

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

<b>STATE OF DELAWARE</b>	)	
	)	<b>CRIMINAL ACTION NUMBER</b>
v.	)	
	)	<b>IN-01-05-0937      IN-01-05-0938</b>
<b>CHAUNCEY S. STARLING</b>	)	<b>IN-01-05-0939      IN-01-05-0940</b>
	)	<b>IN-01-05-2366</b>
Defendant.	)	
	)	<b>ID No. 0104015882</b>

*Submitted: February 10, 2010*

*Decided: July 20, 2010*

**MEMORANDUM OPINION**

*Upon Motion of the Defendant to Compel Discovery -  
DENIED, in part, and GRANTED, in part*

*Appearances:*

John A. Barber, Esquire, Deputy Attorney General, and Elizabeth McFarlan, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorneys for the State

James J. Haley, Esquire, of Ferrara & Haley, Wilmington, Delaware, and David M. Fragale, Esquire, and Emily B. Cohen, Esquire, of Steptoe & Johnson, Washington, D.C., Attorneys for the Defendant

HERLIHY, Judge

Chauncey Starling has moved for postconviction relief. His convictions for two counts (separate victims) of first degree murder and death sentence for each count have been upheld on direct appeal.<sup>1</sup> Related to his motion for relief, Starling has filed a motion to compel discovery of a number of items. To put his motion to compel into context, a brief factual recitation is needed:

About 8:30 p.m. on Friday, March 9, 2001, the barbers at Made-4-Men barbershop on 4th Street in Wilmington were working on several customers. Darnell Evans was seated in the first barber chair on the right, closest to the entrance of the shop. His girlfriend, Shaylyn Flonnory, was seated next to him. Damon Gist Sr., another regular customer, was also in the shop that evening. He had brought his five-year-old son, Damon Jr. (“DJ”), with him as he often did on Friday nights. DJ was sitting in the third barber chair from the entrance as he waited for his father. Several other people were also in the shop.

Flonnory saw a person walking on the sidewalk, dressed in black and holding a gun. Several people heard a shot fired from outside the barbershop just before the front window shattered. Lawrence Moore, the shop owner, was hit by flying glass. A person dressed in black, with a mask covering his face except his eyes, came into the barbershop. The gunman shot at Evans, who tried to flee toward the rear of the shop. The gunman continued to shoot at Evans. Evans fell to the floor at the back of the shop. The shooter followed Evans, stood over him and shot him twice in the head.

The gunman fled out the front door. Evans had been shot five times. DJ, who had been shot in the jaw, ran to his father with blood running from his mouth. Shop-owner Moore followed the shooter out of the barbershop to the corner of 4th and Shipley Streets. Then he realized that it was probably not wise to chase an armed man, and abandoned the chase. He last saw the gunman turn east onto 5th street. DJ and Evans both died as a result of their wounds.

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<sup>1</sup> *Starling v. State*, 882 A.2d 747 (Del. 2005); *Starling v. State*, 903 A.2d 758 (Del. 2006).

The witnesses police interviewed at the scene agree that the gunman was dressed in dark clothing, including a sweatshirt with a hood. The gunman's face was mostly covered with some type of mask. None of the witnesses was able to identify the gunman. No weapon was recovered. The evidence gathered at the crime scene indicated that the weapon was used was .38 special or a .357 magnum.

About a month later, police discovered Alfred Gaines, a new witness regarding the shootings. Gaines testified that on the afternoon and evenings of March 9, he was riding around Wilmington with his friends, Chauncey Starling and Richard Frink. Frink was driving. Starling was in the front passenger seat, and Gaines was behind him. As they drove past the Made-4-Men barbershop, Starling thought he saw Evans inside.

According to Gaines, Starling and Frink discussed whether Evans was the person in the barbershop. While Frink circled back to pass the barbershop again. Starling said that, if it was Evans, he would "put in some work." On the second pass, Frink said that it was Evans in the barbershop. Frink parked the car behind the barbershop on 5th Street between Market and Shipley Street.

Once the car was parked, Starling got out of the car and removed his jacket. He put on a "wave cap" and placed a gun in his pants. Starling was dressed in dark clothes, including a black hooded sweatshirt. Starling walked down the street to Shipley Street and turned toward Market Street. Frink and Gaines stayed in the car. Starling returned about fifteen minutes later, telling Frink, "I got him. I got him. I think I got a little boy, too." Frink then drove Gaines home.

Shortly after 10 p.m. that night, Starling telephoned Gaines saying he needed to talk. Gaines took a taxi to the house of Vicki Miller, Starling's girlfriend. Gaines testified that Starling appeared upset and admitted shooting a little boy. Starling's brother, Michael, was at Miller's house and later told police that Starling was "drunk out of his mind." Starling told Michael, "I'm sorry, I'm sorry." Michael drove Gaines home.

Starling's defense at trial attacked the credibility of the prosecution's primary witness - Gaines. The defense also pointed contradictions in the descriptions of the shooter that the various witnesses provided. Starling's mother and

uncle testified that one or both of them had been with Starling on March 9 until nearly 9 p.m. Starling did not testify.<sup>2</sup>

Starling seeks a number of items. Before undertaking a review of those items and whether there is a basis to compel the State to provide them, a few principles need to be stated.

The underlying motion for postconviction relief has been filed within the terms of Superior Court Criminal Rule 61. That Rule does not provide for additional discovery.<sup>3</sup> This Court does have some inherent discretion, however, to grant “particularized discovery for good cause shown.”<sup>4</sup> The Rule authorizes this Court to expand the record to include material relevant to the determination of the motion’s merits.<sup>5</sup>

The United States Supreme Court has said, “We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigation work on a case.”<sup>6</sup> More recently, the United States Supreme Court has said:

A criminal defendant proved guilty after a fair trial does not have the same liberty as a free man. At trial, the defendant is presumed innocent and may demand that the government prove its case beyond a reasonable doubt. But

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<sup>2</sup> *Starling v. State*, 903 A.2d at 760-61. (Citations omitted).

<sup>3</sup> *Dawson v. State*, 673 A.2d 1186, 1197 (Del. 1996).

<sup>4</sup> *Dawson*, 673 A.2d at 1197.

<sup>5</sup> Super. Ct. Cr. R. 61(g).

<sup>6</sup> *Moore v. Illinois*, 408 U.S. 786, 795, 92 S. Ct. 2562, 33 L.Ed.2d. 706 (1972).

“[o]nce the a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears.”<sup>7</sup>

In all due respect, the above is, in part, a syllogism. A motion for postconviction relief is an effort to determine if Starling received or did not receive a fair trial. The point is, however, that at this procedural state, the State’s “file” is not wide open for unfettered discovery.

### *Starling’s Request*

Starling contends he has shown good cause to obtain the following information and records:

- 1. All Documents, including Communications, that Relate to any and all agreements, whether, written or oral, between Alfred Gaines and Delaware or Pennsylvania.**<sup>8</sup>

As the recited facts showed, the State’s primary witness against Starling was Gaines. He came forward after being shot in Chester. When he was being treated for his wounds, an illegal substance was found in his clothing, and he was charged with possession with intent to deliver.

As to this part of Starling’s request, the State notes: (1) the trial prosecutors checked

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<sup>7</sup> *District Attorney’s Office for the Third Judicial District v. Osborne*, ??? U.S. ???, 129 St. Ct. 2308, 2320, 174 L.Ed.2d. 38, ??? (2009) quoting *Herrara v. Collins*, 506 U.S. 390, 399, 113 S. Ct. 853, 122 L.Ed.2d 203, ??? (1993).

<sup>8</sup> Throughout this request and others certain words are capitalized, such as “Document,” “Relate,” and “Communication.” These were words he defined in Starling’s first set of requests for production filed in November, 2009.

Delaware County files and found no *Brady*<sup>9</sup> documents; (2) there are no such documents; and, (3) at Starling's trial, a Chester Police Detective testified that the Commonwealth dropped the charge against Gaines for reasons unrelated to Starling's prosecution.

Starling has argued in his various filings with the motion to compel that the State is required to divulge any and all work which it did to examine, review or otherwise cull through all records and files in order to comply with his requests. That argument will be kept in mind for not only this request, but all others. The Court is satisfied, as to this specific request about Pennsylvania records, that the State has fulfilled its obligation and need not offer any further explanation of what it did to examine records.

There is a second part to Starling's request relating to Gaines. This part concerns Gaines' probationary status in Delaware. Starling attached to his motion to compel portions of two Probation and Parole reports. The Court found those attachments somewhat confusing because he did not provide complete copies and there seemed to be a sequence problem. The Court deemed it necessary, therefore, to obtain the Court's pre-sentence file for Gaines to obtain his sentencing history and all of his Probation and Parole reports covering any of his charges.

Because of the age of Gaines' sentencing history, his pre-sentence file was in State Archives. It had to be retrieved. Normally, as noted, all Probation and Parole reports would be in it for any and all charges for which he had ever been sentenced in this Court.

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<sup>9</sup> *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963).

One of the partial reports Starling supplied with his motion is from 2004. For inexplicable reasons, that report is not in his file. In addition, separate copies of Probation and Parole reports are kept in the Prothonotary's files, but they are kept in the file for that particular case. Since the 2004 report was not where it should have been, the Court was subsequently compelled to get the Prothonotary's files which turned out to also be in Archives. Those files have now been retrieved. The Court now has all of Gaines Probation and Parole reports.

In January 1998, Gaines was sentenced to three years in jail on a drug trafficking charge, which was effective December 2, 1997. He was also sentenced at the same time on a charge of assault third degree (a misdemeanor) to a one year jail sentence, which was suspended for a year of probation. On the same date, he was found in violation of probation stemming from a 1997 assault second degree sentence and was sentenced to three years of probation to be consecutive to the one year probation. The maximum expiration date on the assault third sentence was November 30, 2001. The maximum expiration date of his assault second sentence was noted as November 30, 2005 by Probation and Parole.

Two years before Starling's trial, Probation and Parole submitted a report dated October 16, 2001, to Judge Gebelein, the sentencing Judge, on the assault third case. In that report are these two paragraphs:

Mr. Gaines is currently being supervised by this Level III Officer. On 04/10/01 Mr. Gaines was the victim in an attempted murder. Mr. Gaines was shot three times in the head in Chester Pennsylvania. Mr. Gaines

survived the attack and has been in the hospital since this time. Mr. Gaines is cooperating with the Attorney General's Office in regards to this case and another related matter. This Officer submitted a VOP requesting a Capias for Mr. Gaines. After speaking with Joelle Wright, the AG working on the case, she advised me that she spoke to YOUR HONOR and requested that the VOP and Capias be withdrawn.

This Officer is respectfully recommending that your Honor withdrawal the VOP and Capias on Mr. Gaines. This Officer is also respectfully recommending that Mr. Gaines Probation be held in Abeyance [sic] subject to the Supervision of the Attorney General's Office until all matter are concluded.<sup>10</sup>

Judge Gebelein approved of Probation and Parole's recommendation, "Probation to be held in abeyance subject to the Supervision of the Attorney General's Office."<sup>11</sup> He agreed to this on October 22, 2001. This was again, two years before the trial.

The Court is unaware if the State informed trial counsel of any of this. The Court is also unaware when Starling's current counsel obtained a copy of the above report and other referenced reports or how.

It turns out, getting Gaines' pre-sentence file was beneficial in an additional way. It contained a March 27, 2002, Probation and Parole Progress report which, if Starling's current counsel had it, was not included as an exhibit with his motion to compel.<sup>12</sup> All of this raises two other questions. First, did Starling's trial counsel have a copy of these

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<sup>10</sup> Probation and Parole Progress Report dated October 16, 2001.

<sup>11</sup> *Id.*

<sup>12</sup> This report and all others not attached as exhibits to Starling's motion to compel are being provided in separate correspondence.



reports prior to the 2003 trial and/or was he aware of the prosecution's discussions with Gaines' probation officers? Second, this March 27th report refers to a February 3, 2002 report. A copy of that report was not included in Starling's motion to compel and the Court has no knowledge whether current counsel have it, let alone when trial counsel did, if ever.

Regrettably, that February 3rd report was also not in Gaines' pre-sentence file. This, in turn, was part of the reason the Court needed to have the Prothonotary's files for Gaines retrieved from the State Archives. That has just been done. Pertinent portions of the February 3rd report state:

This Officer received Mr. Gaines' file from Officer Garrick on 01/02/02. Officer Garrick submitted a Progress Report to your Honor on 10/16/01, as Mr. Gaines was the victim in an attempted murder. Officer Garrick indicates that although Mr. Gaines survived the attack, he is undergoing medical treatment and is currently cooperating with the Attorney General's Office with regards to that case and another related matter. Consequently, a request was made to have Mr. Gaines' probation CRA #IN97-12-1179 be held in Abeyance, as his case will be monitored by the Attorney General's Office until these matters are concluded. This Officer is respectfully requesting at this time that Mr. Gaines probation be amended to include Abeyance for CRA#'s VN96-11-0022-01 and PN97-03-0434.<sup>13</sup>

Judge Gebelein, on February 21, 2002, approved the recommendation to hold Gaines' probation in abeyance. The offenses affected were the sentences for assault second degree sentence and the receiving stolen property.

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<sup>13</sup> Probation and Parole Progress Report dated February 3, 2002.

As noted above, there is a March 27, 2002 report. It contains this information from the probation officer:

This Officer received Mr. Gaines' file from Officer Garrick on 1/20/02. Officer Garrick submitted a Progress Report to the Court on 10/16/01, as Mr. Gaines was the victim in an attempted murder. Officer Garrick indicated that although Mr. Gaines survived the attack, he was undergoing medical treatment and co-operating with the attorney General's Office with regards to that case and another related matter. Consequently, a request was made to have CRA # IN97-12-1179 to be held in abeyance. This Officer submitted a Progress Report to your honor on 02-03-02, which requested that CRA #'s VN96-11-0022-01 and PN97-03-0434 be held in abeyance as well. Since the writing of those reports, Mr. Gaines has been supervised by the Attorney General's probation as well as the Witness Protection Program. This Officer has never met with Mr. Gaines and at this point has very little information as to the status of his pending trial and whereabouts. The purpose of this correspondence is to ask for your Honor's guidance or direction on how to proceed with Mr. Gaines probation. The concern is that since he is not reporting to the probation office and is being supervised by the Attorney General's Office, that our interest in his file should be closed. Any help in the proper course of action regarding this matter is greatly appreciated.<sup>14</sup>

On April 8, 2002, Judge Gebelein discharged Gaines' probationary sentence on the assault third degree sentence (Cr.A. No. IN97-12-1179) and authorized a civil judgment to be entered for any moneys due.

But on April 11, 2002, Judge Gebelein added this provision to the same Progress Report:

96-11-0022 (the assault second sentence) and 97-03-0434 (a sentence for receiving stolen property imposed originally in March, 1999 for one year of probation) should be deferred until he (Gaines) is released from Supervision

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<sup>14</sup> Probation and Parole Progress Report dated March 27, 2002.

by Attorney General.<sup>15</sup>

This was done, of course, about a year and a half before Starling's trial.

Starling attached a Probation and Parole report on Gaines dated November 15, 2004 to his motion to compel. He did not attach the page the judge signed nor, again regrettably, was the full report in the pre-sentence file. The Court had to get this from the archived Prothonotary's file.

The signature page notes that on November 17, 2004, Judge Toliver discharged Gaines from probation on the sentences for assault second degree and receiving stolen property.<sup>16</sup> His action has to be tied in with the recommendation from Probation and Parole and the reasons for that recommendation:

On 01/23/98, Mr. Gaines was sentenced by Judge Gebelein for the charges of Assault 2nd (0022) and again on 03/22/99, for Receiving Stolen Property <\$1000 (0434). He was sentenced to 3 years of Deferred Probation in CRA# 0022, followed by 1 year Level 2, (0434) to run consecutively.

This officer received this file via transfer from Officer William Dupont. Officer Dupont submitted a progress report to the court on 03/27/02, as Mr. Gaines was a victim of an attempted murder. Officer Dupont indicated that although Mr. Gaines survived the attack, he was undergoing medical treatment and co-operating with the Attorney General's Office in regards to this case (Barber Shop Shooting on 4th and Market St. Wilmington, De.) and other unrelated matters. Judge Gebelein instructed this office to supervise Mr. Gaines case until his obligation to the Attorney General's Office has been met.

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<sup>15</sup> *Id.*

<sup>16</sup> Judge Gebelein was on leave from this Court at that time serving a special assignment in Afghanistan.

To date, this officer has contacted Deputy AG Mr. Paul R. Wallace informed this officer that Mr. Gaines has fulfilled his obligation to the AG's Office and has co-operated fully. Therefore, this officer respectfully requests that CRA#'s 97-03-0434 and 96-11-0022-01, be discharged.<sup>17</sup>

Of course, the report and Judge Toliver's action were after the trial, but the report refers to matters and conversations prior to trial between the probation officer and the State's lead trial prosecutor, Paul Wallace. Those comments bear on the issue about which Starling seeks more information.

These reports raise several issues. One, as Judge Gebelein wrote, Gaines was apparently under the "supervision" of the Attorney General's office. What that means is unknown both probably to Starling and the Court. Two, the reports reveal a lot of discussion about Gaines between prosecutors and probation officers. Three, there is a high probability of discussion between Gaines and prosecutors concerning his expectations regarding these probationary sentences and what the State expected in return. Four, and importantly, is what, if anything, did the State tell Starling's trial counsel about all of this prior to trial?

These questions can only be answered in an evidentiary hearing under oath. In fairness, it is not known if the State had copies of the pages in the Progress Reports which the judge signed at any stage prior to the trial. It is also unknown if, lacking such copies, Probation and Parole informed the prosecutors of the date any judge signed the report

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<sup>17</sup> Probation and Parole Progress report dated November 15, 2004.

and/or of what any judge may have added to the signature page. This, too, will have to be clarified at the evidentiary hearing. If, however, the State had or has copies of these reports or any other e-mails or documents involving any agreements, understandings, etc., between it and Gaines which have so far not been produced, they shall be done so within 20 days of this opinion.

**2. All Communications between Delaware and Alfred Gaines Related to the Barbershop Shootings.**

Starling reiterates his reasons from the first request. The State replies that it gave to trial counsel prior to trial all of Gaines' statements. It says anything else is "work product." Starling's response to that is the State cannot hide behind "work product" as far as any agreements with witnesses.

To an extent, Starling's point is correct. What he and the Court do not know is whether there were verbal agreements or understandings with Gaines the State has not divulged to this point. The record just reviewed in Starling's first request suggests there could have been more in the way of understandings ("wink-wink") or agreements reduced to writing or worked out but not put in writing.

Starling's request is for "communications" which, of course, encompasses verbal and written form. Therefore, if there were any communications not yet divulged, the State is to do so promptly. That translates into an affidavit or affidavits from any prosecutor who discussed with Gaines and/or his counsel and any understandings or agreements about

his testimony. It may also be a subject of the evidentiary hearing.

**3. All documents, including communications, that relate to the payment of settlement of civil fines in related [sic] to Alfred Gaines.**

Starling repeats reasons he offered for his first two requests to get these items: Gaines was on probation here, had his Delaware fines paid off, and was not prosecuted in Pennsylvania for the drugs found on him. The State responds there is no such material which Starling claims is untrue because he was interviewed in Pennsylvania about the barbershop murders.

Absent anything else to buttress the claim that there is more, the Court cannot find anything to compel.

**4. All Documents, including Communications, that Relate [sic] to any recommendations by Delaware regarding criminal charges, imprisonment, criminal or civil fines in connection with Alfred Gaines.**

The State denies there are any. But Starling points to the October 16, 2001, VOP report in which there is a reference to a conversation between Gaines' probation officer and a prosecutor about a conversation that a prosecutor had with the sentencing judge (not this judge) concerning withdrawing the violation of probation and the capias for that vacation.

This Court is left in the position of not knowing what documents were turned over to Starling's trial counsel and which were not. Further, the Court does not know which VOP reports Starling now has or how he got them that he has included with his motions.

Starling's argument now suggests (1) certain VOP reports were not supplied and (2) there may be more to be turned over to them in the way of other communications. The other VOP report referencing a communication from the trial prosecutor to the probation officer about Gaines fulfilling his obligations<sup>18</sup> is likewise so suggestive.

The only solution for the Court is to direct the State to recheck its files and records and with any counsel who touched this case, including Gaines' matters, prior to the trial. The purpose is to ensure that the State's response of "none" to these requests is accurate.

**5. All Documents, including Communications that Relate to the payment or settlement of civil fines Related to Alfred Gaines.**

This request is a repeat of earlier requests. The State responds there are none. Any prior discussion and rulings encompassing this request are carried over.

**6. All Documents, including any notes, recording or transcripts that Relate to any and all interviews of Alfred Gaines.**

In his reply supporting his amended motion for postconviction relief, Starling refers specifically to notes of Wilmington Police interviews of Gaines. Starling argues there are inconsistencies between Gaines' trial testimony and what he said those notes would reveal. References to these notes were made during Starling's preliminary hearing.

Starling also mentions an April 17, 2001, interview of Gaines that he claims was redacted. He accuses the State of withholding evidence or "contriving" Gaines' testimony.

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<sup>18</sup> *Supra* p. 6-7.

The State denies that latter accusation. It reports it turned over transcripts and tapes of Gaines' statements to trial counsel prior to trial. It further asserts that there is no additional exculpatory material in the notes. It cites to Gaines' trial testimony during his cross-examination which brought out that he had not originally told the Wilmington Police about things he and Starling did prior to the murders although he testified about those things at trial.

In the Court's view, based on the record presented, Starling has failed to show good cause to obtain anything further on the request.<sup>19</sup>

**7. Side B of the Clifford Henry interview tape.**

The Court cannot fully resolve this request. Starling contends trial counsel never received side B and the State, referring to a pre-trial letter to Starling's trial counsel, submits it was supplied. Even if side B were not supplied, the State says a full transcript, presumably unredacted, of both sides was sent to trial counsel prior to trial.

Starling bases his request on what he claims is an exculpatory statement in Henry's interview. The inference is that the additional side does or may contain more exculpatory material.

As the Court sees it, the only way to determine if trial counsel had "side B" is for current counsel to compare the full tape with the transcript or for the State to compare the transcript provided to trial counsel with the entire tape. The parties should report back

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<sup>19</sup> *Dawson v. State, supra.*



promptly to the Court what this comparison reveals and steps, if any, to resolve the matter.

**8. Identify the name of the witness interviewed by Detective Conner on April 23, 2003 and produce any statements or recordings that relate to that witness.**

Richard Frink was Starling's co-defendant. The evidence was that he was driving the car in which Starling and Gaines were riding. The evidence was that he parked the car on 5th Street, around the corner from the barbershop (which is on 4th Street), and then drove off after Starling returned. Originally, Frink was to be tried along with Starling. Starling argues Frink turned down a generous plea offer which Starling asserts forced the State to turn to other tactics to "turn" Frink.

Just before their joint trial was to begin, however, a witness (still unnamed), a prisoner, provided the State information about Frink. This prompted a last minute severance but Starling's trial proceeded as scheduled in October 2003. Frink's trial was postponed to a later date.

The State in its response to this current request notes that the record shows the statement was provided - name redacted - to Starling's trial counsel prior to trial. Starling argues, however, there are strange coincidences in the statement, in that it parrots Gaines, and he suggests something is not right. The State, of course, says the statement cannot or could not be used against Starling (no party provided the Court with a copy of the statement).

The Court finds Starling's reasoning for learning the *name* of the witness to be confusing and also as a basis to repeat his "conspiratorial" view of the State's conduct in this case. Further, Frink's trial was postponed to May, 2004, and he pled on May 18, 2004.

Without more, the Court finds no reason to compel the State to produce the name of this witness.

**9. Identify the name of the witness referenced in the October 14, 2003, letter from Judge Herlihy and produce any statement or recordings that Relate to that witness.**

This is the same witness as discussed above. No further discussion is needed.

**10. A list of all Phone Numbers, and the names associated with those Phone Numbers, for which Delaware obtained or sought to obtain the Phone Records in connection with the Barbershop Shootings.**

Starling offers several arguments why he is entitled to these records. One, trial counsel filed but did not pursue a motion to compel production of these records. Two, there is likely something exculpatory in them. Third, Gaines told the Wilmington Police that shortly before Starling got out of the car he called Matthew Minor and reported seeing Darnell Evans (the adult victim) in the barbershop, Minor's records might confirm (inculpatory) or not confirm (exculpatory) that such a call occurred.

The State replies that the request is overbroad and the Court concurs. The request, if anything, is mostly directed to Minor's records. The State argues it is irrelevant whether it sought his phone records. The Court finds the response odd, if not unhelpful.

The quandry for the Court is that under *Dawson*, Starling has to show some good cause, and following *Moore v. Illinois*, Starling is not entitled to all of the State's investigation, certainly absent good cause. The quandry is narrowed because the Starling/Minor phone call and its possible timing are potentially important. Yet the State, changing gears, reports there is nothing of an impeaching value in any of the records.

In this narrow instance, the Court finds Starling has made a sufficient enough showing to obtain Matthew Minor's phone records for March 9, 2001, if the State has them. There is no basis Starling offers for the Court to compel turning over any other records.

**11. All Phone Records, covering any period of time between and including January 1, 2001, and December 31, 2002 for all Phone Number associated with the following individuals (the State's response is indicated for each person).**

Alfred Gaines: None. No evidence that Gaines had a cell phone.

Richard Frink: The best recollection of the prosecutor is that these were provided to Starling pre-trial.

Matthew Minor: No records for the time alleged as relevant in Starling's claim. See above at 12.

Bruce Stewart: None.

Shalyn Flonnory: None.

Jabbar Vaughn: None.

Steven Nixon: None.

Rishid McFarlan Zinn: None.

Darnell Evans: None.

Robert Shepard: None.

Starling's reaction to the State's response is that trial counsel did not get Frink's phone records. Whether he did or did not get them prior to his trial needs to be clarified. The Court, however, is unconvinced that Starling has made any showing for getting a full year's records for any of these individuals. The State also seems to indicate it has some phone records for Minor but not for the full year. The Court has already ruled on Minor's records for one date and sees no reason, at the moment, to enlarge that.

Further, Starling's argument about whether Frink's records were supplied to trial counsel as a basis for producing all the other records is too much of a stretch. His other reasons for seeking these records are too speculative. The Court finds no basis to compel the State to supply the balance (after Minor's one date) of the records. See, however, the Court's discussion under item 15.

**12. All Phone Records, covering any period of time between and including January 1, 2001, and December 31, 2001, associated with the following numbers:**

302-438-4503: None.

302-983-7985: No exculpatory or impeachment evidence.

302-292-2150: None.

302-426-9765: None.

The Court has no idea whose numbers these are. Starling offers no new explanation for seeking them beyond that which he offered for items 10 and 11. Unless one number is Minor's, Starling has made an insufficient showing for getting any records associated with these numbers.

**13. All statements from individuals associated with the following numbers:**

302-438-4503: None.

302-983-7985: No exculpatory or impeachment evidence.

302-292-2150: None.

302-426-9765: None.

Again, Starling offers no new basis for the Court to compel any further response from the State. And, if there are none, there are none.

**14. All Documents that Relate to Communications between Delaware and John Malik (trial counsel) Related to Chauncey Starling's motion to compel the production of telephone and cell phone records in the State's possession.**

Starling renews his reasons for his requests in items 10 and 11 as grounds for getting this information. The State's reply is ambiguous:

There is no compelling reason for the State to produce any correspondence with defense counsel. Nothing in the State's file sheds any light on what cell phone records were viewed or received by Mr. Malik (trial counsel) in pre-trial discovery.<sup>20</sup>

The Court is puzzled if this means there was or was not a communication from the State to John Malik about phone records. In addition, was there an offer from the State

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<sup>20</sup> State's response to defendant's motion to compel dated January 29, 2010.

for him to come to the Attorney General's Office to review evidence, including possibly phone records?

Perhaps the confusing answer should be clarified. On the other hand, the Court assumes Malik had turned over his entire file to Starling's current counsel. On that premise, the Court sees no reason to compel the State to further respond to this request, except as just noted.

**15. All Documents, including Communications, that Relate to the phone calls between Chauncey Starling and Richard Frink on March 9, 2001.**

This request is primarily premised on Gaines' failure to mention in his initial interviews with the police that he and Starling made several stops earlier in the day prior to the murders. At trial, Gaines testified they had, and was cross-examined about this discrepancy between the earlier statements and his testimony.

Starling offers two supportive arguments for gaining this information. One, he renews his accusation against the State that it "contrived" Gaines' testimony. The State, of course, as it did with the same assertion with previous requests, denies this allegation.

The second argument is a bit more intriguing. He speaks of phone calls between Starling and Frink and says they were odd because they were supposedly in the same car when these calls were made to each other. This argument relates to Starling's request #11 and the State's response that it "thinks" it turned over to trial counsel the records of Frink's calls.

With the explanation now proffered - were the two in the same car when allegedly calling each other - there is a need to ensure that trial counsel did get Frink's phone records. If it cannot be established that he did, the State is to promptly supply those records for March 9, 2001.

**16. All Documents that Relate to Delaware's investigation into whether Alfred Gaines' took a taxi to Vicky Miller's house on March 9, 2001.**

This request seeks all *documents* related to the State's investigation into the taxi ride. Starling argues that his current counsel have spoken to a representative of the taxi company who said the police could have canvassed the drivers for information about whether Gaines rode a taxi that night (March 9, 2001).

The State's response to rely upon this Court's pre-trial ruling.<sup>21</sup> In that opinion, this Court noted then that the police sought taxi cab records for March 9th, but because of the time which had elapsed between the murder and Gaines' statements, or at least when they checked, the records no longer existed.

Starling's request goes beyond the point covered in this Court's earlier decision. In effect, he is looking for investigative reports concerning police effort to obtain taxi records, interview drivers, etc. His Amended Motion notes that the "lapse" of time was about seven weeks, and taxi companies are statutorily required to keep records for a year.

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<sup>21</sup> *State v. Starling*, Del. Super., Cr.A. Nos. IN-01-05-0937, *et seq.* (February 5, 2003).

The Court is unconvinced Starling has shown good cause to obtain these documents. Granted, there should have been records of a taxi ride kept for a year. But the Court's problem with the request is that Vicky Miller who was Michael Starling's (defendant's brother) girlfriend and she testified that he drove Gaines' home from her house.

At this point, the motion to compel this request is denied.

**17. All Documents that Relate to Communications between Delaware and Shaylyn Flonnory form March 2001 forward.**

To understand this request it is important to note Flonnory's role in the trial. She was the girlfriend of Darnell Evans. He apparently was the target in the shooting. She was in the barbershop with him when Starling entered and started to shoot.<sup>22</sup> She testified she saw him outside before he came in and for a moment after he entered. As Starling began to shoot at Evans, she ducked.

Starling had a mask over most of his face and a hoodie only revealing the upper part of his nose and eyes. He was wearing a hooded sweatshirt. At trial, for the first time, she revealed that Starling's eyes were like those of the shooter's. She testified on direct and on cross examination that the first time she had mentioned this identification of the eyes was to the lead prosecutor earlier in the day before taking the witness stand. Apparently, she saw Starling's picture in the newspaper and this allowed her to relate to the prosecutor about her identification of his eyes. She had not mentioned this to anyone before then.

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<sup>22</sup> The Court is reciting the trial testimony.



All of this was revealed during her testimony.

Trial counsel was aware of this change and cross-examined her accordingly. He had copies of her former statements in which there was nothing said about any identification, as the State notes in its response to the motion to compel.

In his amended motion and in his motion to compel, Starling accuses the State of “manufacturing” this identification of Starling’s eyes. In many other parts of his motion to compel, Starling’s counsel accuse the State of “manufacturing” testimony or “contriving” to get testimony or resorting to methods to “turn” a witness. In each instance, the State denies these accusations. The Court is deeply disturbed by this because these words border on accusing the State of subordination of perjury. First, there is no basis for these accusations. Second, they are offensive. Third, they themselves border on being unprofessional; there being no such record to support them. They are to be avoided.

Considering Flonnory’s trial testimony and the State’s response to the current motion that all of her prior statements were provided to trial counsel, the Court finds there is nothing to compel.

**18. All Documents, including Communications, that Relate to Shaylyn Flonnory’s identification of the shooter in the Barbershop Shooting.**

**19. All Documents, including Communications, that Relate to Delaware soliciting an in-court identification of Chauncey Starling.**

The parties’ views on these requests are repeats of request 17. The Court’s reasoning and ruling remain unchanged. There is no indication Flonnory’s identification

of Starling's eyes was "solicited." Again, this is an unnecessarily strong word.

**20. All Documents, including Communications, that Relate to the investigation of Bruce Stewart in connection with the Barbershop Shootings, including all Documents from the Joint Task Force file.**

Starling asserts the State investigated Bruce Stewart for months as a possible suspect in the murder of Darnell Evans. He infers that the investigation must have developed a suspected killer other than himself. This, he contends, means *Brady* material exists which should now be shared with him.

The State acknowledges the obvious that there was an effort to link Stewart to Evan's murder, presumably by hiring someone to kill Evans. It reports no link was found and, hence, no exculpatory evidence exists.

The Court also concurs with the State that this request is a broad net fishing expedition. *Moore v. Illinois*<sup>23</sup> does not require the State's response.

**21. All Documents provided to America's Most Wanted in connection with its Barbershop Shooting.**

The Court repeats its ruling from #20 that the State has no obligation to fulfill this request.

**22. All Documents, including Communication, that Relate to the investigation of Steven Nixon, Rashid McFarlan Zinn, or Jacob Vaughn in connection with the Barbershop Shooting.**

In an opinion involving Starling's motion for a new trial, this Court thoroughly

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<sup>23</sup> *Supra*, p. 3.

reviewed all of Starling's claims about these individuals.<sup>24</sup> Upon re-review of that ruling made six years ago, the Court finds there is no basis for the State to produce anything more than it has. What it did produce (with its response to the current motion) was a letter it sent to trial counsel nine months prior to the trial about these individuals.<sup>25</sup>

There is nothing to compel.

**23. All Documents, including Communications, that Relate to the white Dodge Stratus that was stopped on March 10, 2001, in Wilmington, Delaware.**

Starling's basis for this request is the same as he offered for his requests in #22 and #23. The car, according to Starling, was one which Bruce Stewart was driving several days earlier when he eluded the police. That fact, of course, seeks to re-inject Stewart into this case and all that would allegedly flow from that. See request #20 above and discussion.

The car was stopped four hours after the murders. It is clear the Wilmington Police had reasons to suspect Stewart and equally clear they would have liked to find evidence linking him to these murders. They did not. The Court finds no good cause or potential issue here. There is nothing to compel the State to produce on this request.

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<sup>24</sup> *State v. Starling*, Del. Super., Cr.A. No. IN-01-05-0937, *et. seq.*, Herlihy, J., (April 26, 2004).

<sup>25</sup> State's response to Motion to Compel dated January 29, 2010.

**24. All Documents, including Communications and notes, recordings and transcripts of interviews of Robert Shepard, that Relate to the investigation of Robert Shepard in connection with Barbershop Shooting.**

Starling asserts Robert Shepard is an associate of Bruce Stewart. The “logic” of where that leads has been discussed above. The State’s response to this request is that Shepard was investigated in connection with this incident, or to the extent it does have any materials, there is nothing exculpatory.

Starling has shown no good cause for this request.

**25. All Documents, including Communications, that Relate to the bullet hole or holes in the door frame of the Made-4-Men Barbershop.**

This barbershop is the scene of these two murders. In his postconviction motion, Starling has raised some issues regarding the ballistics involving the hole or holes. He argues the hole or holes would show the shooter was taller (than he is, presumably). There is a claim of ineffective assistance of counsel surrounding this issue.

Nevertheless, since the State says it supplied to trial counsel prior to trial all photos, diagrams, etc., there is nothing more it can do.

On that representation, the Court finds there is nothing to compel the State to do.

**26. All Documents, including Communications, that Relate to the recorded interviews of Michael Starling.**

Michael Starling is Chauncey Starling’s younger brother. He gave taped statements to the police. While introduced in the State’s case-in-chief, they were played during the defense case. The State notes the poor quality of the tapes. It sent them to an expert for enhancement and says copies were given to trial counsel. But see the discussion below.

**27. The master recording(s) of the Michael Starling interviews.**

The State's response to the above request was the copies were sent to trial counsel. As the Court reads that response, these would have been copies of the enhanced tapes. The State, as to this request, says there is no reason to provide copies of the master tapes to Starling. The Court disagrees. Copies of the master tapes should promptly be made available to Starling's current counsel.

**28. All exculpatory Documents, statement, recordings, or other evidence related to Richard Frink's involvement with the Barbershop shootings.**

Presumably, under the directive of this Court's Criminal Rule 16, the State provided to Starling's trial counsel all of Frink's statements, notes of anything he said to the police, etc. If there was anything not so provided prior to Starling's trial, it should now be so provided.

The State reports, however, that there is nothing exculpatory for Starling in Frink's statements. The Court assumes this applies to anything he said or may have said to the State up and through the date he pled.

The Court observes that is not privy to Frink's statements and cannot confirm the State's representations that there is nothing exculpatory to Starling.

If the Court's presumptions are accurate, there is nothing to order the State to provide. The Court cautions, however, that Frink was a co-defendant and it is important that Starling know what he said.

**29. All Documents, including Communication, that relate to any agreement or offers, whether written or oral, between Richard Frink and Delaware.**

The reason for this request is patent. But the State informs the Court that Starling was aware prior to his trial what was its plea offer to Frink. Of course, the plea he accepted is a matter of public record.

At this time, the Court finds no reason for the State to have to produce more. It is probable there were letters and other written communication exchanges between the State and Frink's counsel. But the key point is that Frink did not testify in Starling's trial.

*Conclusion*

For the reasons stated herein, defendant Chauncey Starling's motion to compel is **DENIED, in part, and GRANTED, in part.**

**IT IS SO ORDERED.**

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J.