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Case Number 64,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HAKIEM ANDERSON,	)	
	)	
Defendant Below-Appellant,	)	No. 64,2021
	)	
v.	)	Court Below---Superior Court of the State of Delaware in and for New Castle County
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	ID No. 1508015476A&B

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

On August 15, 2015, Markevis Clark was shot and killed in Wilmington, Delaware. On September 23, 2015, Hakeim Anderson turned himself in to law enforcement, and he was charged with first-degree murder and firearms offenses in connection with Mr. Clark's shooting death. On July 17, 2017, a jury convicted Mr. Anderson of all charges. The Honorable Mary M. Johnston, who presided over Mr. Anderson's trial, sentenced Mr. Anderson to the mandatory sentence of life without parole for first-degree murder and mandatory sentences for the firearms convictions.

After this Court affirmed Mr. Anderson's convictions and sentences on direct appeal, *Anderson v. State*, 197 A.3d 1049 (Del. 2018) (Table), Mr. Anderson filed a timely *pro se* motion for postconviction relief pursuant to Super. Ct. Crim. R. 61 ("Rule 61") and appointment of counsel on February 21, 2019, *State v. Anderson*, 2021 WL 211152, at *1 (Del. Super. Ct. Feb. 2, 2021) ("*Anderson II*"). On November 14, 2019, appointed counsel Michael W. Modica, Esq., filed an amended Rule 61, raising five claims of ineffective assistance of trial counsel. *Id*. The Honorable Katharine L. Mayer, Superior Court Commissioner, recommended the motion be denied without an evidentiary hearing. *State v. Anderson*, 2020 WL 6132293 (Del. Super. Ct. Oct. 19, 2020) ("*Anderson I*"). Mr. Anderson filed a counseled motion for reconsideration. *Anderson II*, at *2. The State asked the Superior Court to deny this motion. *Id*. Judge Johnston denied it, adopted the

Commissioner's Report and Recommendation in full, and denied Mr. Anderson's Rule 61 motion. *Id*., at *1.

Mr. Anderson filed a timely notice of appeal to this Court. This is his Opening Brief.

SUMMARY OF ARGUMENT

1. Mr. Anderson's right to effective assistance of counsel, as guaranteed by the United States and Delaware Constitutions, was violated by his trial counsel's failure to object to a persistent barrage of plainly inadmissible evidence – admitted through the testimony of State's witness Joseph Brown – which consisted of inflammatory victim impact testimony, prejudicial opinion testimony about Mr. Anderson's guilt, and damaging propensity evidence. The Superior Court's contrary ruling is wrong.

2. Mr. Anderson's right to effective assistance of counsel, as guaranteed by the United States and Delaware Constitutions, was violated when his trial counsel recklessly elicited evidence suggesting to the jury that Mr. Anderson had previously been subjected to and convicted of unknown criminal charges. The Superior Court's contrary ruling is wrong.

STATEMENT OF FACTS

I. Mr. Clark's Shooting Death and the Ensuing Investigation

In the late evening of August 15, 2015, Markevis Clark, a/k/a Quan, was shot and killed on the 800 block of Vandever Avenue in Wilmington, Delaware. A013–A021, A022–025, A042.[1] From that evening into the morning of August 16th, law enforcement canvassed the area to find eyewitnesses, but none was located. *Id*. at A025, A030–031, A034–035.

Shell casings, a juice bottle, a lighter, and a hat with a bullet hole in it were recovered from the scene. A036–038; A196–205. Prints were lifted from the juice bottle and two cars near where Mr. Clark's body was found; the shell casings were swabbed for DNA. A039–041; A196–205. None of the fingerprint evidence came back to Mr. Anderson. A207. The only fingerprint match – the fingerprint lifted from the juice bottle – came back to Mr. Clark. A207; *see* A011–012. Law enforcement elected not to test the DNA recovered from the shell casings. A207–209, A211–212. No firearm connected to the incident was ever recovered. A217.

Mr. Anderson was first implicated in Mr. Clark's shooting death on August 18, 2015, when his stepfather and Clark's father, Arto Harrison, told law enforcement that Anderson confessed to him that he accidentally shot Clark. A226, A230–31, A233–37, A238, A246; *see also* A273–75.

[1] "A" cites reference Mr. Anderson's appendix to this brief.

The day after speaking with Mr. Harrison, August 19, 2015, law enforcement interviewed Theresa Brooks. A219. The following day, August 20, 2015, law enforcement spoke with Keisha Waters. A221. Then, on September 8, 2015, law enforcement spoke with Joseph Brown. A222. All three claimed to be eyewitnesses to the shooting and identified Mr. Anderson as the shooter. A133, A219–22. Mr. Brown also claimed to be part of the conversation in which Mr. Anderson allegedly confessed to shooting Mr. Clark accidentally. A148–49.

Mr. Anderson turned himself in and was arrested on September 23, 2015. A222–23.

II. Mr. Anderson's Jury Trial

The central question at Mr. Anderson's jury trial was whether he was, in fact, the shooter. A227 (Judge Johnston's Remarks). The State presented no physical evidence tying Mr. Anderson to the shooting. *See id*. ("There is virtually no corroborating evidence."). Thus, as Judge Johnston noted, the case "turn[ed] on the credibility of the witnesses . . . alleged to be the eyewitnesses to the crime and their ability to identify whether the defendant was or was not the shooter." *Id*.

The State theorized that Mr. Anderson shot Mr. Clark because Mr. Clark called him a snitch in front of a large crowd of people, a betrayal of "the oath of the streets." A009–010, A051, A139, A143. Ms. Brooks, Ms. Waters, and Mr. Brown were the only putative eyewitnesses who testified.

Theresa Brooks (A078–115) testified, and law enforcement confirmed, that on August 19, 2015, there was an outstanding warrant for her arrest on a shoplifting charge. A096–097, A099–100. A patrolman who knew her and knew she was from the area of the shooting "[a]sked her if she knew anything about any homicides." A097. She replied "that she knew about the . . . Clark homicide," and she then spoke with the assigned detective about it. *Id*. Nothing further happened with the warrant for her arrest or her shoplifting charge after she spoke with police. A100, A113.

Just one day before Ms. Brooks' testimony, she pled guilty to a misdemeanor theft charge, after the State dropped a third-degree burglary charge in the same matter. A078–079, A084.[2] Ms. Brooks had previously been convicted of criminal impersonation and second-degree assault. A084. These convictions were admitted "[f]or the purpose of attacking [her] credibility." Del. R. Evid. 609(a)

Ms. Brooks said she had known Mr. Clark since she was very young and that she knew Mr. Anderson. A082–83. She described them as being "[a]round each other" the night of the shooting, and she said Mr. Anderson was wearing a white shirt and blue jeans. A090, A101. After testifying she did not remember what Mr. Anderson and Mr. Clark were discussing before the shooting and that her statement to the police would not help refresh her recollection, the State played a recording of

[2] She claimed that she received no consideration on this matter from the State in exchange for her cooperation. A078–082.

her August 19, 2015 police statement. A090–099. That recording indicated Ms. Brooks told the police that Mr. Clark accused Mr. Anderson of cheating in a dice game and of snitching on someone. *Id*.; *see also* A276–79. Mr. Anderson walked away, came back with a gun, and shot Mr. Clark. A087–089; *see also* A276–79. She testified that she witnessed the shooting from about ten to twelve feet away. A088–089.

Keisha Waters (A042–076) testified that she had been arrested for shoplifting before speaking to the police about Mr. Clark's death, and that it was conditionally dismissed before she testified at his trial. A042–043.[3] She had three shoplifting convictions from 2013 and one from 2012, A046–047, which were admitted to attack her credibility, *see* Del. R. Evid. 609(a). Her shoplifting habit was designed to feed her addiction to opioids, with which she was struggling as of the night of August 15, 2015. A074. On that night, she was very "high on pills." A064; *see also* A048; A069 ("I was high on Xanies. It was a lot."; "Q. […] How high were you? A. A lot. Q. Real High? A. Yeah."). And she did not remember much about the night Mr. Clark was killed. A073.

But she claimed to remember what happened that evening between Mr. Anderson and Mr. Clark, both of whom she grew up with. A045–046; *see* A047–

[3] She claimed, to her knowledge, that the dismissal had nothing to do with her cooperation against Mr. Anderson. A044.

057. She described Mr. Anderson as wearing a black shirt and blue jeans that evening. A067. She was on Vandever Avenue with them, when Mr. Clark accused Mr. Anderson of having told the police on someone, which was not viewed positively in their neighborhood. A050–051. Mr. Anderson, appearing aggravated, denied the accusation and left. A051–053, A054, A056. When he returned, he approached Mr. Clark and began shooting. A056–057. Ms. Brooks not only did not see the gun, but she also never saw the gun in Mr. Anderson's hand; she did hear the shots ring out. A057, A070–071. After the shooting, Mr. Anderson left the area. A057, A070. Ms. Brooks declined to talk to police that night, because, in her words, she was out past curfew. A057–058.

Joseph Brown (A118–195), Mr. Clark's brother and a close acquaintance of Mr. Anderson, did not speak with the police until September of 2015, when he was "picked up" by the police for, in his words, "a very, very, very minor crime." A154–155. While in police custody, he then spoke detectives investigating Mr. Clark's shooting death, while he, in his own words, "was, obviously, under the influence of narcotics." A154–156. Nonetheless, he claimed that he received no benefit for cooperating against Mr. Anderson or taking the stand, whether for any criminal case, including a misdemeanor charge of offensive touching that was dismissed before Mr. Anderson's trial, or otherwise. A118–20, A123, A134, A145, A156–157, A173–174. He also claimed that, had he not been "picked up," he would have come

forward the next day, and that he did not come forward previously "because I was looking for justice in the streets." A154–155.

Mr. Brown claimed to be present when Mr. Clark was shot, but his recollection of what transpired that night was unclear and incomplete, because he was smoking marijuana. *See* A139–140 ("I was smoking marijuana, so I was kind of -- but it's coming back to me now."); A129 (he was smoking marijuana that evening). He also had difficulty recalling what he did – and did not – tell police. *See, e.g.*, A168–170. Mr. Brown testified that Mr. Clark accused Mr. Anderson of snitching; they argued; and Mr. Anderson later shot Mr. Clark. A124, A133, A139–140, A143–144, A177–178, A178–180. Mr. Brown later backtracked, testifying that he "didn't know my brother was shot then and there." A183–184. Mr. Brown also testified that, while on the phone with Mr. Anderson, Anderson allegedly confessed to shooting Clark, saying he "didn't mean to do it." A148–149.

Mr. Brown said **Arto Harrison** was also on that call, *id*., but Mr. Harrison initially did not testify. His police statement was admitted as part of the State's case, however, after the court found that the State had established that Mr. Anderson "ha[d] engaged or acquiesced in wrongdoing that was intended to, and did, procure" Mr. Harrison's "unavailability [] as a witness" (Del. R. Evid. 804(b)(6)), based solely on prison calls interpreted by the State and the court to implicitly reference efforts to discourage Mr. Harrison from appearing. *See* A228–229. In that August

18, 2015 statement, Mr. Harrison reportedly told law enforcement that Mr. Anderson told him "I didn't mean to do it." A273–275.

But the next day of trial, Mr. Harrison appeared to testify, and he did. *See* A241–268. Mr. Harrison testified that Mr. Anderson never confessed to him any involvement in Mr. Clark's shooting. A249–250, A252. Known by police investigators to be seriously addicted to drugs (*see, e.g.*, A272–273), Mr. Harrison "was heavily in [his] addiction" and "[o]ff the chain" when he spoke to the police on August 18th, which might have affected his ability to explain what he knew. A247, A250. If he told the police that Mr. Anderson confessed to him, it was not the truth. A249. No one threatened him not to come to court, and no one threatened or paid him to provide the testimony he gave. A246, A253, A262. He was unable to come to court the prior day because, until the evening of July 13th, he was in a Wilmington-based Salvation Army inpatient drug rehab, 24 hours a day, 7 days a week . A261, A267–268.

Mr. Anderson was found guilty of first-degree murder and the firearms charges. On December 8, 2017, Judge Johnston sentenced Mr. Anderson to the mandatory sentence of life without parole for first-degree murder, along with other mandatory sentences.

ARGUMENT

I. MR. ANDERON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL ALLOWED THE BROTHER OF THE MURDER VICTIM TO OFFER VOLUMINOUS PATENTLY INADMISSIBLE AND HIGHLY INFLAMMATORY TESTIMONY

A. Question Presented

Whether the Superior Court erred in concluding that Mr. Anderson was not denied the effective assistance of counsel when counsel allowed the brother of the murder victim to offer voluminous patently inadmissible and highly inflammatory testimony.

Mr. Anderson preserved this issue in his Rule 61 motion. *See Anderson II*, 2021 WL 211152, at *1, 2–3, 6; *Anderson I*, 2020 WL 6132293, at *3–4.

B. Scope of Review

This Court reviews the denial of a Rule 61 for abuse of discretion, and it reviews *de novo* ineffective assistance of counsel claims. *Starling v. State*, 130 A.3d 316, 325 (Del. 2015). A court abuses its discretion by denying relief on a meritorious ineffective assistance of counsel claim. *See id*. at 336–37 (reversing denial of a Rule 61 motion, where constitutional errors "undermined [this Court's] confidence in the verdict"); *id*. at 325 (prejudice standard for ineffective assistance of counsel whether the errors create "'a probability sufficient to undermine confidence in the outcome'" (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

When counsel performs deficiently and when that deficient performance prejudices the accused, the accused is denied effective assistance of counsel. *Green v. State*, 238 A.3d 160, 174 (Del. 2020). Deficient performance occurs "where counsel's representation falls below an objective standard of reasonableness." *Starling*, 130 A.3d at 325. If there is "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,'" the accused suffered prejudice. *Starling*, 238 A.3d at 325 (quoting *Strickland*, 466 U.S. at 694). This prejudice standard – satisfied by proof of less than a preponderance of the evidence – is "not [] stringent." *Baker v. Barbo*, 177 F.3d 149, 154 (3d Cir. 1999) (citing *Nix v. Whiteside*, 475 U.S. 157, 175 (1986)); *Starling*, 130 A.3d at 325.

C. Merits of Argument

1. Joseph Brown's Consistent, Highly Objectionable, and Inflammatory Testimony

Unlike the other two eyewitnesses testifying for the State, Mr. Brown stood in a special position regarding the decedent: they were siblings. *See* p. 8, *supra*. He was understandably heartbroken at the loss. *See* A123 ("Yeah, that's my brother. My big, man. I love him, man."). Predictably, he offered very emotional testimony. Much of it, however, was improper and inflammatory.

Excluding sidebar conferences, Mr. Anderson's testimony to the jury spans 70 transcript pages. *See* A122–146, A148–160, A161–195. Improper evidence came in through him on 28 of those pages, or, 40% of those transcribed pages. *See*

A124, A125–127, A129–130, A132–133, A134, A135–136, A139–140, A141–142, A144, A152, A156, A158, A164, A169–A170, A171, A174–175, A178, A184, A186. Not once did defense counsel object. *See id*.

In addition to being non-responsive, this improper, inadmissible testimony came in a variety of forms, all to Mr. Anderson's prejudice. First, Mr. Brown offered loads of victim impact testimony. *See* A124 ("Q. And he was older than you or younger than you? A. He [Mr. Clark] was my big brother. I got no big brother now."); A126 ("Q. That's right. I'm just going to ask you questions -- A. I don't even know why y'all did this to me. Y'all -- I don't even know why."); A130 ("I don't want to see no pictures of Quan [*i.e.,* Mr. Clark's] dead body or nothing, none of that shit."); A135–136 (explaining that he "just want to talk about [his] issues man," and chiding Mr. Anderson for, according to him, killing Mr. Clark, by saying, "I just can't believe this dude[.] Like, after Arteise died, dog? After we just lost our sister, dog?"); A141–142 ("I lost – I lost a sibling already. I tried to take it to the streets already. There's no such justice. And when my sister got hurt, he [Mr. Clark] should have been involved . . . . Like if he was really family --"); A144 ("It's my brother. You know what I'm saying? I'm sorry, it's my brother and some people -- because I want this to be clear, man, ain't no snitching involved with nothing. Y'all don't know what it feel like to lose Arteise and Markevis. I've been trying my whole life to get close with this dude, like -- I'm telling y'all, if y'all ever met Markevis or

Arteise --"); A158 (noting that, when police came to notify him about Mr. Anderson's upcoming trial, "[t]hey gave me a break. They knew I was going through a traumatizing event"); A169–170 ("I don't remember anything outside of him shooting my brother. It -- maybe it was a little bit traumatized after that. I don't remember any of that. None of that rode through my mind. None of that -- none of that even made sense. You try to forget situations like that. You don't want to remember little small details. That's why I didn't want to see no picture of my brother. I don't want to remember really anything. I'm going to give what's best for the case that I can remember. Other than that, it -- you're not going [to] make me go through all that with the remembering little details about the -- you don't have nightmares at night. You don't wake up in cold sweats at night. You don't go through none of that. You going to go home with your family. My life changes after this."); A174 (responding to the question of whether there is any reward for Mr. Anderson's conviction with: "No. We want -- it don't matter if he get convicted or come home. Like, God's going to serve justice. God got this, man. At the end of the day, he know what he did wrong. He know the situation. Him of all people. It's Markevis. Coolest dude you'll ever meet. Funny, hilarious, dog. We'll never get that again, never in a billion years will you get that again."); A175 ("He was a good dude. He was a father, man. . . . Good dude."); A184 ("I know he killed my brother and I can't say nothing different than that . . . . I just lost my sister. I can't believe

it. I still can't believe it to this day."); A186 ("I've been through this hard day, ma'am. I'm sorry. I'm hurt . . . I'm hurting.").

The impact of Mr. Clark's death on Mr. Brown or the community had no bearing on whether Mr. Anderson had committed first-degree murder and unlawful firearm possession. Accordingly, this testimony was irrelevant. *See* Del. R. Evid. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probably than it would be without the evidence; and (b) the fact is of consequence in determining the action."); *id*. 402 ("Irrelevant evidence is not admissible."). Additionally, its admission was also plainly prejudicial. Courts have consistently recognized the power of victim impact evidence to impermissibly sway jurors even when relevant – for example, at a capital sentencing. *See Payne v. Tennessee*, 501 U.S. 808, 831–32 (1991) (O'Connor, J., concurring) ("I do not doubt that the jurors were moved by this [victim impact] testimony [detailing a child's emotional reaction to his mother and baby sister being killed]—who would not have been?"); *United States v. Deaner*, 1 F.3d 192, 198–99 (3d Cir. 1993) ("While 'tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations,' courts imposing sentence are 'free to consider a wide range of relevant material.'" (cleaned up; quoting *Williams v. New York*, 337 U.S. 241 (1949) & *Payne*, 501 U.S. at 820–21)); *Norcross v. State*, 816 A.2d 757, 765 (Del. 2003) (murder victim's relatives' victim impact testimony, which recounted the decedent's

"character and their enormous loss and pain," was "very emotional"); *Com. v. Frein*, 206 A.3d 1049, 1090–91 (Pa. 2019) (Wecht, J., concurring and dissenting) ("Victim impact testimony often is raw and heartrending. It can stir passions in a way that is not generally permitted for a jury's consideration in our system of criminal justice due to the potential emotional impact of such testimony can either prejudice the jury or distract from the issues that must be resolved in the particular case."). Accordingly, Mr. Brown's victim impact testimony was also plainly inadmissible under Rule 403. *See* Del. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, ..."); cmt. Del. R. Evid. 403 ("This rule tracks F.R.E. 403."); *cf. United States v. Copple*, 24 F.3d 535, 544–46 (3d Cir. 1994) (victim impact testimony about the impact, e.g., on the health and financial situation of fraud victims: "had either no, or very little, probative value and was unfairly prejudicial"; had the "principal effect, by far, [of] highlight[ing] the personal tragedy they had suffered as victims of the scheme"; "was designed to generate feelings of sympathy for the victims and outrage toward Copple for reasons not relevant to the charges Copple faced"; and "arguably created a significant risk that the jury would be swayed to convict Copple as a way of compensating these victims wholly without regard to evidence of Copple's guilt").

Second, Mr. Brown offered repeated, improper testimony opining that Mr. Anderson was guilty and suggesting that his trial was a farce. *See* A127 ("Q. You don't want to be here today, do you? A. No, I do not want to be here today. Q. And why don't you want to be here today? A. Because, like, he -- he guilty. Like he did it. THE WITNESS: You know you did it. You should have just took a plea like -- "); A135–136 ("I just can't believe this dude . . . . I seen him do it. He did it. I'm sorry, I know we -- I mean, he did it. It shouldn't be no -- none of this going through none of this extra stuff [*i.e.*, a jury trial involving his testimony]. He did it."); A178 ("Q. Why did you bring [Mr. Anderson's alleged snitching] up? A. Why did I bring it up? Because you asked me question of what did I hear and I told him what I remember that I heard. That's why I brought it up man. Actually, it wouldn't be nothing. He murdered Quan.").

This opinion testimony was irrelevant: it did not tend to prove that Mr. Anderson was guilty, and it was inconsequential to that assessment. *See* Del. R. Evid. 401, 402; Del. R. Evid. 701 (lay opinion testimony is admissible only if it is "helpful to clearly understanding the witness's testimony or to determining a fact in issue"). Further, it is well established that it is improper for a witness to offer an opinion on the guilt of the accused. *See United States v. Moore*, 651 F.3d 30, 59 (D.C. Cir. 2011) ("'drawing the ultimate conclusion of guilt or innocence'" is for the jury; it is improper for a witness to give "his personal opinion as to guilt or

innocence" (quoting *United States v. Gaudin*, 515 U.S. 506, 514 (1995); alteration adopted)); *United States v. Garcia*, 413 F.3d 201, 210–11 (2d Cir. 2005) (under Federal Rule of Evidence 701, on which Delaware's Rule 701 is based,[4] opinion testimony is improper where it is "received merely to tell the jury what result to reach"; "the purpose of the foundation requirements of the federal rules governing opinion evidence is to ensure that such testimony does not so usurp the fact-finding function of the jury" (cleaned up)). And the risk of prejudice in allowing a witness to so state – especially an eyewitness with a deep emotional connection to the victim – is clear. The trial court in this case even recognized as much in the context of the testimony of Ms. Waters, who had a more attenuated connection to Mr. Clark, when the court struck the word "shooter" from the photo array the State intended to use as an exhibit. *See* A007 (THE COURT: All right. I am going to not allow the word 'shooter' to be on here. I think the probative value is outweighed by the potential for prejudice. It's one thing to identify, it's another thing to actually have something in front of the jury that essentially says shooter/guilty on it."); A008 (noting that the court's ruling was based on the premise that "the purpose of this lineup is to identify an individual, it is not to draw a legal conclusion about it," and that it is the jury's duty to "assess the statement separately from what the officer wrote on this"); A005–008 (providing context).

[4] *See* cmt., Del. R. Evid. 701 ("D.R.E. 701 tracks F.R.E. 701[.]").

Third, Mr. Brown repeatedly introduced improper bad character evidence, assailing, in an inflammatory nature, Mr. Anderson as a "snake in the grass." *See* A134 ("Q. How long have you known Ha-Ha?[5] A. Never -- I knew him my whole life. I knew him my whole life. We was -- he was a part of the family. He was a part of the – I thought he was family. I -- I thought he was family, like but you -- snakes in the grass, they work differently."); A139–140 ("Wasn't you cheating? Oh I can't ask him. I'm sorry, no, -- I think he -- he was cheating. . . . He was cheating, doing some snake in the -- he was being a snake in the grass. That's -- I guess that's all he know how to do, but he was being a snake in the grass and Markevis Clark called him out on it . . . ."); A171 ("I seen him creeping from the sidewalk like a snake and, you know, like . . ."). This was rank propensity evidence, admitted and understood by the jury to establish that Mr. Anderson had a bad character, and acted in conformity with it on the night of August 15, 2015 by killing Mr. Clark. *See* Del. R. Evid. 404(a)(1) (character evidence "not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."); *Getz v. State*, 538 A.2d 726, 731 (Del. 1988) (propensity evidence of this sort "is inconsistent with the presumption of innocence and is never in issue, unless [the defendant] tenders

[5] Testimony indicates Ha-Ha was Mr. Anderson's nickname.

evidence of his character under D.R.E. 404(a)(1).").[6] This is, simply, the sort of thing a treacherous, deceitful person does. *See* Snake in the Grass, COLLINS ONLINE DICTIONARY https://www.collinsdictionary.com/us/dictionary/english/snake-in-the-grass (last visited Oct. 13, 2021). Mr. Brown's longstanding relationship with Mr. Anderson – and the likelihood that he, therefore, would be assessed as a reliable judge of Mr. Anderson's character – only heightened the prejudice caused by this evidence.

Fourth, Mr. Brown repeatedly engaged in name-calling of Mr. Anderson. *See* A126 ("I ain't even worried about this girl. Like I can't even do nothing to him if I wanted. Ain't no point in worrying about this girl."); *id*. at 16 ("It's like you just -- you whack."); A130 ("You're a little -- you is a girl. You're a girl."); *id*. at 21–22 ("the girl in the blue -- the man in the blue shirt"; "He's a fag --"; "I can't remember anything during the game, after the game, what led up to why he would do some girl-ass -- some girl --"); A139 ("The boy with the blue shirt on."); A156 ("Q. [] And do you remember if [your police] interview was taped? A. It probably -- I mean, I'm sure it was. All interviews are taped when you snitching. THE WITNESS: Ain't they boy? You's a girl. I'm sorry. I'm sorry."); A164 ("THE WITNESS:

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[6] *Cf*. Del. R. Evid. 404(b)(1) (prohibiting use of other bad acts to show propensity); *Getz*, 538 A.2d at 730 ("404(b) forbids the proponent, usually the prosecutor, from offering evidence of the defendant's uncharged misconduct to support a general inference of bad character. [Under] D.R.E. 404(b), character evidence refers to the disposition or propensity of a defendant to commit certain crimes, wrongs or acts.").

Look at me, you pussy."). This name-calling is another form of bad character evidence, and it is entirely irrelevant. In calling Mr. Anderson these names, Mr. Brown conveyed to the jury that, in his view, Mr. Anderson was disreputable and weak.[7] Further, it was a naked attempt to inflame the prejudices of the jury, with no probative value, and thus inadmissible under Rule 403 of the Delaware Rules. *See* Del. R. Evid. 403 & cmt.; *United States v. Wardlow*, 830 F.3d 817, 822 (8th Cir. 2016) (upholding the exclusion of the defendant's "characterization, or name calling, of the victim," under Fed. R. Evid. 403, because it "has very little, if any, probative value to an issue in the case," and "[w]hen compared to the potential confusion to the jury of the issues and available defenses, any probative value the evidence may have had is substantially outweighed by a danger of unfair prejudice"). Here, too, Mr. Brown's relationship with Mr. Anderson – and the insight into his character this conveyed to the jury – heightened the prejudicial impact of this evidence.

2. Trial Counsel's Persistent Failure to Object to Mr. Brown's Inadmissible and Prejudicial Testimony Was Objectively Unreasonable

In the face of this near-constant barrage of inadmissible, inflammatory, and highly prejudicial evidence against Mr. Anderson in a case resting on the credibility of four compromised witnesses, Mr. Anderson's counsel did not once object. That

[7] Neither Mr. Anderson nor his counsel endorses the stereotypes, sexism, and bias underlying these comments, which were intended as insults. Mr. Anderson simply intends to explain how these comments functioned as bad character evidence.

was objectively unreasonable. A reasonable lawyer would have done precisely the opposite: lodge strenuous objections to keep this prejudicial evidence out. *Green*, 238 A.3d at 174 ("objectively unreasonable" means "no reasonable lawyer would have conducted the defense as his lawyer did"). "Trial counsel's unjustified failure to object to the admission of evidence or testimony that is highly detrimental to the defense prejudices the defendant, and does not satisfy the minimum requirements of *Strickland*." *Starling*, 130 A.3d at 330 & n.83 (citing *Thomas v. Varner,* 428 F.3d 491, 501 (3d Cir. 2005); *Henry v. Scully,* 78 F.3d 51, 53 (2d Cir. 1996); *Tomlin v. Myers,* 30 F.3d 1235 (9th Cir. 1994); & *Commonwealth v. Costa,* 742 A.2d 1076, 1077 (Pa. 1999)). As in *Starling*, "[t]rial counsel would have risked nothing by objecting" to Mr. Brown's highly prejudicial testimony, and would have gained much. *See id*. at 330 (counsel deficiently failed to object to the admission of Mr. Starling's brother's police statement, in which he supposedly told police "that Starling had said he was sorry for what he did to the [murder victim]," because the statement was an important feature of the State's case, and because trial counsel "would have risked nothing" by lodging such an objection); *Henry*, 78 F.3d at 53 (failing to request a missing evidence instruction when the prosecution failed to call an informant in a drug prosecution was deficient, "because there was no downside to doing so and there was a potential benefit to be gained").

Yet the Superior Court accepted trial counsel's assertion that he acted pursuant to a considered strategy by failing to object to this mountain of prejudicial evidence. *See Anderson II*, 2021 WL 211152, at *3. According to trial counsel, this persistent failure to object to inadmissible, highly prejudicial evidence was the product of a strategic choice: to allow Mr. Brown to testify emotionally, because his "demeanor was such that it would limit his credibility." *Id*. (cleaned up); *see* A281.[8] This so-called strategy is incoherent and belied by the record, and it, therefore, is little more than the sort of *post hoc* rationalization *Strickland* condemns. *See Harrington v. Richter*, 562 U.S. 86, 109 (2011) ("[C]ourts may not indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions[.]" (quoting *Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003)). Trial counsel conceded, as he had to, that Mr. Brown became *more* "belligerent and antagonistic" (A281) when challenged on cross-examination, making clear that proper objections designed to limit his vitriol would have made him even more agitated. If, as counsel maintained, this was to his client's advantage, then his failure to object was doubly deficient. The entirety of Mr. Brown's testimony demonstrated that no amount of objecting would have altered his demeanor, something that even the casual observer in the courtroom would have known. Even the trial court's

[8] Mr. Anderson has included Attorney Anthony Figliola's *Affidavit in Response to Petitioners Motion for Post Conviction Relief* as part of his appendix at pages A280–284.

multiple efforts to control his testimony were completely ineffectual.[9] Accordingly, trial counsel gained no advantage by failing to object to Mr. Brown's persistent and prejudicial inadmissible testimony. Any reasonable attorney would have known as much during trial and would have endeavored to object. Where the justification for counsel's failure to object is so dubious, no court should approve of counsel allowing a witness to pillory his client in such an ad hominem manner. Because of his trial counsel's failings, Mr. Anderson was subjected to extensive, inadmissible testimony that deprived him of a fair trial. "The record [] underscores the unreasonableness of

[9] *See, e.g.*, A126 (Direct Examination) ("THE COURT: Mr. Brown, please listen to Mr. van Amerongen and just answer his questions."); A136 (Direct) ("THE COURT: Please just speak with Mr. van Amerongen and the jury and just answer the questions."); A136 (Direct) ("THE COURT: Mr. Brown, please -- if you can't answer the questions, I'm going to have to take a recess."); A142 (Direct) ("THE COURT: Mr. Brown, I don't think you want to finish that sentence. THE WITNESS: But I mean it."); A146 (Direct) ("MR. FIGLIOLA: Objection, Your Honor. THE COURT: You can't [speak to Mr. Anderson]. That is the rules of the Court. You may not speak to him. And -- and you – the only way that you can provide testimony in this court is according to the rules. And the rules are that the attorneys ask questions and you just answer those questions. I know you have a lot more you'd like to say but you cannot say it in this courtroom. THE WITNESS: My bad, Judge."); A152–153 (Cross Examination) (Mr. Brown asks the judge "[c]an we, on the record, like -- ", and the court replies, "No. No question pending"); *id*. at 46 (Cross) ("THE COURT: You need to answer the question."); A160 (Cross) ("THE WITNESS: Come on, try to trick me with that bull -- THE COURT: Just a moment, just a moment. THE WITNESS: see how they -- THE COURT: Just remain silent."); *id*. at 53 (Cross) ("THE COURT: Mr. Brown, please. Control yourself."); A166 (Cross) ("THE COURT: Stop [Mr. Brown], please.").

counsel's conduct by suggesting that [his] failure to [object] thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526.[10]

3. Mr. Anderson Was Prejudiced by this Objectively Unreasonable Performance

"[A]fter considering the[se] errors, this Court "can[not] be confident that the jury's verdict would have been the same." *Starling*, 130 A.3d at 336 (cleaned up)). The case against Mr. Anderson was far from overwhelming. No physical evidence tied Mr. Anderson to the crimes, and the weapon tied to Mr. Clark's shooting death was never recovered. Each of the State's three alleged eyewitnesses were less than credible; so, too, was Mr. Harrison.

Ms. Brooks and Ms. Waters both had substantial criminal records for crimes of dishonesty, which rendered their testimony unreliable. *See Starling*, 130 A.3d at 336 (noting that the "credibility [of the State's main witness] was already at risk due to his criminal record"); *see also United States v. Perdomo*, 929 F.3d 967, 971 (3d Cir. 1991) (a witness's "criminal record constitutes exculpatory evidence").

The events that prompted Ms. Brooks' and Mr. Brown's cooperation impaired credibility. Instead of coming in voluntarily to speak with the police, both were

[10] Additional support for this conclusion lies in a clear factual error in Attorney Figliola's affidavit, which suggests a level of inattentiveness commensurate with his deficient performance at trial. Attorney Figliola says that Mr. Brown admitted he was under the influence of alcohol (*see* A281); Mr. Brown never so testified, *see* A122–146, A148–160, A161–195.

arrested in connection with criminal charges and then, and only then, did they tell law enforcement what they supposedly observed. Their impending criminal charges gave them reason to curry favor with law enforcement. *See Grant v. Lockett*, 709 F.3d 224, 236 (3d Cir. 2013) ("*Davis*[*v. Alaska*, 415 U.S. 308 (1974),] makes clear that, even if there is no evidence of any *quid pro quo* between [a witness] and the Commonwealth, it is the fact that [the witness] had a strong reason to lie, and to testify in a manner that would help the prosecutor, in the hopes of getting favorable treatment from the Commonwealth, that establishes the potential bias that would have been extremely compelling impeachment evidence.").

Additionally, both Ms. Waters and Mr. Brown both were under the influence of narcotics at critical moments during and after the incident, undermining their ability to perceive what happened the night of the shooting and provide accurate information to the police and the jury. Ms. Waters' extreme intoxication on the night of the incident undermined her ability to understand what was happening, recall what happened, recount to the police what had happened, and, thus, testify credibly to the jury about what transpired. The same is true for Mr. Brown, who was high on marijuana the night of Mr. Clark's shooting death, and who was high – "obviously[] under the influence of narcotics" – when he spoke to the police weeks later.

Further, these witnesses' testimony raises concerns about their forthrightness. Among other issues of concern, Mr. Brown suggested, on cross-examination, that

he did not see the shooting, which calls into question the credibility of his police statement and testimony to the contrary. *See* p. 9, *supra*. Ms. Brooks never saw a gun in Mr. Anderson's hand. *See* p. 8, *supra*. Both Ms. Brooks and Ms. Waters gave inconsistent descriptions of the shooter's clothing, raising the concerning specter of misidentification. *Compare* p. 6, *supra*, *with* p. 8, *supra*. And both Ms. Waters and Mr. Brown either could not, or had difficulty, recalling what transpired on August 15, 2015 and/or what they told police. *See, e.g.*, p. 8–9, *supra*.

Mr. Harrison's police statement cannot counteract the damage these weaknesses inflicted on the State's case. Mr. Harrison testified under oath and completely disavowed his unsworn statement, noting that he was struggling with his addiction when he spoke to the police, and that if he told the police his son admitted he was involved in Mr. Clark's death, what he told them was untrue.

Thus, the verdict against Mr. Anderson is hardly supported by overwhelming evidence; instead, it is more aptly described as being "weakly supported by the record." *Strickland*, 466 U.S. at 696. In such circumstances, the likelihood that the above-described errors impacted the jury's verdict – and that in their absence, the verdict would have been different – is substantially higher. *See Strickland*, 466 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). There

is no question that permitting a trove of damning, inflammatory evidence to come in against Mr. Anderson influenced the jury to convict, as opposed to acquit or hang.

The Superior Court's erred in holding otherwise. *See Anderson II*, 2021 WL 211152, at *2–3, 6; *Anderson I*, 2020 WL 6132293, at *4. Its only explanation for this conclusion is that the prejudice was mitigated by the trial judge's final instruction to the jury five days after Mr. Brown's testimony. *See Anderson I*, 2020 WL 6132293, at *4. This assessment misses the mark.

First, it employs an inapplicable standard: the standard employed when counsel objects in the moment and moves for a mistrial. *See id*. at *4 and n.32 (citing, e.g., *Ashley v. State*, 798 A.2d 1019 (Del. 2002)). But when counsel objects and/or makes a motion for a mistrial, the Court can immediately exclude the objectionable evidence and provide a curative instruction. *See Taylor v. State*, 690 A.2d 933, 935–36 (Del. 1997) (affirming denial of mistrial because "the trial judge took **prompt** ameliorative action, by "immediately instruct[ing] the jury to cure any potential prejudice"); *United States v. Vaulin*, 132 F.3d 898, 901 (3d Cir. 1997) ("[T]he trial judge **immediately** gave a strong curative instruction[; . . .] any prejudice was [] eliminated by th[is] **immediate, direct, and insightful action**.").

By contrast, here, because of trial counsel's failure to object, the Court was had no such opportunity, so the jury had free rein to consider all the highly inflammatory evidence that came in through Mr. Brown. One general instruction to

the jury that did not even address this mountain of inflammatory, inadmissible evidence (or more aptly, vitriol) did nothing to mitigate its prejudicial impact. *Cf*. *Ashley v. State*, 798 A.2d 1019, 1022–1024 (Del. 2002) (mistrial required where a single outburst by a spectator – in which the spectator admonished the jury to find Ashley guilty because Ashley viciously assaulted him and was a coward – prejudiced Ashley, despite an immediate curative instruction; the outburst "went directly to the key issue of whether or not Ashley was guilty," and the case was "close").

Accordingly, trial counsel's plainly deficient decision to refrain from objecting to a mountain of inflammatory, inadmissible evidence deprived Mr. Anderson of a fair trial. Thus, this Court should reverse and remand for a new trial.

II. MR. ANDERON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL ELICITED EVIDENCE SUGGESTING TO THE JURY THAT MR. ANDERSON HAD PREVIOUSLY BEEN CONVICTED OF CRIMES

A. Question Presented

Whether the Superior Court erroneously concluded Mr. Anderson was not denied effective assistance of counsel when trial counsel elicited evidence suggesting he had previously been convicted of criminal charges.

Mr. Anderson preserved this issue in his Rule 61 motion. *See Anderson II*, 2021 WL 211152, at *4–5, 6; *Anderson I*, 2020 WL 6132293, at *4–5.

B. Scope of Review

This Court reviews the denial of a Rule 61 for abuse of discretion, and it reviews *de novo* ineffective assistance of counsel claims. *Starling*, 130 A.3d 316 at 325. A court abuses its discretion by denying relief on a meritorious ineffective assistance of counsel claim. *See id*. at 325, 336–37.

When counsel performs deficiently and when that deficient performance prejudices the accused, the accused is deprived of effective assistance of counsel. *Green v. State*, 238 A.3d 160, 174 (Del. 2020). Deficient performance occurs "where counsel's representation falls below an objective standard of reasonableness." *Starling*, 130 A.3d at 325. If there is "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,'" the accused suffered prejudice. *Starling*, 238 A.3d at 325 (quoting

Strickland, 466 U.S. at 694). This prejudice standard – satisfied by proof of less than a preponderance of the evidence – is "not [] stringent." *Baker*, 177 F.3d at 154 (citing *Whiteside*, 475 U.S. at 175); *Starling*, 130 A.3d at 325.

C. Merits of Argument

1. Trial Counsel's Elicitation of Damaging Evidence Suggesting that Mr. Anderson Had Previously Been Convicted of a Crime

One of the key weaknesses of the State's case at trial – and, correspondingly, one of the key strengths of the defense case – was the absence of any physical evidence tying Mr. Anderson to the shooting. *See* pp. 4–5, *supra*. Fingerprints were recovered from the scene of the shooting, but, as Detective Sergeant Peter Leccia testified on the State's examination, none of the fingerprint evidence came back to Mr. Anderson:

> Q. Okay. Let's start with the fingerprint evidence. You heard testimony as to what fingerprint evidence was recovered from the scene; correct?
> A. Yes.
>
> Q. All right. And are you aware whether all those fingerprints were analyzed?
> A. Yes, they were.
>
> Q. All right. Did any matches come back to the defendant?
> A. No.

A207. The issue of fingerprint evidence was not readdressed on direct examination. *See* A207–209.

The direct testimony around fingerprints could not have gone any better for Mr. Anderson. Nonetheless, on cross examination, trial counsel marched headlong back to the issue, for no apparent purpose:

> Q. You indicated that there was no fingerprint matchings to the Defendant.
> A. Yes.
>
> Q. Do you know -- if you know -- if you don't you don't know, but do you know if -- how he did his fingerprint matches? Did he only try to match it to the defendant or did he try to match it to a universe of possibilities?
> A. Each fingerprint we would have would go into our AFIS, the Automated Fingerprint Identification System. And that's just a database of multiple fingerprints from various sources. And the defendant was also in that database and we did not get a match to the defendant from any of those.
>
> Q. Does that database have the entire universe or just individuals that maybe have been convicted of a crime where their fingerprints were?
> A. It's not just subjects that are convicted of crimes, there's other people. It's not everybody, obviously, but it's not just criminals.

A209–210.

2. Trial Counsel's Elicitation of this Damaging Evidence Was Objectively Unreasonable

Before trial counsel asked the above questions on cross-examination, it was clear that no fingerprint evidence tied Mr. Anderson to Mr. Clark's shooting death. At that juncture, the only conclusion that could have been drawn from the evidence was that Mr. Anderson was fingerprinted *because* he was arrested and charged with Mr. Clark's shooting death. The likelihood that the jury would infer that Mr.

Anderson's fingerprints were in the system because he had a prior arrest and conviction was only introduced *because of* trial counsel's bewildering decision to explore this line of questioning. As a result, the jury – for the first time – received evidence suggesting (i.e., ""[i]t's not ***just*** subjects that are convicted of crimes"), that Mr. Anderson may not only have had a prior arrest, but also a prior conviction, that had been hidden from them. The devastating effect of such evidence on the presumption of innocence – and fundamental right to a fair trial – was and remains clear. Rules 404(a) and (b) of the Delaware Rules of Evidence are structured to prevent this very evidence from reaching the jury, precisely because of the extraordinary risk of prejudice it carries.

In this context, there could be no reasonable strategic basis for even hinting at the possibility of Mr. Anderson having a criminal record. And yet, not only did trial counsel do just that and more, but, in response to Mr. Anderson's Rule 61 petition, asserted in an affidavit that his "decision [to do this] was clearly strategic." A283. It was not. Instead, it was nothing other than a product of "inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526. And counsel's affidavit, which "contradicts the available evidence," is merely a *post hoc* rationalization for his poor decisionmaking. *Richter*, 562 U.S. at 109.

Counsel offered multiple reasons to support his purported strategic decision, all of which reveal it to have been nothing of the sort. A283.

- First, counsel wrote, "[t]he importance of the Jury knowing that Anderson's prints were not at the crime scene were in Counsel's opinion far more important than any inference the Jury may have drawn from prints in AFIS." *Id*. But the jury knew, from both direct and cross examination, that Mr. Anderson's "prints were not at the crime scene" before AFIS – let alone anything about a database for assessing matches – was even mentioned. And the State did not elicit testimony about AFIS; defense counsel did.

- Second, counsel wrote, "[t]he data basis in AFIS was never expressed to the Jury as a basis restricted to only people with arrest record." *Id*. But that is completely beside the point. The problem is that trial counsel's deeply misguided line of questioning brought AFIS – and the fact that it contains fingerprints of those arrested and convicted of crimes – to the attention of the jury.

- Third, counsel wrote, "[i]t was also clear to the Jury through the playing of the prison calls that Anderson was incarcerated." *Id*. Again, this is completely beside the point. The jury may have already known he was incarcerated, but they did not know – and had no reason to believe – that he had been arrested or convicted of a crime before his counsel decided to elicit the above-described testimony.

- Fourth, counsel wrote, "Counsel's decision was clearly strategic, the police recovered prints, none of which belonged to Anderson. Testimony from State witnesses had placed Anderson on the street shooting coming between cars, prints were recovered from cars in the area." *Id*. But the fact that "none" of the prints "belonged to Anderson" was established before counsel even began his questioning, and was reestablished by counsel before he began asking about analysis techniques.

- Fifth, counsel wrote, "Additionally jury instruction on defendant's criminal record was removed." *Id*. In so stating, counsel acknowledged the importance of keeping Mr. Anderson's record from the jury. Thus, his role in making the opposite happen is bewildering. There can be no considered strategy to engage in questioning that enables the jury to infer that Mr. Anderson had the very criminal record that counsel claims he endeavored to keep from the jury.

Thus, trial counsel's stated strategy has all the earmarks of a post hoc rationalization. Yet the Superior Court Commissioner accepted it. *See Anderson I*,

2020 WL 6132293, at *5 ("The jury understood that Defendant was incarcerated and his fingerprints would likely be in the database. Prints were recovered from the area of the shooting and Trial Counsel felt that the importance of the jury knowing that Defendant's fingerprints were not at the scene far outweighed any potential inference the jury may have drawn."). And the Superior Court adopted the Commissioner's analysis in full. *Anderson II*, 2021 WL 211152, at *6 (noting that "[t]he Commissioner's Report and Recommendation dated October 19, 2020 is **ADOPTED** in its entirety").

The remaining reasons offered by the Superior Court fare little better on review. First, the Superior Court adopted the Commissioner's reasoning that trial counsel did not perform deficiently because he "did not introduce, nor elicit, testimony indicating Defendant had been previously convicted of a crime or the details of any convictions." *Anderson I*, 2020 WL 6132293, at *5. But without this line of questioning, the jury would have had no evidence to even suggest that Mr. Anderson had been previously convicted of a crime. It is true that counsel did not elicit details of any convictions, but concerningly, he provided the jury with the opportunity to wonder what prior crimes a man on trial for murder might have committed. The absence of such details does not strip this evidence of its prejudicial effect. *See Getz*, 538 A.2d at 728, 734 (reversing conviction for Mr. Getz's rape of his eleven-year-old daughter, where the Superior Court allowed "the admission of

evidence of alleged prior sexual contact with the victim," where "[a]t trial, the State presented no direct specific evidence of the prior criminal acts but was able to place before the jury the inference that the defendant was guilty of other acts of sexual misconduct involving his daughter").

Second, the Superior Court concluded that "neither Detective Leccia nor Trial Counsel made any statements that would lead a juror to infer that [Mr. Anderson's] fingerprints were *already* in the system prior to his arrest for shooting Clark." *See Anderson II*, 2021 WL 211152, *5. This is simply not so. It is true that the most innocuous inference a juror could have made was that Mr. Anderson's prints were only in the system because of his arrest for Mr. Clark's shooting death. But surely the more plausible inference is that the scene prints were obtained and analyzed before anyone connected to *this* crime would have had their prints entered into a database. That inference was also more plausible than the one offered by the Superior Court because the jury knew that Mr. Anderson had not yet been convicted of Mr. Clark's shooting,[11] and because counsel's question and Detective Leccia's answer suggested that those "convicted of crimes" were the only "criminals" in the system. Thus, a reasonable juror could easily have inferred – and likely did infer – that Mr. Anderson was in the database *because* he was earlier "convicted of a crime"

[11] At the very least, they had no facts suggesting he had previously been convicted in connection with Mr. Clark's shooting death.

and left his fingerprints at the scene of that other crime. And trial counsel, with the help of Detective Leccia, was the reason the jury had the evidence to make that inference.

Third, the Superior Court, after acknowledging that "it is possible that Trial Counsel could have stopped after simply confirming that none of the fingerprints found at the scene matched the Defendant," concluded, relying on *Strickland* and *Richter*, that it owes "great deference" to counsel's "strategic decisions," and that trial counsel's decision is entitled to such deference. *Anderson II*, 2021 WL 211152, *5 & n.688. But those very same cases teach that courts owe no deference to post hoc rationalizations contradicted by the available evidence. Likewise, no deference is warranted to objectively unreasonable conduct of this sort – which enabled the jury to infer the existence of a form of evidence that is among the most damaging to the presumption of innocence. *Cf. Starling*, 130 A.3d at 330 & n.83 ("Trial counsel's unjustified failure to object to the admission of evidence or testimony that is highly detrimental to the defense prejudices the defendant, and does not satisfy the minimum requirements of *Strickland*.").

3. Trial Counsel's Elicitation of Evidence that Mr. Anderson Had Been Previously Convicted of a Crime Was Extremely Prejudicial

The Superior Court simply held – without explanation – that Mr. Anderson failed to show prejudice. *See Anderson II*, 2021 WL 211152, at *4–5 (decides claim

with reasoning on deficiency alone), *6 ("After a careful de novo review of the record in this action, the Court finds that Trial Counsel's performance was not objectively unreasonable and did not cause Defendant prejudice."); *Anderson I*, 2020 WL 6132293, at *4–5 (no prejudice ruling). That conclusion was incorrect. Prior bad act evidence of this sort creates "[t]he risk . . . that jurors will focus on evidence of prior acts, believing that someone with a criminal record cannot change and discounting any evidence to the contrary," which is why "American courts have long excluded evidence of a person's prior bad acts." *United States v. Davis*, 726 F.3d 434, 440–41 (3d Cir. 2013); *see Getz*, 538 A.2d at 730 ("It was well established that evidence of other crimes was not, in general, admissible to prove that the defendant committed the offense charged. . . . The underlying rationale for the principle that evidence of bad character is not itself evidence of guilt is simply a corollary of the presumption of innocence. A defendant must be tried for what he did, not who he is."). No curative or limiting instruction was given to mitigate the substantial harm that this defense-counsel-solicited evidence posed, precisely because counsel inattentively elicited it. *See Getz*, 538 A.2d at 733–34 & n.8 (holding that a limiting instruction is necessary when such evidence is admitted so that the jury is prohibited from finding guilt based on propensity). In any event, it is unlikely any such instruction would have ensured Mr. Anderson a fair trial. *See Davis*, 726 F.3d at 445 ("No instruction could have eliminated the infirmity at the heart of this case:

Davis's convictions were inadmissible for any purpose."). Given the weakness of the State's case against Mr. Anderson,[12] there is a reasonable probability that, but for the admission of this damaging evidence, the outcome of Mr. Anderson's trial would have been different. *Cf. Davis*, 726 F.3d at n.8 (observing that the Government did not argue the erroneous admission of prior drug possession convictions was harmless in federal drug prosecution) & 447 (reversing conviction because of the admission of said convictions).

Accordingly, trial counsel's reckless elicitation of evidence suggesting Mr. Anderson had previously been convicted of a crime deprived Mr. Anderson of a fair trial. A new trial is therefore warranted.

CONCLUSION

For these reasons, Appellant Hakiem Anderson 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:

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[12] Mr. Anderson here incorporates by reference the prejudice analysis from pages 25 through 28, *supra*.

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