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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TROY DIXON, Defendant Below-Appellant, v. STATE OF DELAWARE, Plaintiff Below-Appellee.	))))))))))	No. 319, 2020 Court Below---Superior Court of the State of Delaware in and for New Castle County ID No. 1211005646A

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

APPELLANT'S AMENDED OPENING BRIEF (CORRECTED)

Stamatios Stamoulis, Esq.
Del. Bar No. 4606
800 N. West Street, Third Floor
Wilmington, DE 19801
(302) 999 – 1540
stamoulis@swdelaw.com

KARL SCHWARTZ (*pro-hac-vice*)
PA Bar # 38994
KATHERINE ERNST (*pro-hac-vice*)
PA Bar # 209036
Wiseman & Schwartz
781 Arch St., Suite 702N
Philadelphia, PA 19106
(215) 360 -3988
schwartz@wisemanschwartz.com
ernst@wisemanschwartz.com
Attorneys for Defendant-Appellant

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NATURE OF PROCEEDINGS

On January 7, 2013 Troy Dixon ("Dixon") was charged with Assault First Degree, Possession of a Firearm During the Commission of a Felony ("PFDCF"), Disregarding a Police Officer's Signal, Resisting Arrest, and Possession of a Firearm by a Person Prohibited ("PFBPP"). Before trial, Dixon moved to have the PFBPP charge severed from the remaining charges and tried separately. His motion was granted.

On October 1, 2013, at the first trial, Dixon was found not guilty of Assault First Degree, but was convicted of the lesser Assault Second Degree, PFDCF and Resisting Arrest charges. Dixon was sentenced to a minimum of 18 years imprisonment. Dixon's conviction was affirmed by the Delaware Supreme Court on direct appeal. *Dixon v. State*, 2014 WL 4952360 at *1 (Del. Oct. 1, 2014).

On April 7, 2014, Dixon was tried on the PFBPP charge. The prosecution proceeded under two PFBPP counts: 11 Del. C. §1448(e)(2) ("Serious Injury PFBPP") which requires proof of negligent causing of serious physical injury with the firearm, and 11 Del. C. §1448(e)(1) ("Simple PFBPP"), which merely requires proof of possession of the firearm by a person prohibited. At the second trial, the jury found Dixon not guilty of the Serious Injury PFBPP but found him guilty of Simple PFBPP. Dixon was sentenced to an additional minimum of 8 years imprisonment for the Simple PFBPP. (Exhibit 1).

On December 2, 2014, Dixon filed his First Motion for Postconviction Relief, in which he made numerous claims stemming from both trials. The Superior Court denied his postconviction motion, which was affirmed by the Delaware Supreme Court. *State v. Dixon*, 2017 WL 2492565 (Del. June 8, 2017).

On November 21, 2018 Dixon filed a Second Motion for Postconviction Relief ("Second Motion"). On June 6, 2019, the Superior Court denied the second motion. On November 14, 2019 Dixon filed a Notice of Appeal from the denial of his Second Motion. On December 11, 2019 the Supreme Court dismissed Dixon's appeal as untimely.

In his Third Motion for Postconviction Relief, Dixon alleged ineffective assistance of counsel based on counsel failing to advise Dixon of the Superior Court's June 6, 2019 decision. An affidavit from Dixon's counsel led the Superior Court to conclude that Dixon was not made aware of the Superior Court's June 6, 2019 decision. *See State v. Dixon*, 2020 WL 5289927, at *2 (Del. Super. Ct. Sept. 4, 2020). On September 4, 2020, in the interest of justice, the Superior Court vacated its June 6, 2019 decision and reconsidered Dixon's Second Motion; the Superior Court denied the substance of that motion.

A timely notice of appeal was filed on September 28, 2020. This Opening Brief follows.

SUMMARY OF ARGUMENT

I.

Troy Dixon has continually maintained that he is innocent of the shooting for which he is serving decades in prison. Only one piece of evidence linked Dixon to the crime: the testimony of Carl Rone. Rone, the state's ballistics expert, opined that the gun found on Dixon was the gun used in the shooting. Rone's testimony took the case from one that most likely could not withstand a judgment of acquittal to one that led to Dixon's conviction. *See* A311; (N.T. 09/30/13 at 66) (trial judge granted Dixon's codefendant's judgment of acquittal but denied Dixon's request based upon "the tying of the gun" to the shooting).

Because Dixon's conviction is reliant on Carl Rone's false and misleading testimony that he could conclusively match a recovered shell casing to a specific gun, and because Dixon was unable to challenge at trial Rone's credibility, using the evidence of Rone's crimes, the interests of justice and Rule 61(d)(2)(i) require Dixon be granted a new trial.

STATEMENT OF FACTS

I. Introduction

On November 8, 2012, a passenger in a black Crown Victoria shot at a car containing Darren Brown ("Brown"), Maurice Harrigan ("Harrigan") and Aaron Summers ("Summers"). A50, A55; (N.T. 09/25/13 at 87, 92). The only evidence that linked Dixon to this crime was the testimony of Carl Rone ("Rone"), the State's ballistics expert. A255; (N.T. 09/30/13 at 4). Rone, who has since been convicted of multiple crimes related to criminal misconduct committed while working for the State, testified that the gun found on Dixon hours after the shooting was the gun used in the crime. A278; (N.T. 09/30/13 at 27).

The other evidence the State offered at trial was speculative and highly circumstantial. First, the State presented Brown's testimony that the shooter had facial hair and light brown skin, characteristics possessed by Dixon. A74; (N.T. 09/25/13 at 111). Brown was shown Dixon's photo hours after the shooting, and he emphatically stated that he could not say that Dixon had committed the crime. A74-A75; (N.T. 09/25/13 at 110-111). At trial he testified that upon viewing Dixon that he had "never seen him before in my life." A92; (N.T. 09/25/13 at 129).

The remainder of the State's evidence was that Dixon was found a few hours after the shooting in a car similar to the description of the shooter's car, and he ran from the police. A115, A150-151; (N.T. 09/26/13 at 99, 134-135). However, the

license plate of the car Dixon was found in did not match the license plate officers were searching for, and he was a Person Prohibited in possession of a gun who therefore had reason to flee irrespective of any shooting. *Id.*

Moreover, the State's theory of motive was not compelling. The State argued that Dixon and Harrigan had gotten into a dispute a few days earlier at the Rebel nightclub, and this prompted the shooting. A320-A321; (N.T. 09/30/13 at 91-92). However, Harrigan explained that the men merely had a brief miscommunication and that he and Dixon had shaken hands and left the nightclub as friends. A176; (N.T. 09/26/13 at 175).

Indeed, after the defense moved for judgment of acquittal, the judge acknowledged that the State's theory for motive was weak and that the rest of the case was highly circumstantial. A311; (N.T. 09/30/13 at 66). Notably, in denying the motion for judgment of acquittal, the judge pointed "especially [to] the tying of the gun" found on Dixon, to the shooting. *Id.*; *see also* A315; (N.T. 09/30/13 at 70) (the court states: "The altercation is not particularly motive-generating, I don't think.")

Thus, it is entirely likely that without the testimony of Carl Rone, testimony that is now put in grave doubt due to his serious misconduct, this case would not have even gotten past the Motion for Judgment of Acquittal.

II. Evidence Presented by the State

The State presented three direct witnesses to the shooting: Darren Brown, Maurice Harrigan and Aaron Summers. The State additionally presented the testimony of a number of officers, Anita Symonds, the forensic nurse who treated Aaron Summers, and forensic examiner, the now-discredited Carl Rone.

A. Direct Witnesses

Darren Brown

Darren Brown testified that on November 8, 2012 at around 10:30am he was driving a car in which Harrigan sat in the passenger seat and Aaron Summers sat in the backseat. A50; (N.T. 09/25/13 at 87). He drove Harrigan to a funeral. *Id.* Harrigan went in, paid his respects, and returned to the car within three to five minutes. A51; (N.T. 09/25/13 at 88). Brown then proceeded to drive the trio to their next destination. A52; (N.T. 09/25/13 at 89).

When they were stopped at a traffic light, a black Crown Victoria pulled up behind them, and the passenger shot at them multiple times. A55; (N.T. 09/25/13 at 92). Summers got hit by a bullet. A57; (N.T. 09/25/13 at 94). Brown saw the man who shot at them for less than two seconds and noted the shooter was "light skinned" with a beard. A57-A58, A90; (N.T. 09/25/13 at 94-95, 127). A few hours after the shooting, the police presented Brown with a photo array containing Dixon. A73; (N.T. 09/25/13 at 110). He stated that Dixon had the correct complexion, but Brown

emphasized that he could not say that Dixon was the shooter, and during his testimony, upon viewing Dixon, he stated that he had "never seen him before in my life." A92; (N.T. 09/25/13 at 129).

Brown admitted that he had two felony drug convictions. A83; (N.T. 09/25/13 at 120).

Maurice Harrigan

Harrigan testified that his friend Kevin Bell ("K.B.") was killed on November 4, 2012, a few days prior to the shooting incident at issue. A174; (N.T. 09/26/13 at 173). It was K.B.'s funeral that he attended on November 8, 2012, the day of the incident. A173; (N.T. 09/26/13 at 172).

By way of background, Harrigan testified that he had seen K.B. the night of K.B.'s murder at the Rebel nightclub. *Id.* He had been friends with K.B. for a long time, and they talked that night. A175; (N.T. 09/26/13 at 174). They were talking to each other rather animatedly at the club, so some people may have thought they were fighting, but they were not. A176; (N.T. 09/26/13 at 175). While he had this animated conversation with K.B., Dixon got involved to make sure K.B. was okay, but Dixon and Harrigan shook hands by the end of their conversation, so there was no ongoing issue. *Id.*

When Harrigan went to pay his respects at K.B.'s funeral, Dixon looked upset, but Harrigan believed this was because of the death of their friend. A207; (N.T.

09/26/13 at 206). ("I seen Troy [Dixon]. I was going to say something to him, but he looked mad because of the funeral, so I just left him alone. That was it.")

Harrigan was unable to see either the shooter or the driver of the vehicle that the shots came from. A225; (N.T. 09/27/13 at 24).

Aaron Summers

Summers did not see the shooter or the vehicle, and otherwise did not have any information regarding the identity of the shooter. A242; (N.T. 09/27/13 at 43).

B. Police Officer Testimony

Numerous police officers testified to the portion of the shooting investigation that they took part in. Officers testified that a call went out at around 11AM on November 8, 2012 concerning a shooting in the area of the 1000 block of Vanderver Avenue. A97; (N.T. 09/26/13 at 82). There was a report that shots were fired from a 2007 black Crown Victoria with a full DE tag number 453299. A135; (N.T. 09/26/13 at 119).

Officers patrolled around the Browntown area of Wilmington, looking for the 2007 Crown Victoria with 453299 tags. A109; (N.T. 09/26/13 at 93).

Some time later, Officer Marc Martinez spotted a black Crown Victoria. *Id.* at 99. When the vehicle sped away from him, he turned on his lights and sirens. A118; (N.T. 09/26/13 at 102). After a short chase that other police vehicles joined, Dixon jumped out of the passenger seat and ran away from officers on foot. A21;

(N.T. 09/24/13 at 55-56). Officer John Fleming saw Dixon throw something as he ran. A21-A22; (N.T. 09/26/13 at 55-56). Officer Fleming took Dixon into custody. *Id.* at 50. Officer Brian McCanney was asked to locate what Dixon had thrown, and he ultimately retrieved a 9mm Ruger gun. A164; (N.T. 09/26/13 at 162).

After the car was seized, the black Crown Victoria that Dixon ran from was determined to be a 2003—not a 2007—and it had temporary tags completely different from the tags reported in the police bulletin. A150; (N.T. 09/26/13 at 134). Because of this, Officer Martinez acknowledged that the car Dixon was a passenger in was not the same vehicle as the suspect vehicle. *Id.*

C. Testimony of Carl Rone

Other than some brief testimony from the Chief Investigating Detective in this case, the last witness the jury heard from was "firearms expert" Carl Rone. A256; (N.T. 09/30/13 at 5). Rone testified that he had been a firearms expert for approximately 25 years. *Id.* The prosecutor went through Rone's extensive C.V. which included trainings, professional organizations, certifications and seminars that he had conducted. A256-A257; (N.T. 09/30/13 at 5-6); *see also* A341; Exhibit 72, Carl Rone CV. He stated that he had testified "in a court of law as a forensic firearms expert" 498 times. A257; (N.T. 09/30/13 at 6). He noted that he had testified in Pennsylvania, Delaware, Georgia, Florida and the District of Columbia and in both state and federal court. *Id.*

Once he got to the substance of his testimony, Rone claimed that when a bullet is fired, the gun leaves an imprint both on the bullet and the shell casing, a mark equivalent to a fingerprint. A265; (N.T. 09/30/13 at 14). That is, Rone claimed that he could look at the markings on the shell casings recovered from the scene and compare them to the markings on shell casings discharged from test fires of the gun to determine conclusively that the recovered shell casings came from the gun in question. A267; (N.T. 09/30/13 at 16).

Rone testified that in this case he determined that all six shell casings recovered from the crime scene, and one of the bullets, came from the gun possessed by Dixon. A278; (N.T. 09/30/13 at 27). Rone did not quantify any confidence percentile; he stated his conclusions as a certainty. A277; (N.T. 09/30/13 at 26). ("I identified [the shell casings] as having been fired in this pistol that was here"); *see also* Exhibit 73, Carl Rone Report ("Items #1 thru #5 and #7 are six (6) caliber 9mm Luger cartridge cases, Remington and federal brands, which were identified as having been fired in the Item #6 pistol").

On cross-examination, the defense attorney asked Rone to estimate the number of P95 Rugers produced every year, to which Rone replied "bazillions". A281; (N.T. 09/30/13 at 30). Moreover, Rone acknowledged that other manufacturers make an "awful lot" of 9mm Luger guns (the same type of gun as the P95 Ruger). A283; (N.T. 09/30/13 at 32). The defense attorney also pressed Rone

on the fact that pictures of the impressions of the bullets did not look like pictures of the test-fired bullets. A290; (N.T. 09/30/13 at 39). Rone maintained that in his opinion, they were the same. *Id.* The defense attorney also attempted to impeach Rone on the fact that many guns have a rightward spin, and that such a characteristic is not unique to the gun possessed by Dixon. A296; (N.T. 09/30/13 at 45). Nonetheless, Rone remained firm that the recovered bullet and shell casings had to have come from Dixon's gun. *Id.*

III. New Evidence of Carl Rone's Misconduct, that Under the Facts of *This* Case, Create a Strong Inference of Innocence

On May 3, 2018, an arrest warrant was issued for Carl Rone, alleging that from January 1, 2016 to December 31, 2017, he committed theft by false pretenses and falsified business records to be paid for work not performed. *Sierra v. State*, 2020 WL 6481801, at *1 (Del. Nov. 4, 2020). Rone pleaded guilty to both charges. *Id.* Rone received a one-year sentence of probation on each charge, running concurrently, and he was ordered to pay $30,265.39 in restitution.

On November 21, 2018 Dixon filed the instant Amended Motion for Postconviction Relief on the basis that Carl Rone's criminal misconduct "creates a strong inference that the movant is actually innocent of the acts underlying the charges of which he was convicted." *See* Rule 61(d)(2)(i).

ARGUMENT

I. THE SUPERIOR COURT ERRED BY DENYING DIXON'S SECOND MOTION FOR POSTCONVICTION RELIEF WHEN THE INTERESTS OF JUSTICE, AND RULE 61(d)(2)(i), REQUIRE DIXON BE GRANTED A NEW TRIAL BASED ON MONUMENTAL CREDIBILITY ISSUES SURROUNDING THE STATE'S EXPERT WITNESS, DISCOVERED AFTER DIRECT AND POST-CONVICTION REVIEW, WHERE DIXON'S CONVICTION HINGED ON THE EXPERT'S TESTIMONY.

A. Question Presented

Whether the Superior Court erred by denying Dixon's Second Motion for Postconviction Relief when the interests of justice, and Rule 61(d)(2)(i), require Dixon be granted a new trial based on monumental credibility issues surrounding the state's expert witness, discovered after direct and post-conviction review, where Dixon's conviction hinged on the expert's testimony.

This issue was preserved in Dixon's Motion for Postconviction Relief Pursuant to Delaware Superior Court Criminal Rule 61(d)(2) filed November 21, 2018; *see also State v. Dixon*, 2020 WL 5289927, at *4 (Del. Super. Ct. Sept. 4, 2020) (denying Defendant's Second Motion for Postconviction Relief).

B. Scope of Review

This 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, 961 (Del. 2008), and a decision to deny post-conviction relief for abuse of discretion. *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010).

C. Merits of Argument

Dixon has continually maintained that he is innocent of the shooting for which he is serving decades in prison. Only one person, Darren Brown, saw the shooter, and he was clear that he could not identify Dixon. Moreover, while Dixon was found later on the day of the shooting in a black Crown Victoria—the same make and model as the suspect vehicle—it was determined that the vehicle Dixon was found in was not the same car the police were searching for; it was a different year and had a different license plate number.

Only one piece of evidence linked Dixon to the crime: the testimony of Carl Rone. Rone, the state's ballistics expert, opined that the gun found on Dixon was the gun used in the shooting. Thus, Rone's testimony took the case from one that most likely could not withstand a judgment of acquittal to one that led to Dixon's conviction. *See* A311; (N.T. 09/30/13 at 66) (trial judge granted Dixon's codefendant's judgment of acquittal but denied Dixon's request based upon "the tying of the gun" to the shooting).

After Dixon exhausted his remedies on direct and postconviction review, he learned that Rone's credibility and integrity had been destroyed as a result of his criminal convictions directly related to his work for the State of Delaware. Because Dixon's conviction is reliant on Carl Rone's false and misleading testimony that he can conclusively and unreservedly match a recovered shell casing or projectile to a

specific gun, and because Dixon was unable to challenge Rone's credibility using the evidence of Rone's crimes at his trial, the interests of justice and Rule 61(d)(2)(i)[1] require Dixon be granted a new trial.

1. The Superior Court Analysis

The Superior Court held that, while "evidence of Rone's misconduct is 'newly discovered' evidence under Rule 61(d)(2)(i)," Dixon fails to meet that exception because Rone's credibility issues have not "created a significant change in the factual circumstances" of the case since Rone's testimony "was not crucial to the State's case against Dixon." *State v. Dixon*, 2020 WL 5289927, at *4 (Del. Super. Ct. Sept. 4, 2020).

As discussed *infra* at 17-19, this basis for the Superior Court's decision is erroneous and contradicted by the evidence at trial. The Superior Court also found that the timing of the criminal acts for which Rone was caught, rendered them irrelevant to Mr. Dixon's defense. *State v. Dixon*, 2020 WL 5289927 at *4. The Superior Court made this finding notwithstanding that Rone's misconduct was closer in time to Mr. Dixon's trial than it was to the trial in *Fowler v. State*, 194 A.3d 16 (Del. 2018). *See* discussion *infra* at 21-22.

[1] A second or subsequent petition will be considered if it "pleads with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted."

Thus, while the Superior Court found the newly discovered prong had been satisfied, in its opinion, the strong inference of innocence had not. But as demonstrated below, and as evinced by the judgment of acquittal granted the co-defendant who, but for the Rone testimony, was just as culpable in light of his role as driver, the Superior Court's judgment was informed by its misapprehension of the factual record. As demonstrated below, absent the Rone testimony, there was little evidence tying Mr. Dixon to the incident.

2. *Fowler v. State*

In *Fowler v. State*, the defendant was charged with offenses stemming from two separate shootings. *Fowler v. State*, 194 A.3d 16 (Del. 2018). The charges from both incidents were tried jointly. *Id.* at 19. The State's theory was that the defendant was the shooter at both incidents. *Id.* Carl Rone testified that the same gun was used at both incidents. *Id.* at 19-20.

During postconviction proceedings in Superior Court, it emerged that the State had failed to provide Fowler with four *Jencks* statements. *Id.* at 17. To counter this problem, the State argued that the *Jencks* violations were harmless because the ballistics evidence from Rone was so strong. *Id.* The Superior Court agreed. *Id.* Thus, "Rone's testimony was vital to both the State's trial case and the Superior Court's opinion because if one accepted the expert's testimony that the same weapon was

present at each incident, it gave the jury and the Superior Court a basis other than eyewitness testimony to conclude [the defendant] was the shooter." *Id.* at 22.

While Fowler's postconviction proceeding was on appeal to the Delaware Supreme Court, the news emerged that Carl Rone had been charged with Theft by False Pretense over $1,500 and Falsifying Business Records to Make or Cause False Entry for "providing false [Delaware State Police] activity sheets and receiving compensation from [Delaware State Police] for work that was not performed." *Id.* at 17.

The State thereafter changed its argument and asserted that Rone's testimony was not critical in light of the witness testimony tainted by the *Jencks* violations. *Id.* This Court ruled that "[b]oth of the strands of the evidence that the State relied upon to prove that fact have now been materially compromised in different ways, and the State therefore cannot shore up the weaknesses of one strand with the other." *Id.* at 26. "The Court reasoned that the burden was on the State to prove that both the *Jencks* violations and the Rone issue were harmless beyond a reasonable doubt, and that the State failed to meet that burden." *Sierra v. State*, 2020 WL 6481801, at *5 (Del. Nov. 4, 2020) (discussing *Fowler*). Based upon the "unusual confluence of events presented here," the Court vacated Fowler's convictions and remanded the case for a new trial. *Fowler*, 194 A.3d at 27.

3. No evidence presented by the State, other than the testimony of Carl Rone, linked Dixon to the crime.

In this case the Superior Court held:

> In *Fowler*, all of the key testimony used to convict the Defendant was called into serious doubt for different reasons. In the instant case, by contrast, eye witness testimony identified [Dixon] as the shooter. [Dixon] was seen fleeing a vehicle that matched the description of the shooter's vehicle, and [Dixon] tossed a 9mm handgun away while he attempted to flee from police. Any credibility issues on Rone's part would no[t] [a]ffect the reliability of these key pieces of evidence.

State v. Dixon, 2020 WL 5289927, at *4 (Del. Super. Ct. Sept. 4, 2020).

The Superior Court opinion is facially incorrect. No eyewitness testimony ever identified Dixon as the shooter. (N.T. 09/24/13 at 20) (the prosecutor admitted: "So as far as an ironclad identification, I don't think we are ever going to get to that point"); *see also Dixon v. State*, 2014 WL 4952360 (Del. Oct. 1, 2014) (this Court stated in its opinion denying Dixon's direct appeal: "neither witness positively identified Dixon as the shooter…"). Brown testified that Dixon had a similar complexion as the shooter and both Dixon and the shooter had facial hair, but those characteristics would have been shared by thousands of men in the area. Indeed, Brown repeatedly affirmed that he could not say that Dixon was the shooter and he testified that when he viewed Dixon in the courtroom that he had "never seen him before in my life." A92; (N.T. 09/25/13 at 129).

Moreover, while Dixon was found in a black Crown Victoria, and the shooter was a passenger in a black Crown Victoria, it was later revealed that the car Dixon

was in was not the suspect vehicle because it was a different year and it had a different license plate.

Thus, the evidence against Dixon, absent the Rone testimony, was weak. Zaire Cephus, Dixon's co-defendant, was the driver of the black Crown Victoria that Dixon was apprehended in. Cephus was also at the Rebel nightclub a few days prior to the shooting and took part in the discussion between K.B., Dixon and Harrigan that supposedly motivated this shooting. Moreover, it was Cephus, not Dixon, who led the police on a high-speed chase. Nonetheless, the trial judge properly granted Cephus' motion for judgment of acquittal, finding the evidence as to Cephus insufficient to go to the jury. A314; (N.T. 09/30/13 at 69). As to Dixon's Motion for Judgment of Acquittal, the judge explicitly denied the motion due to Carl Rone's testimony that the gun recovered from Dixon was the gun used in the crime. *See* A311; (N.T. 09/30/13 at 66) (judge denied Dixon's request based upon "the tying of the gun"). Thus, the trial judge's rulings establish that the Carl Rone testimony was the linchpin to Dixon's conviction.

Additionally, Dixon was tried on the severed PFBPP charge in April of 2014. *See Dixon v. State*, 113 A.3d 1080 (Del. 2015). Dixon was charged with 11 Del. C. §1448(e)(1) ("Simple PFBPP"), which only requires proof of status as a person prohibited (which Dixon stipulated to being) and possession of a gun (Dixon had admitted in a recorded statement to possessing the gun). Dixon was also charged

with 11 Del. C. §1448(e)(2) ("Serious Injury PFBPP"), which additionally includes the element of negligent causing of serious physical injury or death through the use of the firearm.

Thus, the same evidence of Dixon's supposed involvement in the shooting needed to be re-presented to the second jury to prove this additional element. The jury in the second trial found Dixon not guilty of Serious Injury PFBPP; thus, the second jury could not find beyond a reasonable doubt that Dixon was involved in the shooting incident. This second trial shows that even *with* the testimony of Carl Rone, who testified similarly at both trials, the State's case was thin. Surely, then, if Rone's testimony that Dixon possessed the gun used in the shooting were seriously undermined, it is unlikely that the first jury would have arrived at the verdict it did.

4. The trial jurors had no clue that they were being asked to accept the testimony of a fraudster.

Since the conclusion of Dixon's trial, Carl Rone's credibility and integrity have been destroyed. On May 3, 2018, an arrest warrant was issued for Carl Rone, alleging that from January 1, 2016 to December 31, 2017, he committed theft by false pretenses and falsified business records to be paid for work not performed. *Sierra v. State*, 2020 WL 6481801, at *1 (Del. Nov. 4, 2020). Rone pleaded guilty to both charges. *Id.* Rone received a one-year sentence of probation on each charge, running concurrently, and he was ordered to pay $30,265.39 in restitution.

Rone is no longer a member of the police force, and quite obviously, no longer testifies as an expert.

The interests of justice, animated by Rule 61(d)(2)(i)'s gateway, require Dixon be granted a new trial, or at the very least, be granted a remand so that the Superior Court can conduct an evidentiary hearing to determine what impact the newly discovered evidence would have had on the jury's verdict. The unavailability of impeachment directed at an expert's relevant "personal interest," implicates "Confrontation Clause error" that can have a "substantial and injurious effect on the verdict." *Tuite v. Martel*, 460 Fed. Appx. 701, 706 (9th Cir. Dec. 6, 2011). Thus, a review of Dixon's claims is required in the interests of justice and pursuant to Rule 61(d)(2)(i); *see also VanArsdall v. State*, 524 A.2d 3, *8 (Del. 1987) ("The reviewing court can assess the impact of the…evidence on the fact-finding process at trial by considering factors ascertainable from the trial record, *e.g.*, the importance of the testimony of the challenged witness, whether his testimony was cumulative, and the presence or absence of overwhelming evidence of guilt.").

In *Fowler*, this Court held that "[w]hen the reliability of…the key evidence the State used to prove [defendant] was the shooter has been called into question, Rule 61 requires setting aside the conviction." *Fowler*, 194 A.3d at 18. It found that "Rone's testimony was vital to [] the State's trial case." *Id.* at 22. The Court went on to say:

> [W]e must now discount [Rone's] testimony because of the new developments raising serious concerns about Rone's credibility.
>
> Rone presented evidence critical to the State's theory of the case. The State's indictment of Rone for Theft by False Pretense and Falsifying Business Records to Make or Cause False Entry goes to both Rone's professional reliability and honesty. It also raises questions about whether Rone did the work he says he did or whether he would just testify to the result he knew the State wanted. Defense counsel thoroughly cross-examined Rone at trial, but this new evidence would materially aid counsel's strategy to undermine Rone's credibility. And Rone's credibility was essential to his testimony because the methodology he used is dependent in large measure on the reliability, and therefore credibility, of the expert's observations.

Id. at 26.

Thus, this Court recognized two separate bases for the proper use of the newly discovered evidence: "Rone's professional reliability and honestly"; and "whether he would just testify to the result he knew the State wanted." The Superior Court below found that the timing of Rone's criminality, rendered that criminality irrelevant. *State v. Dixon*, 2020 WL 5289927 at *4. The timing of Rone's criminality, however, was of no such concern to this Court in *Fowler,* under circumstances in which the *known* criminal conduct was more remote in time than here. In regard to Rone's professional reliability and honestly, this Court rightly did not take out a calendar and sanctify all of Rone's testimony that predated the criminality for which he was *caught.* The question of whether or not a witness only became a fraudster after the date of his false and misleading testimony is a weight question for the jury, and not a legal question for this Court. Indeed, Fowler was tried in May of 2013

whereas Dixon was tried in September of 2013. *See State v. Fowler*, 2017 WL 4381384, at *1 (Del. Super. Ct. Sept. 29, 2017), rev'd, 194 A.3d 16 (Del. 2018). That is, Dixon's trial was closer in time to Rone's conviction than Fowler's was, and therefore the timing of Dixon's trial should pose no obstacle to relief.

The second *Fowler* basis is no less critical than the first. "It is well settled that the bias of a witness is subject to exploration at trial and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Weber v. State*, 457 A.2d 674, 680 (Del. 1987) (quoting *Davis v. Alaska*, 415 U.S. 308 (1974) (quoting 3 A J. Wigmore, Evidence § 940, at 775 (Chadbourn rev. ed. 1970))). *Davis v. Alaska* held that this type of bias evidence—there, that the witness may have been incentivized because he was on probation and a potential suspect—is so important that the Confrontation Clause requires a defendant in a criminal case to be allowed to impeach a prosecution witness on bias or motivation to fabricate stemming from potential criminal exposure, even a juvenile's vulnerable status as a probationer, notwithstanding state rules precluding the use of juvenile adjudications and dispositions. *Davis*, 415 U.S. at 317-18; *see also Bland v. State*, 263 A.2d 286, 289 (Del. 1970) (where a witness is biased due to "hopes of reward from the prosecution, his testimony should not be accepted unless it carries with it absolute conviction of truth"). Here, assuming Rone's criminal conduct was not confined to the period noted in the complaint—something that, at the very least, Dixon should be permitted

to explore at an evidentiary hearing and something that did not deter this Court in *Fowler* from granting a reversal—it is relevant for this second, separate basis as well.

As discussed above, Rone's testimony was no less vital to the State's case here than it was in *Fowler*. After *Fowler*, defendants have sought relief based on the fact that Rone was involved in their cases. Delaware cases where relief has been denied are readily distinguishable from Dixon's case. For example, in *Sierra v. State*, 2020 WL 6481801, at *5 (Del. Nov. 4, 2020), this Court denied relief because, unlike here, and in *Fowler*, "Rone's testimony was not so critical in this case as it was in *Fowler* in view of the eyewitness testimony and the testimony of [the defendant's] cell mates." Similarly, in *Phillips v. State*, 227 A.3d 138, 2019 WL 1487787, at *5 (Del. 2019), this Court dismissed the claim based, *inter alia*, on the fact that "there were multiple witnesses who testified about identification and this Court found it was not a close case." In contrast to *Sierra* and *Phillips*, here there were no eyewitnesses who could identify Dixon and the evidence implicating Dixon as the shooter rested exclusively on Rone's shoulders. In *Davenport v. State*, 212 A.3d 804 (Del. 2019), this Court understandably found the Rone issue beside the point where the defendant had pleaded guilty to the offense. *Davenport* obviously has nothing to do with a case where the defendant has contested the charges and gone to trial. In *George v. State*, 209 A.3d 24, 2019 WL 1590631 (Del. 2019), unlike here, the Rone testimony had little to do with the verdict. In *George*, the defendant "shot the victim

at a banquet in front of dozens of witnesses, [and] the evidence presented at trial included a photograph of George pointing a gun at the victim just before the shooting," and George did not deny shooting the victim. *Id.* at *2.

Thus, given this Court's precedent in *Fowler* that when Rone's testimony is critical to the State's case, the conviction should be reversed, Dixon's case must be reversed, or at a minimum the case should be remanded for an evidentiary hearing to determine what impact the newly discovered evidence would have had on the jury's verdict.

5. Carl Rone's testimony was false and misleading.

This Court acknowledged in *Fowler* that the discovery that Rone was a fraudster did not occur in a vacuum.

> This new development [of Rone's arrest] casts doubt on Rone's credibility. This doubt came on top of the realities that (i) as of the trial, Rone had already let his certification lapse, and (ii) the methodology Rone used, one that has been the subject of increasing scrutiny, is dependent in large measure on the reliability of observations by the expert himself.

Fowler, 194 A.3d at 22 (citing and quoting Committee on Identifying the Needs of Forensic Sciences Community, *Strengthening Forensic Science in the United States: A Path Forward* (National Academy of Science 2009) ("NAS Report"), available at https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf ("Knowing the extent of agreement in marks made by different tools, and the extent of variation in marks made by the same tool, is a challenging task. AFTE [Association of Firearm and

Tool Mark Examiners] standards acknowledge that these decisions involve subjective qualitative judgments by examiners and that the accuracy of examiners' assessments is highly dependent on their skill and training")).

Indeed, the NAS Report discusses ballistics examiner testimony that leads to opinions of a "match," and concludes that "even with more training and experience using newer techniques, the decision of a toolmark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates." NAS Report at 153.

The NAS Report emphasizes that experts in this field should ***not*** express certainty when making comparisons:

> Because not enough is known about the variabilities among individual tools and guns, we are not able to specify how many points of similarity are necessary for a given level of confidence in the result. Sufficient studies have not been done to understand the reliability and repeatability of the methods.

Id. at 154-55.

Yet, Rone stated *with certainty* that the bullets fired in this criminal incident came from Dixon's gun. A277; (N.T. 09/30/13 at 26). During his testimony, both Rone and the prosecutor repeatedly compared the gun markings to "fingerprints," even though toolmark analysis is far more subjective than fingerprint analysis. A265, A268, A286 and A289; (N.T. 09/30/13 at 14, 17, 35 and 38). "[T]oolmark and firearms identification is at bottom a subjective inquiry." *United States v. Ashburn*,

88 F. Supp. 3d 239, 248 (E.D.N.Y. 2015); *see also United States v. Glynn*, 578 F. Supp. 2d 567, 572 (S.D.N.Y. 2008) (same); *United States v. Monteiro*, 407 F. Supp. 2d 351, 355 (D. Mass. 2006). Thus, conclusions cannot be stated with certainty.

Given how subjective ballistics analysis is, evidence that Rone committed fraud, places in doubt not only how vigorous his analysis may have been, but also whether he ever conducted any analysis at all. Subjective "match" testimony is not only dependent upon the ballistician's expertise, but it is also dependent upon his or her integrity. There is reason to doubt Rone's veracity both because he was willing to commit fraud against the State, and because his criminal exposure only heightened the importance of him demonstrating his value to the State by testifying consistent with the State's theory. *Fowler*, 194 A.3d at 26.

Dixon's trial attorney did attempt to impeach Rone, both on the prevalence of 9mm weapons and on the fact that pictures of the markings on the bullets from the scene did not appear to be all that similar to pictures of markings on the test bullets. Such impeachment was unsuccessful in the face of definitive, declarative testimony by an expert who was portrayed as a trusted ballistician, with 25 years of experience. The trial attorney's impeachment would have been far more effective, and likely deadly, had evidence of Rone's criminal misdeeds been available at trial.

Thus, Dixon should be granted a new trial, or at the very least, be granted a remand so that the Superior Court can conduct an evidentiary hearing to determine what impact the newly discovered evidence would have had on the jury's verdict.

CONCLUSION

For all of the foregoing reasons, Appellant Troy Dixon respectfully requests that the Court reverse the judgment of the Superior Court, vacate his convictions and sentence, and remand this matter for a new trial.

Respectfully Submitted:

/s/Stamatios Stamoulis, Esq.

Stamatios Stamoulis, Esq.

Del. Bar No. 4606
800 N. West Street, Third Floor
Wilmington, DE 19801
(302) 999 – 1540
stamoulis@swdelaw.com

KARL SCHWARTZ (*pro-hac-vice*)
PA Bar # 38994
KATHERINE ERNST (*pro-hac-vice*)
PA Bar # 209036
Wiseman & Schwartz
781 Arch St., Suite 702N
Philadelphia, PA 19106
(215) 360 -3988
schwartz@wisemanschwartz.com
ernst@wisemanschwartz.com
Attorneys for Defendant-Appellant

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