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IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN WHEELER, Defendant Below-Appellant, v. STATE OF DELAWARE, Plaintiff Below-Appellee.	)	No. 244, 2022 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE ID No. 1610013171

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY

OPENING BRIEF

COLLINS & PRICE

Patrick J. Collins, ID No. 4692
8 East 13th Street
Wilmington, DE 19801
(302) 655-4600

Attorney for Appellant

Dated: August 25, 2022

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NATURE OF THE PROCEEDINGS

Charges and pretrial matters

On October 20, 2016, Delaware State Police officers arrested Stephen Wheeler in connection with a home invasion robbery that occurred in Millville, Delaware earlier that same day.[1] At the time of arrest, the charges were:

1. Home Invasion
2. Assault Second Degree
3. Robbery Second Degree
4. Conspiracy Second Degree (with Lauren Melton and others)

On January 10, 2017, a grand jury returned an indictment against Mr. Wheeler and Lauren Melton.[2] The charges remained the same except the robbery was upgraded to Robbery First Degree and the Home Invasion charge alleged the victim was over 62 years of age.

Julianne Murray, Esquire, initially represented Mr. Wheeler, but was replaced by Andre Beauregard, Esquire (trial counsel).[3] Counsel filed a motion to suppress cellphone evidence.[4] The Superior Court denied the motion.[5]

At final case review, Mr. Wheeler rejected the State's plea offer and the matter was set for trial.[6]

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[1] A10-16.
[2] A17-19.
[3] A4; D.I. 33.
[4] A27-31.
[5] *See*, A157-160.
[6] A170-171.

Trial and sentencing

At an office conference on March 26, 2021, just before jury selection, the State sought two amendments to the indictment. First, the Assault Second Degree was amended over defense objection from 11 *Del C.* § 612 (a)(5) to (a)(6).[7] The judge denied the State's request to add "and/or electronics" to the currency taken in the robbery on the Robbery First Degree count.[8] Defense applications regarding evidentiary issues were also discussed at this first office conference.

A second office conference occurred that same day, just before jury selection. Trial counsel advised the Court that Mr. Wheeler wanted a bench trial. The State did not oppose.[9] The judge conducted a colloquy with Mr. Wheeler and found his waiver of a jury to be knowing, intelligent, and voluntary.[10] As such, this case was heard and decided by the Honorable T. Henley Graves. A written waiver was not executed. Trial counsel inquired if Sussex County has written waivers; the judge responded, "We may have. I haven't done it in so long, I don't know."[11]

The trial proceeded on March 26 and 27, 2018.[12] Mr. Wheeler did not testify and the defense did not present a case.[13] At the conclusion of closing statements,

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[7] A184-185.
[8] A185.
[9] A190-191.
[10] A220-224.
[11] A191.
[12] Trial transcripts are at A218-652.
[13] A616.

the Court found Mr. Wheeler guilty of all charges.[14] On March 29, 2018, the judge sent a letter to the parties with a clarification and further explanation of the verdict.[15]

Sentencing occurred on April 6, 2018. Judge Graves sentenced Mr. Wheeler to 13 years of unsuspended Level V time.[16] On December 11, 2018, the defense filed a motion to correct the sentence.[17] The corrected sentence order fixed the unsuspended Level V time at eight years for Assault Second Degree; it had erroneously been set at 15 years.[18]

Direct appeal

The case went back to Julianne Murray, Esquire (appellate counsel) for appeal. Appellate counsel argued that the warrantless location tracking of Mr. Wheeler's cellphone violated *Carpenter v. United States*.[19] She also argued that insufficient evidence existed for the Robbery count.[20] At oral argument, it was discovered that a warrant *did* issue for the tracking of the phone. Neither party was

[14] A639-650.
[15] A659-660. (The handwriting on this letter was present when postconviction counsel received the file.)
[16] A661-667.
[17] A668-691.
[18] A696-702.
[19] A728; 138 S.Ct. 2206 (2018).
[20] A728-729.

aware of that.[21] The day after the argument, the warrant was unsealed[22] and added to the Superior Court record.[23]

This Court found that Mr. Wheeler's rights were not violated because the newly found warrant established probable cause for the tracking of his phone.[24] Moreover, this Court found that the victim's testimony that he had $10 taken was sufficient to establish the Robbery count.[25] This Court affirmed Mr. Wheeler's conviction and sentence.

Postconviction case

On January 27, 2020, Mr. Wheeler filed a timely *pro se* Motion for Postconviction Relief along with a Motion to Appoint Counsel.[26] The Superior Court granted the motion for appointment of counsel on February 19, 2020,[27] and the undersigned attorney was appointed.[28]

On September 27, 2021, Mr. Wheeler, through counsel, filed an Amended Motion for Postconviction Relief.[29] Trial counsel filed an affidavit on December 1,

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[21] *Wheeler v. State*, 2019 WL 1579600 at *1 (Del. Apr. 11, 2019); A794.
[22] A703-705.
[23] A706-710.
[24] *Wheeler* at *1; A794.
[25] *Id.*; A795.
[26] A798-830.
[27] A831.
[28] A9; D.I. 92.
[29] A834-870.

2021.[30] The State filed its Response on January 21, 2022,[31] followed by the defense Reply on February 21, 2022.[32]

At a teleconference on March 24, 2022, the postconviction judge decided that an evidentiary hearing was necessary, because trial counsel did not directly address the postconviction claim in his affidavit.[33] The hearing occurred on April 8, 2022, with trial counsel and Mr. Wheeler testifying.[34] After the hearing, both sides submitted post-hearing memoranda.[35]

On June 14, 2022, the Superior Court issued a Memorandum Opinion and Order denying Mr. Wheeler's Amended Motion for Postconviction Relief.[36] Mr. Wheeler, through the undersigned counsel, filed a timely Notice of Appeal. This is Mr. Wheeler's Opening Brief.

[30] A882-888.
[31] A891-916.
[32] A917-928.
[33] A932.
[34] A943-991.
[35] A994-1012.
[36] *State v. Wheeler*, 2022 WL 2134686 (Del. Super. June 14, 2022); Exhibit A.

SUMMARY OF ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING MR. WHEELER'S MOTION FOR POSTCONVICTION RELIEF; TRIAL COUNSEL'S DEFICIENT PERFORMANCE CAUSED MR. WHEELER'S WAIVER OF HIS RIGHT TO A JURY TRIAL.

On the morning of trial, Mr. Wheeler was ready for a jury trial. Meanwhile, his counsel was in chambers for a pretrial office conference. At the conference, trial counsel told the judge he wanted to impeach the robbery victim with salacious evidence of his sexual habits. The judge ruled that evidence would be inadmissible in a home invasion/robbery trial. The judge told trial counsel to "brush up" on evidentiary rules before coming into the courtroom, and to check with him before asking such questions.

Counsel then went to the lockup to meet with Mr. Wheeler. He advised Mr. Wheeler to have a bench trial because certain evidence would come in at a bench trial that would not in a jury trial. Mr. Wheeler, who had planned on a jury trial until that moment, followed his attorney's advice and waived his right to a jury trial. On advice of his attorney, he answered the colloquy questions appropriately; the judge accepted the waiver. A written waiver was not executed.

Mr. Wheeler waived his right to a jury trial based on trial counsel's deficient advice. At the evidentiary hearing, trial counsel testified that he was trying to find a way to get the salacious information about the victim in front of the judge. Although he knew that in a bench trial, the judge will not consider inadmissible

evidence, he hoped by making such arguments to the judge, who was also the finder of fact, it would influence the judge. Although he knew that the judge could "absolutely not" consider the inadmissible information, he nevertheless was trying to seek an advantage "within the realms of the law."

At a pre-hearing conference, the postconviction judge noted that the colloquy would not have much meaning if Mr. Wheeler's answers to the judge were based on trial counsel's deficient advice. Nevertheless, in the Memorandum Opinion, the judge held that Mr. Wheeler was not credible because he was untruthful during the colloquy. The judge also held that trial counsel's testimony that he never told Mr. Wheeler that some evidence gets in with a judge and not a jury was credible.

The Superior Court erred in denying Mr. Wheeler's Amended Motion for Postconviction Relief. Mr. Wheeler forfeited his right to a jury trial solely due to the deficient advice of trial counsel. Otherwise, he would have certainly had a jury trial as was planned all along. This Court should reverse the judgment of the Superior Court.

STATEMENT OF FACTS

Investigation and arrests

This case pertains to a home invasion robbery at the home of Gerald Mueller in Millville on October 20, 2016. Mueller, age 64, lived with Lauren Melton, age 19, at the residence.[37] Mueller told police that around four people came into the house, put a blanket over his head, and beat him.[38] He suffered multiple broken ribs, a broken nose, and other injuries.[39]

Lauren Melton initially claimed that someone grabbed her by her hair and dragged her into the kitchen. She said she then hid in an upstairs bathroom while eight suspects, all masked, ransacked the house.[40] The police asked to see her phone; Melton consented. The phone had various messages on it related to drug sales.[41] She then told police that she knew one of the suspects in the home invasion and his name was Kai. She claimed she was held against her will at the house by Mueller, who forced her to perform sex acts with him.[42] Melton said that Kai promised to get her out.[43]

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[37] A12-13.
[38] A13.
[39] *Id.*
[40] A201.
[41] A203.
[42] *Id.*
[43] *Id.*

The messages found on Melton's phone that related to the home invasion had content such as "unlock back," "we laying down," "he called the cops," and "call your mom in u delete the messages."[44] The messages were with the phone number (302) 249-6594.

Further examination of Melton's phone revealed a photo message from that number, which had sent a photo of Mr. Wheeler from that number. As such, Mr. Wheeler was identified as a suspect.[45] Later in the day of October 20, 2016, police took Mr. Wheeler into custody; he was in possession of the phone with the number (302) 249-6594.[46]

Melton took a plea on April 27, 2017 and agreed to cooperate in the prosecution of Mr. Wheeler.[47] The Court sentenced her to time served, which was just over six months.[48] Based largely on Melton's cooperation, police also arrested Mr. Wheeler's cousin Jerome Wheeler. Jerome pled guilty to Robbery First Degree and Conspiracy Second Degree.[49]

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[44] A204.
[45] A14.
[46] *Id.*
[47] A206.
[48] A207-211.
[49] ID No. 1705006772; D.I. 30.

Office conferences on the day of trial; waiver of jury trial

At the first office conference, trial counsel stated he wanted to admit evidence of salacious material found on the cellphones. Trial counsel stated that Mueller was a 64 year-old man who had teenage girls living with him and that he enticed them with drugs and had sex with them.[50] Counsel sought to admit, for example, a video of Mueller watching Melton and another girl have sex in his home.[51] The judge inquired how that had anything to do with impeachment under Rule 608.[52] Counsel replied that it "goes to moral turpitude."[53] The judge advised trial counsel, "before you ask your questions in there, and you ask me before you ask the question, I'm telling you, you better go get some 608 brushup before you walk into the courtroom."[54] The judge ruled that this sort of evidence was inadmissible.[55]

Shortly after this ruling, trial counsel went back to chambers for another office conference. He advised the Court that Mr. Wheeler wanted to waive a jury trial and proceed to a bench trial.[56] Although trial counsel told the judge that he and

[50] A179.
[51] A180.
[52] A180-181.
[53] A181-182.
[54] A183.
[55] A181-182.
[56] A190.

Mr. Wheeler had talked the prior week about a jury trial or bench trial, he also stated that the request for bench trial was a "last minute thing."[57]

In a postconviction affidavit, Mr. Wheeler averred that he chose a bench trial because trial counsel told him, "on the morning of trial that a bench trial would be better because certain evidence could come in with a judge that could not come in with a jury."[58] Trial counsel did not explain to Mr. Wheeler what that evidence would be.[59]

The judge conducted a colloquy with Mr. Wheeler and found his waiver of a jury to be knowing, intelligent, and voluntary.[60] No written waiver was executed. Trial counsel inquired if Sussex County has written waivers; the judge responded, "We may have. I haven't done it in so long, I don't know."[61] The case proceeded as a bench trial.

Trial evidence

In his opening statement, trial counsel spoke about Melton's involvement and the various stories she told police.[62] He also said that Mr. Wheeler has been sitting for months in jail, "awaiting to tell his story" that he was not there that

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[57] *Id*.
[58] A832.
[59] *Id.*
[60] A220-224.
[61] A191.
[62] A229-230.

night.[63] Trial counsel also said Jerome Wheeler, who was incarcerated in Smyrna, would likely come testify.[64] However, trial counsel had not yet subpoenaed him. Counsel explained that even though Jerome Wheeler pled guilty and received three years in prison, he would testify that Stephen Wheeler was not involved.[65]

Derek Cathell

Detective Cathell was the chief investigating officer, working out of Troop 4.[66] The 911 call came in at 1:51 AM.[67] Upon Cathell's arrival at the house he found it ransacked and in disarray.[68] Cathell conducted an initial interview with Lauren Melton. Then he went to Beebe Hospital to interview Mueller, who had sustained several injuries such as broken ribs and a broken nose.[69]

Cathell soon learned that there was more to Melton's story than what she reported, based on a review of her phone.[70] Police transported Melton back to Troop 4 for a reinterview, but she invoked.[71] Police downloaded the contents of her

[63] A231.
[64] *Id.*
[65] A231.
[66] A233-234.
[67] A234.
[68] A235.
[69] A236-237.
[70] A238.
[71] A239.

phone pursuant to a search warrant.[72] Evidence on the phone in the form of photos and messages established Stephen Wheeler as a suspect.[73]

Various police officers interviewed Melton at different times. She initially gave a statement at the residence. Then she gave a statement to drug investigators due to drugs being found at the home. Then police attempted to re-interview her at the Troop, but she invoked. Next, she gave a statement to a different officer claiming she was a victim of sex trafficking. Finally, Melton gave a proffer statement in connection with her plea.[74]

On cross-examination, trial counsel first asked Cathell about Mr. Wheeler's interview, but that objection was sustained.[75] Counsel next asked about Jerome Wheeler's involvement in the incident, but the Court did not permit the hearsay.[76] It was established that Jerome Wheeler pled guilty to charges involving this incident.[77] Cathell also testified that he was given the name of Patrick Johnson as a suspect.[78] Then, counsel asked about "Kai," the person Melton had initially claimed was in on the home invasion. It turns out that both Mueller and Melton

[72] *Id.*
[73] A245.
[74] A251-252.
[75] A259.
[76] A260.
[77] A261.
[78] A263.

told police that Na Kialla Williams, aka Kai, had robbed them of over $3,000 in a marijuana sale.[79]

Trial counsel then asked about Brittany Pate, who had introduced Lauren Melton to Mueller. He asked whether Pate had a "reputation." The judge confirmed that Pate was not present that night and stopped further inquiry.[80]

Cathell testified that he was not aware of any cash haven been taken from Mueller in the robbery.[81]

Keith Collins

Detective Collins was an evidence detection officer with the Delaware State Police. He took photos of the ransacked house that were admitted into evidence.[82] The photos also established that the safe had been removed from its location and pried open.[83] On cross-examination, trial counsel entered a photo of the bureau, again trying to introduce evidence of Mueller's possession of pornographic materials.[84] Again, the judge sustained an objection because that fact does not go to Mueller's credibility. The judge stated, "what he chose to look at in magazines is

[79] *Id.*
[80] A265-267.
[81] A273.
[82] A283-284.
[83] A287.
[84] A292.

not an issue, as far as your client's defense, counsel. Unless you proffer better than you've proffered."[85]

Trial counsel moved on and established that in all the photographs Collins took of Mr. Wheeler, there did not appear to be injuries to his hands.[86]

Gerald Mueller

Mueller, now 65, testified next. He testified Melton was a girlfriend "who visited."[87] They had been in a relationship for about two months.[88] Mueller testified that he and Melton had smoked marijuana together. About a week prior to the incident, Mueller gave Melton $3,200 to buy marijuana. This pertained to the prior alleged theft that took place.[89]

On October 19, 2016, Mueller and Melton went to bed after watching television.[90] He was awoken by being punched by fists. Unknown assailants were asking "where is the money?" and "what is the combination to the safe?"[91] The assailants tied his hands with belts and started strangling him, then hit him with a lamp.[92] Lauren Melton called her mother first, then 911.[93]

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[85] A293.
[86] A294.
[87] A309.
[88] A310.
[89] A310-311.
[90] A311.
[91] A313.
[92] A314.
[93] A316.

After detailing his injuries, Mueller testified that the intruders took his wallet, which contained $10.[94] He also testified that Stephen Wheeler was known to him as a boyfriend of Melton.[95]

On cross-examination, trial counsel again attempted to elicit evidence about Mueller and Melton's sexual habits and whether they engaged in threesomes. The objection was again sustained.[96] Mueller did testify that Melton initiated the relationship by text and that he gave her $300 for sex on the first night they met.[97]

Lauren Melton

Melton testified that Mr. Wheeler had given her Mueller's phone number, leading to the first text from Melton.[98] At the time, she was in an "on and off" relationship with Mr. Wheeler.[99] Melton testified that during the day of October 19, 2016, Mr. Wheeler discussed with her plans to rob Mueller. He believed that Mueller had money.[100] She testified she would often ask Mueller for money, he would comply, and then she would turn the money over to Mr. Wheeler.[101] That

[94] A323.
[95] A323-324.
[96] A329.
[97] A334.
[98] A341.
[99] A342.
[100] A346.
[101] A347.

includes the $3,200 Mueller gave her to buy marijuana; she then lied and said she was robbed.[102]

After she and Mueller went to bed, Melton made sure Mueller was asleep before the assailants came into the house.[103] Three people came in: Mr. Wheeler, Jerome Wheeler, and a person named Pat. According to Melton, Stephen Wheeler did not participate in the beating of Mueller.[104] However, she testified that Mr. Wheeler had a bag with a crowbar in it and that "they did have guns."[105]

According to Melton, Mr. Wheeler and Melton went to the safe and moved it out of the closet. Mr. Wheeler opened the safe but found nothing of value.[106] She testified that then the three men went through and ransacked the house, taking mostly electronics.[107]

Melton testified that she made up a story about Kai saving her from Mueller so as to not get Mr. Wheeler in trouble.[108] The text messages between her phone and Mr. Wheeler's phone were then admitted.[109]

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[102] A347-348.
[103] A350.
[104] A351.
[105] A352.
[106] A352-353.
[107] A355.
[108] A357.
[109] A360-361.

Melton testified that she entered into a plea agreement with the State requiring her to cooperate against Mr. Wheeler.[110]

On cross-examination, Melton admitted she was on Dilaudid on the night of the incident.[111] She also agreed that she performed escort services.[112] She was also involved in escort services with a "handful" of other people.[113]

Melton next was taken through her several statements to police. She agreed that after invoking, she gave another statement to a different officer alleging human trafficking and being held against her will by Mueller. She testified that she gave that statement to help Mr. Wheeler.[114] Melton further testified that she did what Mr. Wheeler asked because he gave her drugs.[115]

At the conclusion of Melton's testimony, all her statements were admitted into evidence for review by the Court.[116]

Gerald Windish

Lieutenant Windish assisted Detective Cathell in the investigation. He wrote the pen register/cell tracking warrant for the phone with the number (302) 249-

[110] A364.
[111] A368.
[112] A373.
[113] A375.
[114] A377.
[115] A386.
[116] A413.

6594.[117] Using this warrant, the police tracked Mr. Wheeler's location: Peachtree Run in Dover.[118] Police arrested Mr. Wheeler and seized the phone.

Brian Daly

Investigator Daly analyzed the cell site location information for the phone seized from Mr. Wheeler.[119] He opined that the phone was pinging off cell towers near the crime scene in Millville at the relevant time.[120] Trial counsel questioned Daly about slight revisions he had made to the maps, but Daly did not recall what revisions were made prior to his final report.[121] After questioning Daly and reviewing other evidence, the judge admitted the AT&T phone records for the phone.[122]

The State rests and the defense presents no case

The State rested at the conclusion of Cathell's testimony.[123] Trial counsel told the Court that the defense would not be calling any witnesses.[124] After short break, trial counsel presented a motion for judgment of acquittal. Trial counsel first argued that Mr. Wheeler was present by permission, so did not enter or remain

[117] A432-433.
[118] A440.
[119] A591.
[120] A597.
[121] A604.
[122] A610.
[123] A616.
[124] *Id.*

unlawfully; that was denied.[125] The second motion pertained to the robbery and whether currency was taken; the Court ruled that there was testimony that $10 was taken that must be considered in a light most favorable to the State.[126] Finally, trial counsel argued that there was no evidence that Mr. Wheeler possessed the cellphone, but the Court ruled there was inferential evidence of possession.[127]

Again, the judge asked for the defense case to begin, but the defense rested.[128] After a colloquy, Mr. Wheeler declined to testify.[129]

Closing arguments and verdict

The prosecutor argued that Melton and Mr. Wheeler set up the robbery, as demonstrated by her testimony and the text messages back and forth.[130] The prosecutor argued that the phone seized from Mr. Wheeler was Mr. Wheeler's phone and that he had sent the texts to Melton. Finally, the prosecutor argued that cell site analysis showed Mr. Wheeler's phone to be near the crime scene at the relevant time.[131]

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[125] A618.
[126] A619.
[127] A620.
[128] *Id.*
[129] *Id.*
[130] A623.
[131] A623-624.

Trial counsel focused much of the closing argument on the fact that Melton was a prostitute[132] and that Mueller was 64 and "running with these 19 year-olds. And they are not just 19 year-olds; they're the cream of the crop."[133] He further argued that there was no evidence Mr. Wheeler participated in the crime, but that Jerome Wheeler and Melton pled guilty.[134]

Trial counsel then argued that Mr. Wheeler did not present evidence or lies in his defense and that the Court should take judicial notice of the fact that Mr. Wheeler is not the sort of person who commits home invasions or robberies.[135] The judge declined to take such notice.[136] Then trial counsel argued about the sentence Mr. Wheeler was facing, which the judge advised was not relevant. Counsel argued that it showed, "what Mr. Wheeler is facing, what he's doing and how he would present why he did what he did, his trial tactics."[137] Trial counsel also argued that the State fell short of proof beyond a reasonable doubt.[138]

The trial judge immediately rendered a verdict. The judge found that the cellphone evidence established an agreement to plan together to commit a robbery

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[132] A626.
[133] A631.
[134] A633.
[135] A634.
[136] *Id.*
[137] A636.
[138] *Id.*

of Mueller.[139] Based, at minimum, on principles of accomplice liability, the judge also found Mr. Wheeler guilty of the assault committed during the robbery.[140] The judge also found that a robbery of U.S. currency occurred, based largely on Mueller's testimony.[141] Finally, the judge found Mr. Wheeler guilty of Home Invasion because the evidence demonstrated that Mr. Wheeler and others entered or remained unlawfully – and that remaining unlawfully started when the assault occurred.[142]

As noted previously, on April 6, 2018, the Court sentenced Mr. Wheeler to 13 years of unsuspended Level V time, followed by probation.[143] The sentence was later corrected to fix an error in the amount of unsuspended Level V time.[144]

The postconviction evidentiary hearing

On March 24, 2022, the Court convened the parties for an oral argument on the motion.[145] However, the Court decided instead to schedule an evidentiary hearing.[146] The judge noted the evidentiary hearing was necessary because trial counsel did not directly address the relevant issue in his affidavit. The State

[139] A641-643.
[140] A644.
[141] A646-647.
[142] A647-648.
[143] A661-667.
[144] A696-702.
[145] A930-941.
[146] A931-932.

opposed the hearing, as "going down a rabbit hole" that would not change the outcome of the postconviction case.[147] The State argued the hearing was unnecessary because the trial judge conducted a waiver colloquy with Mr. Wheeler.[148]

The judge responded:

> …if counsel gave the advice that he could get evidence in front of a judge that he couldn't in front of a jury and if that is why the defendant made his decision to waive the jury trial, then I'm not sure what it matters what the judge said in terms of the colloquy because the defendant was making all his answers and making his decision based upon that faulty evidence. Now I don't know that faulty evidence was given.[149]

At the evidentiary hearing, the witnesses testified as follows:

Stephen Wheeler

Mr. Wheeler testified that trial counsel met with him about a week before trial by video platform.[150] Trial counsel advised Mr. Wheeler to have a jury trial.[151] He explained that the prosecutor was new, and that this was her first trial. Trial counsel opined that the prosecutor was just looking at "one tree in the forest."[152] Mr. Wheeler took that to mean that the prosecutor was focusing only on Lauren

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[147] A933.
[148] A935.
[149] A936. Upon information and belief, the judge meant to say, "faulty advice" rather than "faulty evidence."
[150] A947.
[151] A948.
[152] *Id.*

Melton, Mr. Wheeler's erstwhile codefendant who was cooperating with the State.[153] Trial counsel planned to attack her credibility.[154]

When the meeting concluded, Mr. Wheeler had no doubt this would be a jury trial. Trial counsel advised Mr. Wheeler to have a relative supply trial clothing for the jury trial.[155]

Things changed on the morning of trial. Mr. Wheeler was transported to the courthouse; trial counsel gave him his jury trial clothing.[156] Trial counsel asked Mr. Wheeler if he was ready to pick the jury; Mr. Wheeler responded in the affirmative.[157] Then Mr. Wheeler waited in the lockup for 30-45 minutes.[158] During this time, trial counsel and the prosecutor were in the aforementioned office conference with the trial judge.[159] As previously discussed, at this hearing, trial counsel sought to introduce certain salacious facts about the alleged victim to establish "moral turpitude."[160] The trial judge denied these requests and told trial counsel to "go get some [Rule] 608 brushup before you walk into the courtroom."[161]

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[153] A948-949.
[154] A949.
[155] A949-950.
[156] A950.
[157] A951.
[158] *Id.*
[159] *See*, A176-187.
[160] A181-182.
[161] A183.

After the 30-45 minute absence, trial counsel returned to the lockup and told Mr. Wheeler it would be better to have a bench trial than a jury trial. This new advice surprised Mr. Wheeler.[162] Trial counsel explained that a bench trial is better because certain evidence could come in with a bench trial that could not come in with a jury trial.[163] Mr. Wheeler did not ask nor did trial counsel explain what that evidence would be.[164]

Mr. Wheeler testified that trial counsel told him that the judge would be asking him questions about a bench trial and to answer "yes" to the questions.[165] Counsel further explained that he could not answer the questions for Mr. Wheeler and the answers had to come from Mr. Wheeler himself.[166] Mr. Wheeler admitted that he provided untrue answers during the colloquy;[167] however, at all times he was following his lawyer's advice as to what to say.[168]

The judge questioned Mr. Wheeler. The judge confirmed that Mr. Wheeler planned on a jury trial until the morning of trial, when trial counsel recommended a bench trial.[169] Mr. Wheeler confirmed this was a "big switch."[170] The switch was

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[162] A951.
[163] *Id.*
[164] A952.
[165] *Id.*
[166] A953.
[167] A953-955.
[168] *Id.*
[169] A960.
[170] *Id.*

because trial counsel told Mr. Wheeler that he could get certain evidence in at a bench trial but not a jury trial. Upon questioning from the judge, he admitted he did not know what the evidence was and did not ask.[171] Mr. Wheeler explained to the judge that he was nervous because it was his first trial, and that he just went with his lawyer's advice.[172] The judge continued questioning Mr. Wheeler about why he did not ascertain what the evidence was; Mr. Wheeler finally admitted, "it was something that I should have asked."[173]

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Trial counsel did not recall much about the case as it occurred four years ago.[174] To some questions, he responded that a court reporter was present and the transcript would reflect what happened.[175] Trial counsel recalled he discussed the bench trial vs. jury trial decision at least one time with Mr. Wheeler prior to trial, but "the conversation day of trial was when the decision was made."

Trial counsel agreed that he wanted to introduce evidence regarding the alleged victim's bureau full of pornography, pornographic DVDs, and a video of the victim and the key witness performing erotic dancing.[176] After those requests

[171] *Id.*
[172] *Id.*
[173] A961-962.
[174] A963.
[175] *See, e.g.*, A967-968, A970, A979, 980.
[176] A969.

were denied, trial counsel went down to the lockup to discuss advantages and disadvantages of a bench trial and jury trial.[177]

Trial counsel testified there were a lot of "moving parts" on the morning of trial, including the fact that the victim and main witness were white and the defendant was Black. This posed a problem in trial counsel's opinion, "this being in Sussex County."[178] Another issue on his mind was that with a bench trial, only one person, the judge, needs to be convinced.[179] However, trial counsel did not think he mentioned those concerns to Mr. Wheeler.[180]

What trial counsel did discuss with Mr. Wheeler is that with a bench trial, the judge hears evidentiary arguments before deciding admissibility, and is also the finder of fact: "so everything goes in front of a judge in a bench trial."[181] By contrast, with a jury trial, the judge hears the arguments, but the jury does not and the jury just sees the evidence the judge permits.[182] Trial counsel wanted the judge to "at least get a flavor" of the fact that the victim, Mueller, did not have "clean hands."[183]Asked to clarify, trial counsel confirmed the point is that even after ruling on an evidentiary issue, he would have already heard the evidence sought to

[177] A970.
[178] *Id.*
[179] A985.
[180] A987.
[181] A973.
[182] *Id.*
[183] *Id.*

be admitted "with the same hat." When asked whether the strategy would be that the judge would be influenced by evidence deemed to be inadmissible, trial counsel explained, "legally, obviously, absolutely not because they're not supposed to do that. They have to keep it separate."[184] But trial counsel was looking for any advantage there might be within the "realms of the law."[185] Trial counsel confirmed that "to some extent," the goal was to have the judge know about evidence as a factfinder that he had excluded as a judge.[186] Trial counsel also noted that judges have their different personalities and that he thought the judge might allow evidence in but say he was giving the evidence little weight.[187]

On the other hand, trial counsel testified that he never pushed Mr. Wheeler one way or the other and only gave him the option of bench trial or jury trial.[188] Trial counsel also testified that he had no discussions with Mr. Wheeler as to how to answer the judge's questions during the colloquy.[189]

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[184] A974.
[185] *Id.*
[186] A976.
[187] A976-977.
[188] A979.
[189] A980.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING MR. WHEELER'S MOTION FOR POSTCONVICTION RELIEF; TRIAL COUNSEL'S DEFICIENT PERFORMANCE CAUSED MR. WHEELER'S WAIVER OF HIS RIGHT TO A JURY TRIAL.

A. Question Presented

Whether the Superior Court erred in denying Mr. Wheeler's motion for postconviction relief, where trial counsel on the morning of trial advised Mr. Wheeler to waive to a bench trial because he could get certain evidence in before a judge but not a jury. This issue was preserved by the filing of an Amended Motion for Postconviction Relief [190] and in subsequent proceedings on the motion.

B. Scope of Review

This Court reviews the denial of a motion for postconviction relief for an abuse of discretion. This Court applies a *de novo* standard of review to legal and constitutional questions.[191]

C. Merits of Argument

Applicable legal precepts

Both the United States and Delaware Constitutions guarantee a criminal defendant the right to trial by jury.[192] To waive the right, the defendant must make

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[190] A834-870.
[191] *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013).
[192] *Davis v. State*, 809 A.2d 565, 568 (Del. 2002), *citing*, U.S. Const. art III, § 2, Del. Const. art. I, § 7.

an "intelligent and voluntary waiver in writing."[193] This Court has long held that the written waiver should be accompanied by a colloquy to ensure "the defendant understands the nature of the jury trial right he or she is waiving."[194] Superior Court Criminal Rule 23(a) states, "cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the State."[195]

The Superior Court has had occasion to consider claims of ineffective assistance of counsel in the context of jury trial waivers. In *State v. Taye*,[196] a murder case, the defendant claimed his counsel was ineffective by counseling him to waive a jury trial. Taye claimed that he would not have done so if he had known that counsel would concede at the bench trial that Taye was driving the car and that his conduct was reckless.[197] The Court noted that in claiming ineffective assistance in connection with a waiver of a jury trial right, the defendant bears the burden of proving his or her counsel's conduct was unreasonable and that counsel's performance prejudiced the waiver.[198] Relying on precedent, the Court held that such deficiency can be cured by a colloquy with the defendant, which occurred in

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[193] *Davis v. State*, 809 A.2d 565 (Del. 2002).
[194] *Id.* at 571.
[195] Super. Ct. Crim. R. 23.
[196] 2014 WL 785033 (Del. Super. Feb. 26, 2014); *aff'd Taye v. State*, 2014 WL 4657310 (Del. Sept. 18, 2014).
[197] *Id.* at *3.
[198] *Id.*

Taye's case.[199] Moreover, the Court found that Taye had executed a written waiver and acknowledged that he had read and understood the waiver.[200] The Court also held that Taye's conviction was supported by substantial evidence, impliedly finding that ineffective assistance in connection with a jury trial waiver is subject to "regular" *Strickland* analysis.

More recently, in *State v. Caulk*,[201] the Superior Court denied a similar claim, although under slightly different legal framework. Initially, the Court held that because the jury trial right is solely the defendant's to waive, the decision was Caulk's alone.[202] Then the Court added that "a criminal defense attorney no doubt has a duty to advise his client regarding the waiver of any of these core rights including the waiver of a jury trial."[203] The Court found that defense counsel did just that.

The *Caulk* Court set forth the applicable legal test as follows:

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[199] *Id., citing State v. Couch*, 2007 WL 987403 (Del. Super. Mar. 30, 2007)(finding that a very extensive colloquy with the defendant cured any prejudice arising from counsel's allegedly deficient performance).
[200] *Taye* at *4.
[201] 2021 WL 2662250 (Del. Super. June 29, 2021).
[202] *Id.* at *7.
[203] *Id.*

> At bottom, when complaining of his lawyer's conduct regarding a waiver of the right to trial by jury, "the defendant bears the burden of proving that his counsel was unreasonable and whether counsel's deficiency prejudiced defendant's waiver of a trial by jury." Thus, Mr. Caulk would—to carry his burden on such a claim—have to demonstrate some deficiency in Mr. Wilkinson's discussion with him about a waiver of a jury trial and then demonstrate that deficiency somehow tainted Mr. Caulk's waiver to such a degree as to overcome the record of his waiver colloquy.[204]

As such, the *Caulk* Court did not hold that any prejudice from ineffective advice about a jury trial waiver can be cured by a colloquy itself or by significant evidence of guilt. This Court affirmed.[205]

In the context of the federal constitution, the Third Circuit has resolved the legal issue of what standard applies to ineffective assistance claims regarding waiver of the jury trial right. It squarely addressed the appropriate postconviction test for ineffective assistance in the jury trial waiver context in *Vickers v. Superintendent Graterford SCI*.[206] Vickers faced aggravated assault charges in Pennsylvania. He filed for postconviction relief in state court, alleging that his counsel misled him as to his right to a jury trial and that his waiver of jury trial was not valid.[207] Vickers' private counsel had opted for a bench trial; the Pennsylvania statutory procedures for waiving a jury trial did not occur. Then that lawyer

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[204] *Id.* (internal citations omitted).
[205] *Caulk v. State*, 2022 WL 320575 (Del. Feb. 2, 2022).
[206] 858 F.3d 841 (3d Cir. 2017).
[207] *Id.* at 845.

withdrew, and Vickers was appointed counsel. The appointed attorney just assumed that the proper procedures had occurred, and the trial went forward as a bench trial.[208]

In State postconviction proceedings, Vickers claimed that he fully intended to have a jury trial. Vickers' former attorney disagreed, testifying that he had discussed the relative merits of a jury trial and a bench trial and that Vickers affirmatively elected to waive his right to a jury trial.[209] The State court agreed and denied relief. The Pennsylvania Supreme Court affirmed.[210]

Now in federal court, Vickers sought *habeas* relief and got it. The District Court held that since there was no written or oral waiver of jury trial, counsel's performance was constitutionally deficient. The Court also found that Vickers was prejudiced by counsel but did not specify what sort of prejudice must be demonstrated in these circumstances.[211] The Commonwealth of Pennsylvania appealed to the Third Circuit.

The Third Circuit readily found that Vickers' attorney provided deficient performance, because the right to trial by jury "may only be ceded by a knowing, voluntary, and intelligent waiver."[212] Vickers' replacement attorney did not take

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[208] *Id.*
[209] *Id.* at 845-846.
[210] *Id.* at 846-847.
[211] *Id.* at 847.
[212] *Id.* at 851.

the "minimal step" of reviewing the case file, the docket, or the record to determine if a proper waiver or colloquy had occurred.[213]

The question of what standard to apply for *Strickland* prejudice required a more thorough analysis. The *Vickers* Court first considered whether the error was one of the few structural errors in which prejudice is presumed. Although the Court noted that the Supreme Court has "discussed the 'profound' importance of the Sixth Amendment right to a jury trial,"[214] the issue in Vickers' case was not the denial of the right to a jury trial, but an "unintelligent and involuntary" waiver of that right.[215] As such, the Court could not find a *per se* structural error.

The Third Circuit next moved on to what sort of prejudice need be shown to prevail on such a claim. Although the Court had previously held that the petitioner needed to demonstrate a reasonable probability of a different result with a jury rather than a judge,[216] it reconsidered that holding in light of recent Supreme Court cases.

In *Hill v. Lockhart,*[217] the Supreme Court considered counsel's deficient performance in failing to inform the defendant of the consequences of a guilty plea. The *Vickers* Court noted that the Supreme Court held that the prejudice prong

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[213] *Id.*
[214] *Id.* at 853, *citing Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968).
[215] *Id.* at 853.
[216] *Id.* at 855, *citing United States v. Lilly*, 536 F.3d 190, 196 (3d Cir. 2008).
[217] *Hill v. Lockhart*, 474 U.S. 52 (1985),

was established if the petitioner could show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty but would have insisted on going to trial."[218]

Similarly, in *Roe v. Flores-Ortega,*[219] the Supreme Court considered whether the petitioner suffered prejudice when counsel's deficient performance caused him to forfeit his right to an appeal. The *Vickers* Court observed that the Supreme Court found it would be unfair to require the petitioner to prove a likelihood of success on the merits of such an appeal. Rather, the Supreme Court held the petitioner had to show that, "but for counsel's deficient conduct, he would have appealed." This was all *Strickland* required.[220]

Finally, the Third Circuit considered *Lafler v. Cooper,*[221] in which the Supreme Court considered counsel's deficient performance in explaining a plea offer to the petitioner as opposed to the merits of going to trial. The *Vickers* Court noted the Supreme Court's holding that "the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance."[222]

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[218] *Vickers* at 855, *citing Hill* at 59.
[219] 528 U.S. 470 (2000).
[220] *Vickers* at 856, *citing Roe* at 486.
[221] 566 U.S. 156 (2012).
[222] *Vickers* at 856, *citing Lafler* at 169.

This trio of cases, particularly *Lafler*, caused the Third Circuit to overrule precedent and establish a new dispositive test for prejudice: but for counsel's deficient performance in failing to ensure a proper waiver of his right to a jury trial, "he would have exercised that right."[223]

The *Vickers* Court found the standard had not been met. The record reflected that Vickers' attorney discussed with him the strategic advantages and disadvantages to a bench trial and a jury trial. The attorney explained that because the defense was legal in nature, that a judge was more likely to appreciate and apply the legal precepts. As such, the Third Circuit reversed the District Court.[224]

The Superior Court misapprehended the central facts of the postconviction case.

The Superior Court held,

> I reject Petitioners' claim that he was given incorrect advice as to the type of evidence a Judge could receive in a bench trial, and I accept what Trial Counsel testified he advised Petitioner.[225]

But what trial counsel told Mr. Wheeler was exactly that – that he could get evidence in front of a judge in a bench trial that he could not in a jury trial.

This case was clearly set for a jury trial right up until the morning of trial. At the last meeting with Mr. Wheeler, trial counsel advised him to have family

[223] *Vickers* at 857.
[224] *Id.* at 857-858.
[225] *State v. Wheeler*, 2022 WL 2134686 at *1 (Del. Super. June 14, 2022).

members provide trial clothing. As far as Mr. Wheeler was concerned, he was going to trial before a jury.

The abrupt change occurred after an office conference with the trial judge. Trial counsel previewed for the judge that he wanted to admit salacious evidence of the robbery victim's sexual habits. This, said trial counsel, went to establish "moral turpitude." The judge admonished trial counsel that such evidence was not admissible for impeachment in a home invasion trial. He advised trial counsel to check with him before asking such questions and to review the Rules of Evidence before the trial began.

After that rebuke, trial counsel devised an alternate plan to have the judge "at least get a flavor"[226] of the victim's sexual habits. He knew that if he stuck with a jury trial, all the evidentiary arguments would take place out of the jury's hearing. But a judge would hear the evidentiary arguments before ruling. As such, trial counsel sought to have the judge be influenced by evidence the judge deemed to be inadmissible, even though, "legally, obviously, absolutely not because they're not supposed to do that. They have to keep it separate."[227] Paradoxically, this is because trial counsel sought to obtain any advantage at trial "within the realms of the law."[228]

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[226] A973.
[227] A974.
[228] *Id.*

With this new plan in mind, trial counsel went back to Mr. Wheeler and advised a bench trial. Mr. Wheeler accepted his lawyer's advice. The postconviction judge questioned Mr. Wheeler at some length as to why he did not ask trial counsel precisely what evidence would be admitted in a bench trial that would not be in a jury trial. But Mr. Wheeler can hardly be faulted for following his attorney's advice.

This sequence of events and trial counsel's reasoning is plain from the record. Mr. Wheeler clearly understood trial counsel's advice to be that trial counsel could get evidence in front of a judge that he could not in front of a jury. To hold that trial counsel was credible in testifying that he did tell Mr. Wheeler that some evidence would be *admissible* in a bench trial but not a jury trial, as the Superior Court did,[229] is too fine a distinction that expects way too much legal sophistication from Mr. Wheeler. Trial counsel's advice was clear, and the Court erred in holding otherwise.

The Superior Court also erred in finding that trial counsel was credible in his testimony that explained to Mr. Wheeler his options, the benefits and disadvantages of each kind of trial, and the like.[230] First, the evidentiary hearing made clear that trial counsel remembered little about the case or the advice he gave

[229] *Wheeler* at *7.
[230] *See*, *Wheeler* at *2.

Mr. Wheeler. He answered several questions by suggesting that the answers would be in the trial transcript. More importantly, the only thing that changed – and caused the waiver of jury trial – was trial counsel's morning-of-trial conference with the trial judge. Up until that moment, this case was a jury trial. Mr. Wheeler had his trial clothes and was ready to go. It only changed the morning of trial after trial counsel's meeting with the judge. Trial counsel described the jury trial waiver as a "last minute thing."[231]

There is simply no reason to find credible that this jury trial became a waiver late on the morning of trial based solely on advice discussing pros and cons of a jury trial. It is clear from the record that trial counsel realized the only way he could get salacious information about the victim to the Court would be by having a bench trial and hoping the judge was influenced by evidentiary arguments. That prompted his deficient advice to Mr. Wheeler.

As the postconviction judge noted in a pre-hearing conference, the waiver colloquy did not reflect an intention by Mr. Wheeler to waive his jury trial right.

Two weeks before the evidentiary hearing, the postconviction judge held an office conference and indicated a hearing was advisable. The State disagreed, arguing that any alleged deficient performance by trial counsel was cured by the trial judge's colloquy with Mr. Wheeler. The postconviction judge stated:

[231] A190.

> …if counsel gave the advice that he could get evidence in front of a judge that he couldn't in front of a jury and if that is why the defendant made his decision to waive the jury trial, then I'm not sure what it matters what the judge said in terms of the colloquy because the defendant was making all his answers and making his decision based upon that faulty evidence. Now I don't know that faulty evidence was given.[232]

The postconviction judge's statement was accurate. Mr. Wheeler testified that trial counsel told him he would have to answer the judge's questions and just to say yes to each question. Mr. Wheeler admitted that he was not truthful, because he still wanted a jury trial, but was following trial counsel's advice. As such, the colloquy did not reflect a knowing, intelligent, and voluntary waiver by Mr. Wheeler. He was relying on the flawed advice of trial counsel.

In the Memorandum Opinion, the judge then considered the colloquy in two important ways. First, the judge used the colloquy to find Mr. Wheeler not credible at the evidentiary hearing and instead chose to believe trial counsel completely.[233] Second, the Court found that Mr. Wheeler's answers to the trial judge's questions represented a free choice and intelligent waiver of his right to a jury trial.[234] As such, the Court pivoted from stating that the colloquy would not be effective if based on deficient advice to holding that the colloquy demonstrated that Mr. Wheeler made a voluntary and intelligent waiver – and that he was not a credible

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[232] A936.
[233] *Wheeler* at *7.
[234] *Id.* at *8.

witness in postconviction. The record squares with the judge's earlier comment: if the waiver was based on deficient advice, then it cannot be relied upon as valid.

A written waiver is required by Superior Court rule.

The Memorandum Opinion briefly mentions the fact that Mr. Wheeler did not execute a written waiver, as required by rule.[235] It was error to hold that Mr. Wheeler's waiver was valid absent a written waiver. The Court's reliance on *Davis v. State* is misplaced. In *Davis*, the trial judge accepted a written waiver of jury trial and conducted a brief colloquy.[236] This Court underscored that a written waiver is necessary to waive the jury trial right, but also held that a colloquy is preferred.[237]

Davis does not hold, as the Superior Court did here, that a colloquy can replace a written waiver. It holds that a thorough colloquy in addition to a waiver is preferable. Indeed, in all the cases cited by the Court in its Memorandum Opinion, the defendant executed a written waiver.[238]

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[235] *Id.* at *7.
[236] *Davis v. State*, 809 A.2d 565, 567-568 (Del. 2002).
[237] *Id.* at 569-572.
[238] *See*, *State v. Taye*, 2014 WL 785033 at *4 (Del. Super. Feb. 26, 2014); *State v. Hall*, 2016 WL 241192 (Del. Super. Jan. 19, 2016)(ID No. 1011006903B, D.I. 4, A1013); *State v. Couch*, 2007 WL 987403 (Del. Super. Mar. 30, 2007)(ID No. 0104005738, D.I. 25, A1014); *State v. Caulk*, 2021 WL 2662250 (Del. Super. June 29, 2021)(ID No. 1705002474, D.I. 26, A1015).

For these reasons, the Superior Court erred in holding that the waiver could be accepted without compliance with the Superior Court Rule requiring a written waiver.[239] Although the trial judge could not remember if there were waiver forms, it was incumbent upon trial counsel to ensure the waiver was executed in writing.

But for trial counsel's deficient performance, Mr. Wheeler would have exercised his constitutionally guaranteed right to a jury trial.

The United States Supreme Court precedent has established a rubric for prejudice in the context of constitutionally protected rights. These involve deficient advice regarding the consequences of a guilty plea,[240] advice about the right to appeal,[241] and advice regarding the existence of a plea offer.[242] In these cases, the Supreme Court has held that prejudice is established if the petitioner can show that but for counsel's ineffective assistance, he or she would have exercised the right.

These cases caused the Third Circuit to adopt such a standard in the context of ineffective assistance claims regarding jury trial waivers: but for counsel's deficient performance in failing to ensure a proper waiver of his right to a jury trial, "he would have exercised that right."[243] As such, the test for prejudice is

[239] Super. Ct. Crim. R. 23(a).
[240] *Hill v. Lockhart*, 474 U.S. 52 (1985).
[241] *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).
[242] *Lafler v. Cooper*, 566 U.S. 156 (2012).
[243] *Vickers*, 858 F.3d at 857.

modified when considering rights of constitutional dimension, including the right to trial by jury.

The Memorandum Opinion does not decide whether the traditional *Strickland* standard or the *Vickers* standard applies to this case.[244] The Court held that under the modified prejudice standard, Mr. Wheeler's claim fails, because he made an "informed, strategic decision to proceed with a bench trial after consultations with Trial Counsel."[245]

Nothing in the record demonstrates that Mr. Wheeler had consultations that resulted in an informed, strategic decision. In fact, quite the opposite. This was a last-minute decision by Mr. Wheeler based on flawed advice by trial counsel. The advice was based on counsel's ill-conceived idea that he could influence the trial judge by arguing about salacious impeachment evidence that he had been warned would not be considered.

The Superior Court's finding that Mr. Wheeler "failed to demonstrate that but for his counsel's deficiency, he would have gone to trial"[246] has no basis in the record. It is unrebutted that Mr. Wheeler wanted to go to trial and only changed his mind minutes before jury selection based on trial counsel's deficient advice.

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[244] *See*, *Wheeler* at *8-9.
[245] *Id.* at *9.
[246] *Id.* at *9.

Because Mr. Wheeler was deprived of his right to a jury trial, this Court should reverse the Superior Court's denial of postconviction relief.

CONCLUSION

For the foregoing reasons, Appellant Stephen Wheeler respectfully requests that this Court reverse the judgment of the Superior Court.

COLLINS & PRICE

/s/ Patrick J. Collins
Patrick J. Collins, ID No. 4692
8 East 13th Street
Wilmington, DE 19801
(302) 655-4600

Attorney for Appellant

Dated: August 25, 2022