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Case Number 6,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RODERICK OWENS,	)	
	)	
Appellant,	)	
	)	No. 6, 2022
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY
DUC 1312003447B

APPELLANT'S REPLY BRIEF

HUDSON JONES JAYWORK & FISHER

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I. THE SUPERIOR COURT ABUSED ITS DISCRETION BY CONCLUDING THAT THE SECOND PLEA OFFER HAD BEEN COMMUNICATED TO MR. OWENS BECAUSE THAT FINDING OF FACT IS NOT SUPPORTED BY COMPETENT EVIDENCE IN THE RECORD. MR. OWENS SUFFERED PREJUDICE.

A. Prejudice is presumed under Chronic and prejudice exists under Strickland and Frye.

Mr. Owens asserts and maintains that *United States v. Chronic*[1] applies to his claim that his trial counsel was ineffective by failing to communicate plea offers to him. In the alternative, per this Court's guidance in *Urquhart v. State*,[2] Mr. Owens argued in his Opening Brief that, in the alternative, prejudice is shown under *Strickland v. Washington*[3] and *Missouri v. Frye*.[4] In Mr. Owens' case, as in *Urquhart*, reversal is required under both *Chronic* and *Strickland*.

The State argues that *Chronic* does not apply. The State is wrong. It misapplies *Urquhart* and wrongly urges the Court to qualify Mr. Owens' assertions as non-credible, despite the fact that he was muffled by never being permitted to go on record during his trial and the Superior Court denying him an evidentiary hearing.

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[1] *United States v. Chronic*, 466 U.S. 648 (1984).
[2] *Urquhart v. State*, 203 A.3d 719 (Del. 2019).
[3] *Strickland v. Washington*, 466 U.S. 668 (1984).
[4] *Missouri v. Frye*, 566 U.S. 134 (2012).

This Court held that *Urquhart's* facts could be considered under *Chronic*.[5] In *Urquhart*, trial counsel failed to meet with defendant pre-trial to prepare for trial or review evidence or discuss plea negotiations. Different public defenders represented the defendant at different stages. Trial counsel appeared on the morning of trial and "winged it."[6] The *Urquhart* Court stated that the Sixth Amendment demands more than the presence the morning of trial of a warm body with a law degree.[7] As a result, the Court qualified the facts as an example of those contemplated by *Chronic*.[8]

Nevertheless, the *Urquhart* Court applied *Strickland* because it led to the same result as *Chronic* (reversal in favor of the appellant) and because the appellant in *Urquhart* had not fully briefed *Strickland* in the alternative – despite the fact that the State maintained only *Strickland* applied.[9] The Court chastised appellate counsel for failing to brief the alternative analysis and applied *Strickland* in the interest of justice because prejudice was manifest on the record.

Likewise, prejudice is manifest on the record in Mr. Owens' case. *Chronic* applies to Mr. Owens' case because his complete denial of counsel is a

[5] *Urquhart v. State*, 203 A.3d 719, 732 (Del. 2019).
[6] *Id.*
[7] *Id.* at 732.
[8] *Id.*
[9] *Id.*

circumstance so likely to be prejudicial that the cost of litigation is unjustified.[10] A complete denial of the right to council does not require trial counsel's absence for the entire duration of the case, as seen in *Urquhart*. Prejudice is presumed when there is a complete denial of council *at any single critical stage*.[11] Mr. Owens was completely denied his right to counsel[12] at a critical stage of his proceedings: the plea-bargaining stage.[13]

Had Mr. Owens been afforded the opportunity to go on record, he would have testified that he has no recollection of receiving any plea offer – neither the first nor the second. As to the first plea offer, it is notable that the box on the plea form, indicating that the offer was rejected, was never marked.[14] Contrary to the post-conviction court's conclusion, the offer was tied to Final Case Review as that offer indicated it would expire at Final Case Review.[15]

While the State does point to trial counsel's affidavit indicating that he communicated the first offer, the State cannot point to a single piece of direct evidence that Mr. Owens was informed by his trial counsel of the existence of a

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[10] See *United States v. Chronic*, 466 U.S. 648, 658 (1984).
[11] *Mitchell v. Mason*, 325 F.3d 732, 740 (6th Cir. 2003).
[12] See *United States v. Chronic*, 466 U.S. 648, 659 (1984). See also *Urquhart v. State*, 203 A.3d 719 (Del. 2019).
[13] See *Missouri v. Frye*, 566 U.S. 134, 141 (2012) (citing *Padilla v. Kentucky*, 559 U.S. 356 (2010)).
[14] A770.
[15] A770.

10-year plea offer. It matters not that Mr. Owens was not entitled to a plea offer. What matters is that the record establishes that the offer existed, that trial counsel had an absolute duty to communicate the offer, and that there is no established record it was ever communicated to Owens.

Trial counsel does not *know* if he communicated the second plea offer to Mr. Owens – his affidavit only states directly that the initial plea offer was communicated. Nothing in the record says that the offer was in fact communicated. However, in addition to a total absence of evidence of trial counsel relaying the 10-year plea, he also cannot recall discussing the 10-year offer with Mr. Owens nor going over the supposed conditions of withdrawing the suppression motion.[16] Nor does trial counsel state directly that he met with Mr. Owens at Final Case Review in the holding cell – his affidavit only says that it was *likely* he did. The only direct evidence from that day is the transcript, where Trial Counsel admits to not having the paperwork for the plea with him and struggles to recall the details of the offer.[17]

The State asks this Court to draw the same erroneous inference drawn by the post-conviction court: that the second plea offer was communicated to Mr. Owens because it was supposed to have been. This is an illogical conclusion and an abuse

[16] A727-29, &31-33.
[17] A719-22.

of discretion. The conclusion that the offer had been communicated is not supported by evidence in the record. If any inferences can be drawn from that discussion it is that the plea agreement was *not* fresh in his mind to discuss the details and consequences of rejection with his client. It is more likely and more supported that in the midst of a heavy caseload with infrequent and sparse communication with his client,[18] the offer slipped through the cracks, trial counsel mistakenly assuming he communicated it. In the absence of any evidence to contradict Mr. Owens, the post-conviction court muffled Mr. Owens when it should have held an evidentiary hearing.

Because *Chronic* applies, the prejudice analysis stops. However, in the alternative, prejudice is established under *Strickland.* As the State admits,[19] prejudice is presumed as a matter of law because the loss of the plea opportunity led trial resulting in a conviction on a more serious charge and the imposition of am more serious sentence.[20] As noted in the Opening Brief, prejudice exists in the form of the imposition of a 19-year sentence[21] when the first and second plea offers recommended 15-year[22] and 10-year[23] sentences, respectively. Further, Mr. Owens

[18] *See generally*, Mr. Owens's letters to counsel and the court.
[19] State's Answering Brief at page 14.
[20] *Urquhart v. State*, 203 A.3d 719, 733, 734 (Del. 2019).
[21] A756.
[22] A770.
[23] A720.

was sentenced as a habitual offender after trial[24] which the 10-year offer avoided.[25] Despite not being permitted on record in court, Owens' fortuitously shows in his letters to trial counsel that from the beginning he wanted to plea out and would have accepted a favorable plea offer.[26] Here, the outcome would have been different if the plea offers had been communicated because Mr. Owens would have accepted them – and certainly would have accepted the second offer.[27]

B. The need for an evidentiary hearing.

In *Reed v. State*,[28] the post-conviction petitioner alleged that trial counsel advised him to plea because black people do not receive fair trials in Sussex

[24] A756.

[25] Possession of a Firearm by a Person Prohibited, when the prohibition is the result of having been convicted of two prior violent felonies, is punishable by 10-15 years at Level V. In fact, Mr. Owens was not convicted of two prior violent felonies. At the time of his trial, he had only one prior violent felony. Accordingly, his non-habitual minimum-mandatory was rightfully 5 years at Level V. Neither trial counsel, the prosecutor, the calendar judge, the trial judge, post-conviction counsel, nor the post-conviction relief judge were aware that they had misinterpreted Mr. Owens' criminal history. Regardless of that error, under the habitual offender statute that existed prior to the 2017 Amendment to 11 Del. C. § 4214, Mr. Owens was subject to a habitual offender sentencing range of 15-years to life at Level V.

[26] A606.

[27] See *State v. Kelson*, 2017 LEXIS 56 (Del. Super. Feb. 2, 2017) applying *Strickland*.

[28] *Reed v. State*, 258 A.3d 807 (Del. 2021).

County. Applying *Strickland*, this Court found that such advice fell below an objective standard of reasonableness.[29]

However, this Court was not able to determine from the record whether or not the trial attorney did, in fact, give such advice in *Reed*. As a result, this Court remanded the matter for an evidentiary hearing.[30]

"Reed's assertion is a serious one, and the trial court did not conduct an evidentiary hearing to evaluate whether Reed's claim is true. Nor does a review of the record reveal the answer as to what advice was actually given, as counsel's affidavit includes denials which are either general or ambiguous. Without an evidentiary hearing directly probing the question of whether Reed's attorney told him words to the effect that a black man will not receive a fair trial in Sussex County, this Court cannot fully evaluate Reed's ineffectiveness [sic] assistance of counsel claim."[31] "We are struck by the general denial in the affidavit and the notable absence of any explicit refutation of that accusation. If the alleged statement had not been made, we would have expected counsel in their affidavit to explicitly and specifically refute it. But here, the statement in counsel's affidavit that they advised Reed of the 'probable make-up of the jury pool' indicates that

[29] The Court applied *Strickland* instead of *Cronic* because, unlike in *Urquhart*, at least Reed's attorney was present to give advice – albeit bad advice.
[30] *Reed v. State*, 258 A.3d 807, 827 (Del. 2021).
[31] *Id.* at 826.

Reed's claim might have at least some foundations in a remark counsel made in the course of representation."[32]

This Court criticized the *Reed* trial judge, "Apparently construing the general denial as containing a specific denial of Reed's alleged statement, and then crediting that denial, the trial judge made a credibility finding without conducting an evidentiary hearing. We find that to be error."[33]

In Mr. Owens' case, the State's approach to the evidence is predicated on a logical fallacy. In an effort to parse inferences the Court should engage once again in LSAT logic analytics. In effect trial counsel and the state assert the following:

- If X (meeting with client), then usually Y (communicate plea agreements),
- Trial Counsel usually does X,
- Z (Owens's final case review) may have been X,
- Therefore Z is Y.

This is the logical fallacy *possibiliter ergo probabiliter*, "possibly, therefore probably" which relies on the appeal to probability and lacks true certainty while asserting sufficiency.[34] Reduced to basic terms, the strongest statement made by trial counsel in his affidavit is that he 'does not know' Z was not X, therefore Z

[32] *Id.*
[33] *Id.*
[34] DURMUS, MURAT, COGNITIVE BIASES – A BRIEF OVERVIEW OF OVER 160 COGNITIVE BIASES, Lulu Press (2022).

was X, meaning Z is also Y. Conclusions based on the above reasoning cannot be said to be "the product of an orderly and logical deductive process".[35]

Mr. Owens' argument, while more complex, is not so fallacious. In essence Mr. Owens asserts the following premises and conclusions:

- If A (present at final case review) then Y (plea agreement communicated),
- If B (trial counsel wrote to him about the plea) then Y,
- If C (trial counsel called him about the plea) then Y,
- If D (trial counsel met with him about the plea) then Y;
- If Y, then R (right to decide met);
- Only R if Y;
- Only Y if A, B, C, or D.
- Not A, B, C, or D therefore not R.

The premises and conclusions of Mr. Owens' arguments, unlike those of the State, are sound and in line with the reasoning laid out in the case law. While logic tests are becoming optional for entry to law school, testing logic should never be optional in the practice of law.

The only way to refute Owens' logical conclusions is by disproving a premise. Here, the State's constrictions on evidence are so wholly unreasonable that to enshrine them as good law would result in manifest injustice not only to Mr.

[35] *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

Owens but to all criminal defendants attempting to assert their rights. The presumption under *Strickland* that counsel's conduct was professionally reasonable is designed to eliminate the distorting effects of hindsight,[36] not to create an insurmountable barrier to the defendant's ability to establish his own credibility. With no record of any discussion or disclosure of the advantageous plea offer by trial counsel to the defendant, the only evidence supporting post-conviction court's conclusion of communication is habit and duty.

The Superior Court's refusal to grant an evidentiary hearing was an abuse of discretion based on circuitous logic. The court asserted that Owens's allegations were unsupported by the record. How can defendants make a record of pleas they do not know about? If Owens had made a record of it wouldn't that prove that he did know of the plea?

The Superior Court maintained that Mr. Owens has no credible witnesses to support his claims. Yet, Mr. Owens has never had the opportunity to obtain credible witnesses on the matter because there has been no evidentiary hearing where he could testify himself, could cross examine trial counsel or the prosecutor about the plea offer, no opportunity to subpoena DOC records or witnesses evidencing a meeting at final case review in the holding area. Nevertheless, Mr. Owens has attempted to support his claims through the documented

[36] *Albury v. State*, 551 A.2d 53, 59 (Del. 1988).

correspondence between trial counsel, the court, appellate counsel, and himself. If these documents are presumed unreliable without a hearing that leaves the only reliable documents as three emails which do not mention the plea as evidence the plea was communicated. It seems incongruous that if documents did mention the plea they would be proof of the plea's communication and that a lack of mention is also proof of the communication. Such reasoning means that the only way to prove a lack of communication would be by an articulated admission by trial counsel on record that the plea was not communicated. This is impracticable in situations where the error was the result of ineffective assistance of counsel, as Mr. Owens maintains is the present case.

This is an unreasonable evidentiary burden where none of the defendant's statements are considered reliable in what is ultimately a he-said-he-said situation. Denying Mr. Owens' claims and further refusing him an evidentiary hearing would raise the burden of proof so that all future appellants would need to make expansive, fishing paper trails in advance of trial to preserve any hope they might have of success on appeal. Such a result is unjust and unconscionable.

II. THE SUPERIOR COURT ABUSED ITS DISCRETION BECAUSE THE FINAL CASE REVIEW WAS A CRITICAL STAGE BECAUSE IT WAS THE CUTOFF FOR A PLEA AND BECAUSE IT WAS ESSENTIAL TO PLEA NEGOTIATIONS. MR. OWENS SUFFERED PREJUDICE AS A RESULT OF HIS ABSENCE.

The State asserts that Owens neither had a fundamental right to be present at the final case review nor suffered prejudice from his absence.[37] They maintain that the meeting on record was administrative and any mention of pleas was mere discussion that defendants do not engender fundamental rights and that Owens had no right to be present.[38] Even if final case reviews are generally administrative, it is the substance of the discussion on the record that is determinative. In fact, Mr. Owens' final case review served to act as a plea colloquy where the 10-year plea offer was rejected without him. Mr. Owens' absence violated his constitutional rights and prejudiced his right to due process.

Though a defendant may not have a constitutional right to a plea offer, if a plea offer is made then defense counsel has an affirmative duty to communicate it to the defendant.[39] The obligation to relay proffered plea offers is not for the sake of reporting and administration, but corresponds to the fundamental right of a defendant to make critical decisions about his case, foremost of which is whether

[37] State's Answering Brief at pg. 25.
[38] State's Answering Brief at pg. 27, 35.
[39] *Missouri v. Frye*, 566 U.S. 134, 145 (2012); *State v. Sewell*, 2018 Del. Super. LEXIS 296, at *6; *State v. Carr*, 2020 Del. Super. LEXIS 20, *2

or not to plead guilty.[40] The decision to plead guilty or not has consequences that are too important to be made by anyone but the defendant and cannot be delegated.[41]

While Superior Court Criminal Rule 11 does not require a plea colloquy to reject a plea offer, as it does to accept a plea agreement,[42] colloquies are frequently used to make sure the defendant understands the consequences of rejecting the proffered offer. The statements and affirmations made to and by a defendant at the colloquy are used as evidence that the decision was knowing and voluntary, and that there was ample communication between the defendant and his counsel.[43]

This is precisely how trial counsel and the calendar judge used Mr. Owens' final case review – albeit ineffectively. At the final case review, trial counsel represented that there was a 10-yearplea offer that was made by the State prior to the suppression hearing. Trial counsel told the court that 10 years was the minimum mandatory – even though it was not. Trial counsel also told the court that Mr. Owens was not subject to further minimum mandatory time that was to be nolle prossed as part of the plea offer – another inaccuracy. In fact, the habitual sentence range after trial for the "B" Case was 15 years minimum mandatory to

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[40] *Cooke v. State*, 977 A.2d 803, 842 (Del. 2009).
[41] *Id.*
[42] Super. Ct. Crim. R. 11.
[43] *State v. Barksdale*, 2015 Del. Super. LEXIS 500; *State v. Sykes*, 2012 Del. Super. LEXIS 65; *State v. Torres*, 2015 Del. Super. LEXIS 526.

life. On the "A" case, the habitual sentence range would have been 8 years minimum mandatory to life. When the court asked for the written offer, trial counsel said he did not have a copy. The assigned prosecutor was not present.

Notably, trial counsel never told the calendar judge that he had communicated the offer to Mr. Owens' and that he knowingly rejected the plea.[44] He never told the calendar judge that he did in fact meet with Mr. Owens on final case review day. Nor does trial counsel make such representations in his affidavits.

It is a red herring to suggest that Owens is asserting a right to be present at all plea negotiations[45]—Owens is making a much narrower claim: he had a right to be present and have the chance affirm or deny these assertions and inferences. While the State is correct in that this Court has not squarely addressed this matter, the case law it cites supports the need for a defendant to be on record in order for a plea colloquy to wash out any procedural errors, which is also supported by this Court's related opinion that such colloquy be of the complete agreement.

In the noncontrolling cases from other jurisdictions, cited by the State to show a trend in courts to hold pretrial plea conferences as not critical, the defendant was at some point brought on record to make a statement. In *People v.*

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[44] A721-22.

[45] Consequently *Powell v. United States,* 2008 U.S. Dist. LEXIS 91381 and related cases are not relevant.

Harris, the defendant had a subsequent plea colloquy where he was asked and affirmatively answered that he did have a "full and complete opportunity to speak to his attorneys, that he was satisfied with his attorney's legal advice, and that he was satisfied with his legal representation in this case."[46] Owens was never brought on record at any point during his trial and his written correspondence with his counsel and the court shows that if he were brought on record he would not have made such an affirmative statement.

In *Brennan v. State,* a plea agreement had been reached between the defendant and the State but when it was presented to the court outside of the presence of the defendant for consideration the judge rejected it.[47] The involvement of the defendant in that conference would have in no way affected the outcome because the defendant did not have a right to enter a guilty plea- his desire to enter the plea, to which he had knowingly agreed, did not overcome the court's right to reject the agreement. This is a very different situation from that of Owens, where the rejection of a plea was offered by his counsel and accepted by the court without his knowledge.

In *Kruse*, the State case most similar to the facts at hand, counsel from both sides met with the trial judge to go over the particulars of a plea agreement that had

[46] *People v. Harris*, 222A.D.2d 522 (N.Y. App. Div. 1995).
[47] *Brennan v. State*, 868 S.E.2d 782 (Ga. 2022).

been reached between the parties, presented in detail to the defendant and discussed between he and his counsel.[48] The defendant ultimately accepted the agreement at a plea colloquy with the trial judge where the judge only went over the plea in generalities. The Court in *Kruse* stated that the procedure was ill advised, the details being discussed outside of the defendant's presence and the plea colloquy only going over generals not particulars, and that such conferences during a trial hold "a risk of the conference exceeding a non-constitutional scope or causing misunderstanding".[49] In *Kruse* there was no error because the defendant had the benefit of counsel during the entry of his plea and at sentencing with his affirmative statements at the colloquy acting as a backstop to any errors of procedure.[50] There was no similar backstop to whitewash the errors in Owens' case; he was never allowed to go on record following the extension of any plea offer. As in *Kruse*, if a different procedure had been followed then there would not now be a need postconviction proceedings.[51]

This Court raised similar concerns when presented with a similar mess of abrogated procedures in *Scarborough v. State*.[52] In *Scarborough*, the Superior

[48] *Kruse v. State*, 177 N.W.2d 322 (Wis. 1970).
[49] *Id.* at 468.
[50] *Id.* at 468.
[51] *Id.* at 466.
[52] *Scarborough v. State*, 938 A.2d 644 (Del. 2007).

Court held a plea colloquy at which the defendant entered a guilty plea which was affirmed on record as being a full and complete agreement.[53] In actuality there was a side oral agreement that if the defendant met certain conditions the State would not pursue certain sentencing enhancements.[54] Due to a failure to meet these conditions, the defendant moved to withdraw his guilty plea on the basis that his original plea was not in fact the complete plea agreement.[55] This Court was ultimately unable to determine what the terms of the oral agreement were and remanded the case for further factual findings on the matter.[56] In its discussion, this Court re-emphasized the "importance of reducing an agreement to writing to save time and unnecessary confusion…[noting] that the parties could have easily avoided this confusion by putting their agreement in writing or on the record BEFORE the proffer."[57] While this Court allowed that the parties had their reasons for wishing to keep certain terms from the public it created a confused and concerning mess.[58] In Owens case the lack of record with regards to the plea offers extended and Owens' own position has led to the State and the Superior Court making grand inferences from minor statements or lack of statements, which is in

[53] *Id.* at 648.
[54] *Id.* at 646.
[55] *Id.*
[56] *Id.* at 654.
[57] *Id.* at 652.
[58] *Id.* at 653.

complete contrast to premise of *Chronic* that "Truth is best discovered by powerful statements on both sides of the question."[59]

Further the record does not support the State's assertion that the final case review gives evidence that Owens knew of the plea and rejected it because of his preference to continue with the suppression motion. The final case review transcript is the only record that of the ten-year plea offer that trial counsel cannot attest he communicated. It is only because of this transcript that Mr. Owens knows at all of the plea offer.

Prior to obtaining the final case review transcript years later, he was not aware the offer was ever made. The State asserts there is no evidence of this but ignores Mr. Owens own written history, which shows that the uncommunicated plea offer did not even arise until the issue was raised by his postconviction counsel.[60] Had Mr. Owens been present at the final case review, he would have been aware of the plea offer in advance of his trial permitting him to be on record and foreclosing this entire appeal. Further, Mr. Owens could have recited for the court an accurate description

The sworn statements of a defendant during a guilty plea colloquy are presumed to be truthful and are a "formidable barrier in any subsequent collateral

[59] *United States v. Chronic* 466 U.S. 655.
[60] A496, 548.

proceedings."[61] Owens is trapped, not unlike *Reed* - his lack of statements at this proxy colloquy are a barrier to his appeal and yet he could not have gone on record unless he had known about the plea, but if there were a recorded statement from him about the plea that would mean he knew about the plea. This Court has mandated that a criminal defendant is to have an opportunity to attend any proceeding where his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. And where his absence would thwart the fairness and justice of the hearing.[62]

Neither trial counsel, the prosecutor, nor any judge at any time, understood Mr. Owens' criminal history. Every legal professional involved in Mr. Owens' case failed to recognize that Mr. Owens only had 1 prior violent felony at the time. Believing there to have been 2 prior violent felonies, the professionals believed that Mr. Owens was subject to 10-year minimum-mandatory for Possession of a Firearm by a Person Prohibited. In fact, because he only had 1prior violent felony, his minimum mandatory term was 5 years.

It is not as though Mr. Owens could have come upon the information regarding the plea offer on his own. He remained incarcerated during the pendency of this case. He was represented and unable to speak directly to the

[61] *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).
[62] *Capano v. State*, 781 A.2d 556, 653 (Del. 2001).

prosecutor. He was also unable to make pro se filings with the court. All the while, he was represented by an attorney who did not understand his criminal history and was negotiating from a place of misunderstanding from the beginning.

Had Mr. Owens been present to contribute at the trial calendar call, he could have learned of the plea offer. He could have indicated if he was willing to take that offer. He could have corrected the judge about the nature of his criminal record. Given all the bad information that was in play and the lack of communication with Mr. Owens to correct that bad information, Mr. Owens was not able to participate in his negotiations. The only place in the record where the 10-year offer is memorialized was at final case review. His absence is thwarting the fairness of his proceedings.

"A fair trial does not 'wipe clean any deficient performance by defense counsel during plea bargaining.'" [63]

[63] *Urquhart v. State*, 203 A.3d 719, 733 (Del. 2019).

III. THE POSTCONVICTION COURT ABUSED ITS DISCRETION BECAUSE TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO PRESENT EVIDENCE AT THE SUPPRESSION HEARING THAT WOULD HAVE CAUSED THE COURT TO GRANT THE MOTION TO SUPPRESS HAD IT BEEN PRESENTED.

Trial counsel's failure to prepare by calling witnesses and presenting evidence at the suppression hearing was objectively unreasonable knowing it was a fact-specific inquiry. The weight of trial counsel's failure to prepare considers the significance of the trial stage to the defendant's case.[64] "The trial which might determine the accused's fate may well not be that in the courtroom but that at the pre-trial confrontation, … Where a conviction may rest on a single fact or point of law which the accused is unable to scrutinize at trial, his primary safeguard is that pretrial ability to meaningfully cross examine the witness.[65] Unlike cases like *Stincer,* where the issues raised in a competency hearing were unrelated to the basic trial issues,[66] Owens' suppression hearing was based on a single testimony. In Owens's case, the suppression hearing was not just 'a' critical stage, it was 'the' critical stage, as winning it would have gutted the State's evidence and likely resulted in the case being dropped.

[64] *Strickland*, 466 U.S. 690; *Coleman v. Alabama*, 399 U.S. 1, 7 (1970); *Potter v. State*, 547 A.2d 595, 786 (Del. 1988).
[65] *Kirby v. Illinois*, 406 U.S. 682, 695-96 (1972).
[66] *Kentucky v. Stincer*, 482 U.S. 730, 741 (1987).

As the Superior Court opinion noted and this Court affirmed, reasonable suspicion is a highly fact based inquiry,[67] and unprovoked flight is *one* factor in its determination.[68] The court stated in the suppression hearing that this was a matter of the interpretation of the facts and the credibility of the witness.[69] *Woody* does not hold that flight alone creates reasonable suspicion and the Woody court lists several other contributing factors: recent arrests at that specific location, specific complaints of drug dealing in that area, a visible bulge the defendant was clutching as he ran.[70] The court in Owens' suppression motion similarly listed other contributing factors: sitting at a vacant home with boarded windows, a no loitering sign, and that the owner had reported people loitering there.[71] The prosecutor relied on these other facts to legitimize the "reasonable suspicion".[72]

Trial Counsel not only did not present his own evidence to challenge these facts, he stipulated to one of them-that there was a 'no loitering' sign outside-expressly in opposition to his client's testimony.[73] By not preparing he foreclosed his chance to impeach the officer's credibility. If the officer's ability to accurately

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[67] A696. *See also Cummings v. State*, 765, A.2d 945, 949 (Del. 2001); *Murray v. State*, 45 A.3d 670, 674 (Del. 2012
[68] *Woody v. State*, 765 A.2d 1257, 1263 (Del. 2001).
[69] A45-47.
[70] *Woody v. State*, 765 A.2d 1261.
[71] A700.
[72] A42-43.
[73] A36-37.

observe a "no loitering" sign and overall condition of the house is doubtable, then it is equally doubtable that the officer would have been able to observe a bulge on the side of the defendant's body pointed away from his vision, under a black hoodie at night. The credibility of the witness went directly to the matter of reasonable suspicions.

This was not a reasonable tactical decision. The cases that trial counsel relied on in his suppression argument showing a dispute as to the time of seizure look to specific facts that showed no reasonable suspicion.[74] Counsel could not have hoped to successfully argue without similarly introducing facts that could support his assertions.

To not introduce any evidence challenging the matter and furthering his point, was not an unfortunate tactical decision—it was clear ineffectiveness and fell outside of the basic range of adequate representation. Had flight alone remained, there would not have been grounds for reasonable suspicion and the officer's testimony would have been suppressed.

The suppression of the testimony would have resulted in the charges being dropped as this was the only evidence introduced at trial, trial counsel's failure to present evidence and call witnesses was ineffective assistance of counsel.

[74] A765-66.

CONCLUSION

WHEREFORE, Mr. Owens prays that this Honorable Court vacate his sentence and remand the matter to the Superior Court for acceptance of the second plea agreement. In the alternative, Mr. Owens prays that this Court remand the matter to the Superior Court for an evidentiary hearing regarding the uncommunicated plea offer. Further in the alternative, Mr. Owens requests a new trial.

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