. Cabrera sought the following discovery regarding the gun: (1) police and prosecution records concerning the searches and seizures at his residence; and (2) the depositions of certain detectives regarding the searches and seizures (Ex. 3 at 6-7). The Superior Court denied the requested discovery on the basis that the record was "fully developed" (Ex. 4 at 1-2). But the record was not fully developed, e.g., there is no indication in the record as to why an investigation of an unrelated murder, which did not involve a gun, led police to seize a gun from Mr. Cabrera's residence. It was an abuse of discretion for the Superior Court to deny the discovery. *See Harris v. Nelson*, 394 U.S. 286, 300 (1969) ("[W]here specific allegations before the court show reason to believe that the petitioner may,

if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.").

The Superior Court also incorrectly denied discovery regarding the inappropriate relationship between Detective Lemon and Ms. Mathis (*see* Ex. 3 at 10-11; *see also* Ex. 4 at 2). Mr. Cabrera sought discovery regarding: (1) police and prosecution records concerning Ms. Mathis; (2) personnel records for Detective Lemon; and (3) police or prosecution records concerning any internal affairs investigation regarding Detective Lemon's relationship with Ms. Mathis (*see* Ex. 3 at 10). The Superior Court's decision to deny discovery regarding a potentially inappropriate relationship was an abuse of discretion. *See Weedon*, 750 A.2d at 528 ("In fairness to the prosecutor, as well as to the defendant, that claim [suggesting prosecutorial misconduct] should be either proved or dispelled through direct testimony.").

The Superior Court also denied the request for discovery concerning the statements to police by Mr. Powell and Ms. Harrigan (*see* Ex. 3 at 12; Ex. 4 at 2). Those statements constituted *Brady* material, and should have been disclosed prior to trial. It was likewise an abuse of discretion not to order them produced in discovery.

## CONCLUSION

The Superior Court's Order to the extent it denied Mr. Cabrera's requested Rule 61 relief should be reversed, and a new guilt-phase trial or further post-conviction proceedings should be ordered.

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**CERTIFICATE OF SERVICE**

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