EFiled: May 21 2015 01:13PM EDT
Filing ID 57276705
Case Number 64,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	§	
	§	No. 64, 2015
Appellant,	§	On Appeal From The Superior
	§	Court's January 30, 2015 Order
	§	Suppressing Wright's Custodial
v.	§	Statement
	§	
JERMAINE WRIGHT,	§	
Appellee.	§	
	§	
	§	

APPELLEE'S ANSWERING BRIEF

Eugene J. Maurer, Jr. (#821)
Allison S. Mielke (#5934)
1201-A King Street
Wilmington, DE 19801
(302) 652-7900
Appointed Attorneys for Appellee,
Defendant Below

Herbert W. Mondros (#3308)
Margolis Edelstein
300 Delaware Avenue, Suite 800
Wilmington, DE 19801
(302) 888-1112

Dated: May 14, 2015

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE

UNITED STATES SUPREME COURT

DELAWARE SUPREME COURT

DELAWARE SUPERIOR COURT

DELAWARE COURT OF CHANCERY

OTHER JURISDICTION

STATUTES

RULES OF PROCEDURE

NATURE OF THE PROCEEDINGS

In a 2014 opinion, this Court remanded this case to the Superior Court for a retrial due to the State's cumulative evidentiary non-disclosures, which constituted a *Brady* violation.[1] B0121. In August 2014, Mr. Wright, through counsel, filed a Motion to Suppress his custodial statement arguing that his waiver of *Miranda* rights was neither knowing nor intelligent, that defective *Miranda* warnings rendered the statement inadmissible, and that the statement was involuntary. B0142.

The State submitted its response on October 10, 2014. B0198. The Superior Court granted Mr. Wright's motion on January 30, 2015.[2] B0287. The court's decision addressed only the adequacy of *Miranda* warnings. B0287. This appeal, filed on February 11, 2015 by the State of Delaware ("State") challenges the Superior Court's January 2015 decision that the *Miranda* warnings provided to Mr. Wright were inadequate, requiring the statement be suppressed. Following the court's dismissal of the charges on the State's motion, the State appealed pursuant to 10 Del. C § 9902(b). B0315-B0319. The State submitted an Opening Brief on March 30, 2015. This is Mr. Wright's Answering Brief.[3]

---

[1] *Wright v. State*, 91 A.3d 972 (Del. 2014).
[2] *State v. Wright*, 2015 WL 475847, at *1 (Del. Super. Feb. 2, 2015).
[3] All previous opinions will be cited in this brief according to the standard Bluebook citations. The State's appendix will be referred to as "A" and Mr. Wright's appendix will be cited as "B." The State's Opening Brief will be cited as "OB."

SUMMARY OF ARGUMENT

1. **Denied.** Because this Court has never ruled on the merits of the claim on which Superior Court granted relief and earlier Superior Court rulings did not address the claim at all, the "Law of the Case" doctrine did not preclude the Superior Court from granting Mr. Wright's Motion to Suppress.

2. **Denied.** The trial court properly excluded Mr. Wright's custodial statement because officers failed to provide Wright adequate *Miranda* warnings. Over the course of a thirteen-hour interrogation, officers communicated inaccurate versions of the warnings, which were recited by memory, and failed to re-administer warnings after Wright withstood hours of questioning. Wright was a suggestible, cognitively limited eighteen-year old undergoing heroin withdrawal. No less than four detectives in two different interrogation rooms questioned him. The trial court properly held that the admission of Wright's statement would violate Mr. Wright's due process rights and privilege against self-incrimination.

3. **Denied.** This Court lacks jurisdiction to decide whether the lower court properly denied the State's motion to recuse, which the State improperly raises as if a matter of right under 10 Del. C §9902(b). Even if this Court had jurisdiction to hear the argument, the Superior Court judge properly held that he had a "duty to sit."

STATEMENT OF FACTS

In its 2012 opinion, the Superior Court made detailed findings of fact based on its review of the record and the testimony procured at the 2009 Postconviction Relief evidentiary hearing.[4] B0325-B0327. The court relied in part on this evidence in its 2015 decision. The evidence established the following:

A. Offense, Arrest, and Interrogation

On the night of January 14, 1991, Phillip Seifert was found murdered at the HiWay Inn, a tavern with attached liquor store, just outside Wilmington, DE.[5] B0325. Unable to locate any suspects, "the police went to unusual lengths to develop information."[6] Detective Mayfield, the chief investigator, offered money in exchange for information about the case.[7] Not surprisingly, this tactic produced an anonymous note that claimed "Marlo" was involved in the crime.[8] B0345.

Officers lacked probable cause to arrest Mr. Wright for the HiWay Inn shooting. State Police personnel worked in tandem with the Wilmington Police. They obtained both an arrest warrant for Mr. Wright's person and a search warrant

[4] *Wright v. State*, 2012 WL 1400932, at *1 (Del. Super. Jan. 3, 2012).
[5] *Id*. at *1, 5.
[6] *Id*. at *7.
[7] *Id*.
[8] *Id*.

for Mr. Wright's home based upon two unrelated Wilmington police investigations, which had no bearing on the HiWay Inn murder and served as a ruse to interrogate Mr. Wright at the police station.[9] B0380-B0383. A SWAT team composed of local police, along with detectives Robert Merrill, Robert Moser, and William Browne of the Wilmington Police and Detective Mayfield of the State Police, stormed the house and arrested Wright at approximately 6:00 a.m., January 30, 1991. A131, A132. The subsequent search of Mr. Wright's home failed to uncover any physical evidence related to the HiWay Inn murder. B0357-B0360.

Wright, who had just turned eighteen, B0441, was immediately taken to the Wilmington Police Department and placed in an interrogation room. B0391. The room was small and windowless. B0404. It contained a metal seat affixed to the floor. Mr. Wright was shackled to the furniture. B0454. The room contained a video camera, protected by a metal box, which was used to transmit video and audio of the interview to detectives' offices. B0404, B0405. Mr. Wright spent the better part of the next thirteen hours in the interrogation room.[10] Throughout the day, Wright was under the influence of a controlled substance and began withdrawal due to the limited amount of drugs he was able to consume during the day. B0593-B0595. It is uncontroverted that Mr. Wright possessed drugs on his person, which law enforcement officers neglected to find when they brought

[9] *Id*.
[10] *Id.* at *7.

Mr. Wright into the interrogation room. B0369-B0373; B0423-B0425.

Det. Merrill was the first of three interrogators to interview Mr. Wright. B0391. He began at approximately nine o'clock in the morning, three hours after Wright was arrested in his home. For approximately an hour, Det. Merrill questioned Wright about an unrelated investigation. B0392, B0393, B0507. Although Merrill testified that he gave "*Miranda* warnings to Wright before the interrogation began," and the original trial judge, Judge Del Pesco, assumed that he did, no written waiver was obtained.[11] B0393. Apparently, obtaining such a waiver was standard practice at the time.[12]

After Det. Merrill's questioning, Det. Moser began his inquiry. B0397. The Superior Court found "as fact that Moser did not administer *Miranda* rights."[13] *See* B0531. During Moser's interrogation, Det. Mayfield listened to the interviews on a live feed and conferred with him at various intervals. B0418. He told Det. Moser to "[k]eep it up. It takes a long time. Do the best you can. We don't have anything now, just try to get what you can."[14] B0419, B0541. With Mayfield's remote coaching, Moser questioned Wright for hours. B0411.

---

[11] *Id.* at *41.
[12] *Id*.
[13] *Id*. The Court relied on inconsistent testimony, the fact that Det. Moser testified at trial that he did not administer warnings (contrary to his previous testimony before Judge Del Pesco), Moser's demeanor on the stand, and the fact that there was no mention in his police report that warnings had been provided. *See* B0531, B0777-B0781.
[14] *Id*. at *8.

During this time,

> Wright manifested bizarre behavior during the Moser interview. At one point, Wright began speaking very softly, almost inaudibly, because he feared his answers ... were being overheard by Dixon and another individual. Later he curled up in a fetal position under the table in the interview room. At another point, he insisted on writing down his answers on a piece of paper, passing the paper to Detective Moser who in turn handed it back to Wright, whereupon Wright would eat the paper.[15]

Eventually, Wright stated to Moser that he was involved in the HiWay Inn offense, and Mayfield determined that he should himself conduct a videotaped interview of Wright in a separate conference room.[16] B0527, B0543. The third interrogation began at "7:34 p.m., roughly thirteen hours" after Wright had been arrested.[17] B0422. Det. Mayfield began the interrogation with an attempt to advise Defendant of his *Miranda* rights. A92. He stated:

> What I'll first do is I'll read your rights to you, okay? Basically, you have the right to remain silent. Anything that you say can and will be used against you in a court of law. You have the right, right now, at any time, to have an attorney present with you, if you so desire. ***Can't afford to hire one, if the state feels that you're diligent and needs one, they'll appoint one for you.*** You also have the right at any time while we're talking not to answer. Okay? And at the same time during the interview here, I will advise you, I am a, ah, member of the Delaware State Police. And I am investigating the Highway Inn, the robbery/homicide there. Okay? Do you understand what I've asked you today? Okay. Do you also understand that what we're going to be taking is a formal statement

[15] *Id*. *See also* B0415.
[16] But only once Wright had "fully given all the details that he was given at that particular time and they went over it again" off the record. B0543.
[17] *Wright*, 2012 WL 1400932, at *8.

> and that this statement's going to be video taped? Okay. Are you willing to give a statement in regards to this incident? Say yes or no.

A92. (emphasis added).

Det. Mayfield's interrogation continued for approximately forty minutes. A91. Wright told police exactly what they wanted to hear. When an answer did not conform to the detective's expectations, Mr. Wright hesitantly changed his answer to suit, but only after prompting from the officers.[18] *See* Dr. Martell, Det. Trainor, and Dr. Fulero's testimony. B0612-B0711. Wright repeatedly made statements that were contrary to the limited evidence the police had already obtained.[19]

B. Evidence Concerning the Custodial Statement Developed at Trial And The Superior Court's Factual Findings

The Superior Court also reviewed the evidence introduced at the original 1991 trial.[20] The centerpiece of the State's case was Wright's video confession introduced through Mayfield. A91. No physical evidence connected Wright or Dixon to the offense. B0358-B0360; B0501. "Aside from Wright's confession, the case[-in-chief] against him was weak to non-existent."[21] B0360-B0367. The two eyewitnesses, Milner and Hummel, did not identify Wright or Dixon; and no forensic evidence linked either Wright or Dixon to the shooting. B0471, B0357-

[18] *Id*. at *16.
[19] *Id*. at *8.
[20] *Id*. at *5-9.
[21] *Id*. at *9.

B0360. The murder weapon was never recovered. Despite searching Mr. Wright's home for evidence, they also did not recover any clothing that resembled those purportedly worn by the shooting suspects. *See* B0465, B0358-B0367.

The Superior Court held that "many of the key 'facts' recited by Wright in his statement…[were] demonstrably wrong."[22] For example:

- Wright described the murder weapon as the .38 caliber gun from his house. B0358, A102. The murder weapon was .22 caliber. B0498, B0499;
- Wright said he fired one shot and then ran off with the gun. A97. The victim was shot three times. B0782;
- Wright said Dixon picked him up to go to the HiWay Inn between 11:30 p.m. and midnight. A100. The crime occurred an hour earlier. B0482;
- Wright said Mr. Seifert fell to the floor when shot. A107. Mr. Seifert remained seated on a stool, with his head on the counter, and only fell to the floor after the perpetrators left. B0490, B0493;
- Wright said Dixon was yelling during the robbery. A93. Milner, who heard the bell ring and the shots fired, did not hear yelling. B0478, B0479;
- Wright said he and Dixon both left in the car. A99. Hummel testified that the two perpetrators fled in different directions, with only one person leaving in the car. B0482-B0488, B0492.

[22] *Id*. at *8.

At trial, the defense presented Robert Maslansky, M.D., who testified as to the effects of heroin. B0546-B0554. Dr. Maslansky reviewed the video confession approximately two weeks prior to his testimony. B0546. He discussed the case with defense counsel, but had not reviewed any other materials about the case, and did not speak to Wright until the day of his testimony, when they met for "fifteen minutes." B0482-B0488, B0492.

Dr. Maslansky testified that Wright's behavior on the video was consistent with heroin intoxication. B0553-B0555. He testified that heroin creates "a significant loss of the capacity to feel emotions that are very negative" and a "singular indifference to the consequences" of situations that pose "tremendous threats to ... well-being." B0548-B0551. He further testified that heroin intoxication could permit a person who was already susceptible by nature to be more susceptible to suggestion. B0552.

On cross-examination, the prosecutor emphasized Dr. Maslanksy's lack of forensic experience and knowledge of police interrogations, his limited contact with Wright, only fifteen minutes, and his failure to review materials relating to the case, except the video, which he had seen two weeks earlier. B0556, B0557. The prosecutor focused on suggestibility:

> Q. Did you do any type of personality inventory or have any type of psychiatric [or] psychological testing to determine whether the defendant was subjected to suggestibility to begin with?

> A. This morning, which was my only time I ever saw the defendant, the answer is no. I didn't do any formal psychiatric or assessment of the psychology of the individual. B0559, B0560.

The last defense witness was Wright himself. B0562-B0577. He testified that he had nothing to do with the HiWay Inn offense; he was not with Dixon that night; and he was playing pool with friends (the alibi witnesses) from about 7:30 p.m. until about 11:45 p.m. B0562-B0577. He then went to a friend's house until approximately 2:30 a.m. B0575.

Wright testified that at the time of his arrest (6 a.m.), he had been up all night using heroin, was still high, and had barely slept in two days. B0562-B0577. He had hidden heroin in his pants, undiscovered by the police, which he used when the interrogators were out of the room. B0568-B0572. He falsely confessed because he wanted the detectives to stop interrogating him, he was in his "own world," and he would "tell them anything." B0577, B0578.

C. The Postconviction Evidentiary Hearing Testimony Concerning Mr. Wright's Statement

In Mr. Wright's Rule 61 proceedings, the Superior Court held a seven-day evidentiary hearing, followed by oral argument, and reviewed the record, documentary submissions, and briefs of both parties.[23] The detectives testified that at one point in the interrogation, Wright only responded by writing down his

[23] *Wright*, 2012 WL 1400932, at *4-12.

answers on paper and then ate the paper so no one could see the answer.[24] B0719. Wright, through counsel, introduced un-contradicted expert testimony concerning his "addiction to heroin, the effects of that addiction as manifested during his interrogation, his intellectual status, and his susceptibility to suggestion."[25] B0580-B0711. These experts included a nationally recognized professor of neuro-molecular pharmacology, a neuropsychologist, a forensic psychologist, a false-confession expert, and a 27-year veteran homicide detective.[26] B0580-B0711. The court held that the experts were credible and accepted their testimony "without reservation."[27]

The experts concluded that Wright's behavior was "'bizarre and paranoid'" and "linked ... to the dissociative state of an opiate high."[28] B0592. Moreover, even when Wright had an appearance of calm, he was markedly impaired and unreliable due to opiate intoxication and his severe dependence on heroin. B0604, B0607. The experts opined that a heroin high does not produce the same indicia of outward impairment as alcohol intoxication. B0604, B0607.

The experts also testified as to Wright's underlying intellectual deficits

[24] *Id*. at *12.
[25] *Id.*
[26] *Id*. at *12-18.
[27] *Id*. at *46.
[28] *Id*. at *12.

and extreme suggestibility.[29] B0603, B0619-B0626. Wright had verbal and memory comprehension deficiencies. B0624, B0552. Additionally, he tested in the mentally handicapped range with a score of 62 on verbal comprehension and judgment tests. B0553, B0624. His mental limitations were of critical importance here because *Miranda* warnings were given verbally.[30] B0624-B0625.

Wright scored as remarkably susceptible to suggestion on the Gudjonsson Suggestibility Scale, a "highly reliable" test.[31] B0642, B0618. One expert noted the significance of sleep deprivation, which exacerbated Wright's deficits and affected Wright's ability to comprehend the rights he was waiving. B0592. Wright's "underlying trait of suggestibility" in conjunction with his intoxication, the "long duration of the interrogation" and "sleep deprivation" interacted to "render him more suggestible." B0624.

Additional factors also contributed to Wright's having given a false confession, including his "young age," "learning," "intellectual" and "cognitive deficiencies," especially those "involving verbal comprehension and judgment," "heroin intoxication," "sleep deprivation," and the "extreme length of the interrogation." B0604, B0609. These factors also adversely affected his ability to

---

[29] *Id*. at *14-16.

[30] *See also* B0617 (testing revealed "great difficulty with verbal comprehension;" Wright "needed to have various [verbal] questions and test instructions repeated and explained;" school records show intellectual deficits including, an "inability to actually make it in school," and that he was held back from 4th, 5th and 6th grades).

[31] He scored more than "two standard deviations" from the mean. B0554, B0624.

understand *Miranda* warnings, especially given that he "has trouble understanding information presented verbally." B0624, B0625. "There is good research ... that a majority of juveniles with IQs below 85 misunderstand at least two of the *Miranda* warnings, sometimes more." B0637.

Det. Trainum, a veteran homicide detective presented as an expert in police interrogation practices, explained that Mr. Wright's confession was the product of police tunnel vision. B0659. He testified that "you see this sort of thing from good police officers ... who are fully convinced in the defendant's guilt, and ... [they] fall victim to ... tunnel vision[] and ... verification bias." B0659. "Sometimes ... we ignore the obvious, ignore the contradictions, we get so focused that we only hear what we want to hear, and that's what I think happened here." B0659.

Det. Trainum also saw troubling irregularities in the way *Miranda* warnings were delivered, including the lack of written waivers, recitation of rights from memory, with errors, rather than reading them, and failure to go through the rights one by one. B0660. The numerous factual inaccuracies raised additional concerns about reliability. B0657-B0661. A reliable confession should provide the interrogator with significant unknown information, unlike Mr. Wright's statement, which was replete with details inconsistent with the known facts. B0657-B0661.

D. Subsequent Litigation And Mr. Wright's Retrial

In January 2012, the Superior Court issued an opinion denying six of Mr.

Wright's claims and granting him relief on three claims.[32] The court held that the confession was not knowing and intelligent, that *Miranda* warnings were inadequate and that the State failed to disclose material exculpatory information, which constituted a *Brady* violation.[33] In a 2013 opinion, this Court reversed and remanded, holding that Rule 61 procedurally barred the *Miranda* claim and that the failure to disclose the evidence of a similar robbery, while exculpatory, was not material and did not constitute a *Brady* violation.[34] Following the reimposition of Wright's sentence on remand, Wright appealed the remainder of his Rule 61 claims.[35] In 2014, this Court remanded the case for a new trial after holding that several nondisclosures, including additional impeachment evidence, amounted to a *Brady* violation.[36]

On remand, after considering briefing and hearing oral argument, the Superior Court denied a motion to recuse by the State, B0321-B0286, and granted Mr. Wright's motion to suppress his statement on the basis of the adequacy of *Miranda* warnings. B0287. The court did not address Wright's other claims. The State certified the case by letter, B0315-B0319, and filed a Notice of Appeal on February 11, 2015.

---

[32] 2012 WL 1400932, at *5.
[33] *Id*.
[34] *State v. Wright*, 67 A.3d 319 (Del. 2013).
[35] *Wright v. State*, 91 A.3d 972 (Del. 2014).
[36] *Id*.

ARGUMENT

I. THE LAW OF THE CASE DOCTRINE DOES NOT BAR SUPPRESSION OF WRIGHT'S CUSTODIAL STATEMENT

A. Question Presented

Whether the Superior Court is foreclosed from ruling on the merits of a motion to suppress when no court has previously determined the issue on the merits. B0174.

B. Standard And Scope Of Review

This Court conducts a *de novo* review of the trial court's determination that the law of the case doctrine does not bar litigation of Wright's Motion to Suppress.[37] This Court reviews the judge's findings of fact for clear error.[38] This Court generally refuses to review issues not fully and fairly presented to a trial court.[39] Therefore, issues not fairly raised to the trial court are reviewed for plain error.[40] Under the plain error standard, "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[41]

C. Merits Of The Argument

The law of the case doctrine is a judicial procedural guideline that fosters

---

[37] *Lopez-Vazquez v. State*, 956 A.2d 1280, 1285 (Del. 2008).
[38] *Id.*
[39] Sup. Ct. R. 8; *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
[40] *Id*.
[41] *Id*.

finality in litigation. The doctrine requires courts to defer to previously determined issues in the same litigation. However, the doctrine applies only to a "specific legal issue" that was "necessarily decided."[42] An issue is determined for the purposes of the doctrine if it has been "fully briefed and squarely decided in an earlier appeal."[43] The doctrine is distinct from *res judicata* principles because "it is not an *absolute* bar to reconsideration of a prior decision that is clearly wrong, produces an injustice or should be revisited because of changed circumstances."[44] Thus, in order for the law of the case doctrine to apply, the issue must have been "actually decided." B0293-B0301.

Recently, in *Hoskins*, this Court held that a specific issue had not been actually decided on direct appeal because the Court would not have determined the merits of the postconviction issue under the previous plain error review.[45] Consequently, the law of the case doctrine did not bar review of the later postconviction relief motion.

The law of the case doctrine does not apply to rulings that were clearly in error,[46] "produce[d] an injustice, or should be revisited because of a change of

---

[42] *See Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1181-82 (Del. 2000) (citing *Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990).
[43] *Kindle v. City of Jeffersontown, Ky.,* 2014 WL 5293680 (6th Cir. Oct. 16, 2014) (internal quotations omitted).
[44] *Hoskins v. State*, 102 A.3d 724, 729 (Del. 2014).
[45] *Id*. at 729.
[46] *Hamilton v. State*, 831 A.2d 881 (Del. 2003); *Bailey v. State*, 521 A.2d 1069, 1093 (Del. 1987).

circumstances."[47] Delaware precedent illustrates that the law of the case doctrine does not preclude a court from correcting "clear error" and ruling accordingly.[48] In *AT&T Corp. v. Lillies*, this Court corrected its own error in the context of the law of the case doctrine, stating:

> Moreover, the law of the case doctrine does not preclude this Court…from examining the prior rulings in this case when the factual premises of those prior rulings are demonstrated to have been mistaken. In our first opinion, this Court instructed the Court of Chancery to disregard AT&T's admissions because we concluded that these admissions did not relate to the 1994 plan. We were wrong.[49]

In *Jenkins v. State*, the Superior Court granted the defendant's Rule 61 Motion despite this Court's determination on direct appeal that the issue lacked merit.[50] The evidence developed in Rule 61 proceedings, as in this case, showed that the warnings given to Jenkins failed to inform him that he had a right to have counsel appointed free of charge.[51] As in this case, the warnings were videotaped.[52] The videotape revealed that the warnings were defective.[53] When the State appealed the Superior Court's ruling suppressing the statement, this Court affirmed

---

[47] *Johnson v. Preferred Prof. Ins. Co.,* 91 A.3d 994, 1009 (Del. Super. Ct. 2014); *see also Hamilton v. State*, 831 A.2d 881, 889 (Del. Super. Ct. 2003).
[48] *See Anderson v. State*, 2014 WL 3511715, at *1 (Del. July 14, 2014) (stating that "[t]he law of the case doctrine bars re-litigation of the terms in the absence of clear error in our decision on appeal or any important change in circumstances since that time").
[49] 970 A.2d 166, 170 (Del. 2009)
[50] 2010 WL 596505, at *2 (Del. Super. Feb. 18, 2010). In the direct appeal this Court stated, "Jenkins' suggestion that he did not receive *Miranda* warnings is belied by the record. The Court has reviewed the videotape of Jenkins' interview with Chambers. The video depicts Chambers informing Jenkins of his rights before asking any questions."
[51] *Id*.
[52] *Id*.
[53] *Id*.

the Superior Court's decision, thereby correcting its original assertion that the claim lacked merit.[54] Despite this Court's prior ruling, law of the case principles did not preclude review of the claim.

1. This Court's 2013 Decision That Rule 61 Precluded Review Of A Postconviction Relief Motion Does Not Prevent It From Ruling On The Merits Of This Appeal

In its 2013 Opinion, this Court determined that Rule 61 *procedurally barred* review of Wright's *Miranda* claim.[55] This Court never addressed the merits of the claim that the *Miranda* warnings were inadequate, but ruled entirely on procedural grounds. That determination imposes no bar to its consideration on the merits of the claim on this appeal.[56] Furthermore, after this Court's 2014 Opinion granting Mr. Wright relief for a *Brady* violation, the case was remanded to the Superior Court for a retrial. Despite the State's reliance on Rule 61 in its brief, the procedural requirements of a postconviction relief motion are not applicable in a retrial proceeding that does not relate to postconviction matters.[57] Because Mr. Wright is not under a sentence of the Superior Court and he does not seek to collaterally attack a conviction, the procedural requirements of Rule 61 do not

---

[54] *Id*.
[55] As discussed below, the Court was mistaken in its perception that the *Miranda* claim had been formerly adjudicated.
[56] *See Bell v. Cone*, 543 U.S. 447 (2005) (holding that state court opinion erroneously ruling that claim had been previously litigated was not ruling on merits that required habeas court to defer).
[57] Sup. Ct. Crim. R. 61(a) ("This rule governs the procedure on an application by a person in custody ***under a sentence of this court seeking to set aside the judgment of conviction or a sentence of death***…") (emphasis added).

apply.

2. The Law of the Case Doctrine Does Not Apply Because No Court Has Ever Determined Whether Officers Administered Adequate *Miranda* Warnings.

Like in *Hoskins*, no court has actually decided the specific issue as to the adequacy of Mr. Wright's *Miranda* warnings. On postconviction relief procedural grounds and without assessing the merits, this Court's 2013 opinion rejected the trial judge's determination that the *Miranda* warnings communicated to Mr. Wright were insufficient.[58] The Court observed generally that "the admissibility of Wright's confession ha[d] been challenged and upheld repeatedly," and that the prior rulings "address[ed] Wright's understanding of his *Miranda* rights."[59] But, this Court cited to no prior rulings on separate and distinct claim that *Miranda* warnings were defective.[60]

The record reflects that none of the previous rulings cited in the 2013 decision, nor any other previous rulings, addressed the defects in the content of the *Miranda* warnings.[61] Prior to 2009, none of the challenges to the admissibility of Mr. Wright's statements concerned the adequacy of the actual warnings, but instead focused on the voluntariness of Mr. Wright's waiver and the voluntariness

[58] *State v. Wright*, 67 A.3d 319, 323 (Del. 2013).
[59] *Id*.
[60] *Id*.
[61] *See* B0293-B0296; B0002-B0140.

of the confession.[62] B0293-B0296. Therefore, the "specific issue" as to the adequacy of the *Miranda* warnings was never decided and Mr. Wright was not barred from raising it in his Motion to Suppress.

In a 1991 pre-trial motion to suppress, Mr. Wright alleged that the search of his home was wrongfully executed at night, the search warrant was invalid, and that his statements were involuntarily given.[63] The Superior Court rejected Mr. Wright's claims.[64] In 1992, still in the original trial phase, Mr. Wright again challenged the admissibility of his custodial statements alleging a delay in presentment.[65] After the Superior Court denied the motion, Mr. Wright raised a presentment issue and sentencing issues on appeal. *Miranda* arguments, in any form, were remarkably absent.

In 1994, Wright filed his first postconviction relief motion alleging ineffective assistance of counsel for failing to present an alibi defense, advancing an unsuccessful trial strategy, failing to request jury instructions, and failing to present mitigation evidence.[66] The Superior Court granted him relief on the issue of failing to provide mitigation evidence in the sentencing phase.[67] After having

---

[62] The United States Supreme Court has explicitly held that 1) voluntariness, 2) a knowing and intelligent waiver, and 3) adequacy of *Miranda* warnings are three distinct inquiries. *Edwards v. Arizona*, 451 U.S. 477, 482-84 (1981).
[63] *State v. Wright*, 1991 WL 11766247, at *1 (Del. Super. Oct. 9, 1991).
[64] *Id*.
[65] *State v. Wright*, 1992 WL 207255, at *1-2 (Del. Super. Aug. 6, 1992).
[66] *State v. Wright*, 653 A.2d 288, 293 (Del. Super. Ct. 1994).
[67] *Id*. at 303.

been sentenced to death after a new sentencing hearing, Wright appealed and argued ineffective assistance of counsel for poor trial strategy, errors in admitting evidence into the sentencing phase, and sentencing issues.[68] This Court affirmed the Superior Court's decisions.[69]

In 1998, Wright filed a second postconviction motion.[70] He alleged ineffective assistance of counsel for failing to present evidence that heroin intoxication rendered his waiver involuntary, miscellaneous evidentiary issues, failure to request a jury instruction, inadequate *voir dire*, and errors in the penalty phase.[71] These claims were either denied or barred.[72] Wright appealed that decision, which was summarily affirmed.[73]

In 2009, Wright began the current round of litigation in a new postconviction motion. He raised nine claims. The court granted him relief as to the involuntariness of Wright's *Miranda* waiver, the inadequacy of the *Miranda* warnings, and a *Brady* violation. The court's ruling formed the basis of this Court's 2013 decision. It was the first time a court decided the *Miranda* inadequacy issue.

This record illustrates that the adequacy of the *Miranda* warnings was not presented in Wright's initial direct appeal or any subsequent proceedings. B0293-

---

[68] *Wright v. State*, 671 A.2d 1353, 1355 (Del. 1996).
[69] *Id*.
[70] *Wright v. State*, 1998 WL 734771, at *1 (Del. Super. Sept. 28, 1998).
[71] *Id*. at *4.
[72] *Id*. at *18.
[73] *Wright v. State*, 2000 WL 139974, at *1 (Del. Supr. Jan. 18, 2000).

B0296. Consequently, this Court was mistaken in its 2013 opinion when it stated that the adequacy of *Miranda* warnings had been previously litigated.[74] As the "specific issue" of the adequacy of the warnings had never been determined before 2012,[75] the trial judge was not precluded from hearing the issue and properly determined that the warnings were inadequate.

3. The State Has Never Previously Argued That Prior Superior Court Rulings Implicitly Decided The Adequacy Of *Miranda* Warnings

This Court only reviews claims that have been fairly presented to the trial court.[76] The State has never previously argued that prior Superior Court rulings *implicitly* decided the adequacy of *Miranda* warnings. B0198-B0215. Therefore, this claim is waived.[77]

The State argues, for the first time, that prior decisions of the Superior Court constituted an *implicit* finding that the *Miranda* warnings provided to Wright were adequate. OB 15-16. The State's argument lacks support in the record. It is true that Wright has briefed and previously argued that his statements were involuntary.

---

[74] *State v. Wright*, 67 A.3d 319, 323 (Del. 2013).
[75] Except for the Superior Court's 2012 decision in Wright's favor.
[76] Sup. Ct. R. 8.
[77] The State has similarly argued that this Court *implicitly* adjudicated Wright's *Brady* claim during the State's 2012 appeal because Wright's "written discussion [on another non-disclosure matter] was sufficient to place the issue before this Court, thus constituting a previously adjudicated claim." *Wright*, 91 A.3d at 986. This Court's 2014 opinion rejected the State's argument because the State had not briefed the issue in the previous appeal and Wright had likewise not addressed it. *Id*. The State attempts the same tactic for a different claim in this appeal.

B0003. Therefore, there have been "written discussions" generally about the voluntariness of Wright's custodial statements. However, there has been no prior ruling or discussion, either explicit or implicit, addressing the merits of the *Miranda* warning adequacy claim. B0295-B0300.

The State's argument that a court has implicitly determined the issue is belied by the record, which illustrates that the adequacy issue has never been fully and fairly briefed or decided.[78] Not only does the State's argument lack merit, but it has also waived the claim because they have never raised the "implicit finding" argument in any lower court.

4. The Judge Properly Considered The Adequacy of the *Miranda* Warnings Given To Wright Because Any One Of The Law Of The Case Doctrine Exceptions Apply.

Even if this Court were to find that the adequacy of the *Miranda* warnings had been raised and that prior rulings precluded review, the Superior Court was not bound to follow prior rulings if they were clearly wrong, produced an injustice, or "should be revisited because of a change in circumstances."[79] All three exceptions are satisfied here.

First, the record reflects that no party has briefed the adequacy issue and no court has decided the issue on the merits; therefore, this Court was mistaken when it stated in a postconviction context that the *Miranda* adequacy issue had already

[78] Sup. Ct. R. 8.
[79] *Johnson*, 91 A.3d at 1009.

been litigated. Additionally, the interests at stake here demand the maximum procedural due process available. The State seeks to sentence Mr. Wright to death. Even if this Court finds that the law of the case doctrine applies, it should not allow a rule that is grounded in judicial efficiency concerns to prevent Mr. Wright from litigating a colorable —indeed, meritorious— claim alleging a violation of constitutional rights. Doing so would result in an injustice.

Finally, if this Court determines that a prior court has litigated the inadequacy of the *Miranda* warnings claim, there was a "change in circumstances" that permitted the trial court to consider the issue anew. Judge Del Pesco (the original trial judge in 1991-1992) was not aware of the extent of Det. Moser's disparate testimony when she considered the voluntariness of Mr. Wright's *Miranda* waiver. Moser's admission that he did not provide warnings came at the trial testimony, after the judge had considered the first motion to suppress. Additionally, she did not have the opportunity to observe the detective invent facts out of thin air, as he did in the 2009 hearing when he testified that Mr. Wright signed a *Miranda* waiver form. B0722. She further lacked knowledge about the extent of detectives' knowledge of the case prior to the interrogation, including Det. Mayfield's presence at the autopsy at which he observed the number and location of gunshot wounds. B0784. These new facts warrant reconsideration of the *Miranda* adequacy claim.

II. THE SUPERIOR COURT PROPERLY GRANTED MR. WRIGHT'S MOTION TO SUPPRESS BECAUSE WRIGHT NEVER RECEIVED ADEQUATE *MIRANDA* WARNINGS

A. Question Presented

Whether the Superior Court properly held that detectives failed to provide Mr. Wright accurate *Miranda* warnings and failed to re-administer the warnings as required by *Ledda v. State*.[80] B0184-B0186.

B. The Standard And Scope Of Review

This Court reviews the court's decision to grant Mr. Wright's Motion to Suppress for an abuse of discretion.[81] The Court's inquiry focuses on whether the trial court relied on sufficient evidence to support its determination.[82] This Court reviews the trial court's findings of fact for clear error.[83] Legal conclusions are reviewed *de novo*.[84]

This Court generally refuses to review issues not fully and fairly presented to a trial court.[85] Therefore, issues not fairly raised to the trial court are reviewed for plain error.[86] Under the plain error standard, "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity

[80] *Ledda v. State*, 564 A.2d 1125 (Del. 1989).
[81] *Lopez-Vazquez*, 956 A.2d at 1285.
[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] Sup. Ct. R. 8; *Wainwright*, 504 A.2d at 1100.
[86] *Wainwright*, 504 A.2d at 1100.

of the trial process."[87]

C. Merits of The Argument

1. The Trial Court's Factual Finding That Det. Moser Never Gave *Miranda* Warnings Was Supported By The Record And His Opportunity To Assess Moser's Demeanor

The trial court, as the fact finder, is the arbiter of witness credibility because it has the opportunity to observe witness' demeanor and may compare relevant testimony with the body of evidence available during a hearing or trial.[88] During the 2009 postconviction hearings, the trial court heard testimony from the detectives who administered *Miranda* warnings, from expert witnesses (including a detective and nationally recognized intoxication specialists), and from lay witnesses.[89] The State and Mr. Wright disagreed about certain factual events, namely how and when *Miranda* rights were provided. The court, in its discretion, harmonized those events based on the record evidence before it. The court's fact-findings were far from clearly erroneous and were well supported in the record. This Court should defer to them on appeal.

The court made findings of fact about the witness' credibility, demeanor, and the substance of their testimony. The court concluded as a fact that Moser did

---

[87] *Id*.
[88] *Poon v. State*, 880 A.2d 236, 238 (Del. 2005) (stating that an appellate court will not substitute its judgment for that of the fact finder).
[89] *Wright*, 2012 WL 1400932, at *12-18.

not administer *Miranda* warnings.[90] The court's factual finding that Det. Moser did not provide *Miranda* warnings was supported by the multiple inconsistencies in the record,[91] the court's ability to assess Moser's demeanor on the stand, B0713-B0738, as well as the expert testimony provided to him about interrogation techniques and the circumstances of Wright's interrogation.

For example, Det. Moser testified in 2012, remarkably, that he had Mr. Wright sign a written *Miranda* waiver. B0722. This was highly suspect considering no waiver has ever been produced and no law enforcement officer has previously testified that a waiver was executed. B0722. Additionally, after explicitly testifying at the motion to suppress hearing that he read warnings to Wright, Moser testified at trial that he did not recite *Miranda* warnings because "[h]e had already been Mirandized." B0531. The State argues that the testimony was unclear, but the trial judge's comments suggest otherwise. When trial counsel attempted to revisit the issue, the judge sustained the State's objection and stated, "You have asked him. He's answered. And so I would suggest there is no appropriate further questioning." A152. The only credible reading of this record as a whole is that Det. Moser did not read Wright his *Miranda* warnings, as the Superior Court held.

---

[90] *Id*. at *41-44, 46. The court made other findings as well, including that Wright was impaired, manifested bizarre behavior, was sleep-deprived, had verbal comprehension problems, had a low IQ, was only 18-years old, that he did not understand or appreciate the consequences of his statements, that Wright was susceptible to suggestion, and that the statements were unreliable and included incorrect key facts. *Id*.

[91] *Id*. at *41.

The Superior Court weighed Det. Moser's demeanor, statements, and the record evidence. In particular, the judge observed Moser's demeanor when confronted with prior inconsistent testimony and the inability to produce the waiver form. The judge concluded that Moser did not provide *Miranda* warnings and that Moser's 1992 trial testimony, provided when there was no motive to embellish the truth, was the most accurate.[92] As the fact finder, that decision was well within the judge's ample discretion and role as arbiter.

In its brief, the State misquotes the judge and argues "the court inexplicably found it significant that the State did not ask Det. Moser any questions regarding *Miranda* during re-direct at the 1992 trial." The State reasons that the "prosecutor was certainly not going to open a door he had just successfully closed." However, the court's comments were not directed at the State's re-direct at the trial proceedings, but rather how the State completely side-stepped Det. Moser's *Miranda* recitation in its *direct* examination, prior to any objections and before defense counsel elicited that the detective had not provided warnings.[93] Moreover, if Moser's testimony was unclear, as the State now claims, it only makes sense that the prosecutor would clarify the detective's statements on re-direct. This did not occur, and it was permissible for the Superior Court to consider these curious facts in its factual determination of whether *Miranda* warnings were administered.

---

[92] *Id*.
[93] *Id*. *41.

The judge's findings of fact are grounded in the evidence adduced at the hearing and in comparison with the prior trial and hearing testimony. This included a determination of whether and how detectives provided *Miranda* warnings. The findings had ample support in the record. Therefore, this Court must defer to those findings on appeal.[94]

2. Judge Parkins Properly Determined That Det. Mayfield Was Required To Re-Administer *Miranda* Warnings

This Court only reviews claims that have been fairly presented to the trial court.[95] The State did not object to the trial judge's prior determination that *Miranda* warnings were required to be re-administered under the controlling case, *Ledda v. State*,[96] or even cite to *Ledda*, despite the fact that Mr. Wright explicitly relied on that finding in his Motion. Therefore, it has waived the claim on appeal absent a showing of plain error. B0198-B0215; B0184-B0186.

A court must look to the factors set forth in *Ledda v. State*[97] to determine whether, in light of the totality of the circumstances, an officer is required to re-administer *Miranda* warnings.[98] Those factors include "the time lapse since prior warnings, change of location, interruptions in interrogation, whether the same officer who gave the warning also interrogated, and significant differences of

---

[94] *See Johnson v. State*, 2015 WL 478258, at *2 (Del. Feb. 3, 2015).
[95] Sup. Ct. R. 8.
[96] 564 A.2d 1125, 1129-30 (Del. 1989).
[97] *Id*.
[98] *Miles v. State*, 2009 WL 4114385, at *2 (Del. Supr. Nov. 23, 2009) (reviewing the trial court's analysis of the totality of the circumstances under an abuse of discretion standard).

statements."[99] In *Ledda*, this Court held that a two-hour time lapse between an initial warning and a subsequent statement did not require an additional recitation of *Miranda*.[100] The same officer gave both the warning and conducted the questioning and there were no interruptions in questioning.[101] Therefore, *Miranda* was not required to be re-administered.[102]

In *United States v. Marc*, the district court suppressed defendants' statements after warnings had been orally provided, the suspects had been moved to a different location, and different officers subjected the individuals to ten hours of interrogation about crimes involving escalating levels of severity.[103] In *United States v. Hanton*, the court suppressed a defendant's statement after *Miranda* warnings were provided orally, five hours passed between the first and second interview, the location of the interrogation changed, different officers questioned the defendant, and the questioning involved charges of escalating severity.[104]

Here, the trial judge weighed the *Ledda* factors and determined that Det. Mayfield was required to re-administer *Miranda* warnings to Mr. Wright.[105] The judge based this conclusion on the evidence offered at the postconviction relief

---

[99] *Ledda*, 564 A.2d at 1130.
[100] *Id*.
[101] *Wright*, 2012 WL 1400932, at *43-44.
[102] *Id*.
[103] 1997 WL 129324, at *1 (D. Del. Mar. 18, 1997).
[104] 418 F. Supp. 2d 757, 764 (W.D. Pa. 2006).
[105] *Wright*, 2012 WL 1400932, at *43-44.

evidentiary hearing, the trial testimony, and prior motion to suppress testimony.[106]

He considered the following facts:

- Ten hours passed between the initial verbal warnings provided by Det. Merrill and Det. Mayfield's questioning.[107]
- Det. Moser, who questioned Wright after Det. Mayfield, did not administer *Miranda* warnings.[108]
- At least three detectives interviewed Wright about three different crimes at various intervals.
- Wright was kept in bleak conditions, handcuffed to his seat.[109]
- There were no windows nor was there a clock in the small room[110]
- There were multiple interruptions in the questioning.[111]
- Mr. Wright was moved to a separate room after approximately ten hours of questioning for a third round of interrogation.[112]
- Wright was intoxicated on heroin and suffering from withdrawal.[113]
- He was only 18 years old and he exhibited strange behavior, including writing responses to questioning on tiny bits of paper and then eating the paper so no one else could see the answers.[114]

The trial judge held that under the totality of the circumstances, Det. Mayfield was required to refresh the *Miranda* warnings.[115] Each of the *Ledda* factors weighed in favor of Mr. Wright. There was a ten-hour time lapse between the beginning of Det. Merrill's interrogation and Det. Mayfield's *Miranda*

---

[106] *Id*.
[107] *Id*.
[108] *Id*.
[109] *Id*.
[110] Therefore, Wright "was deprived of any sense of the passage of time." *Id*.
[111] *Id*.
[112] *Id*.
[113] *Id*.
[114] *Id*.
[115] *Id*.

recitation— five times the length of the interrogation approved in *Ledda*. Like in *Hanton* and *Marc*, Wright was moved to another location for a third round of questioning, which further attenuated the proximity of the original oral *Miranda* recitation.

Throughout the day, officers entered the rooms and interrupted the interrogations. There were extended periods of time in which Wright was left alone. B0409. There was a period of two hours between the time that Det. Merrill stopped his interrogation and Det. Moser began his questioning. B0407. The record reflects that at least four different officers conducted the questioning at different times.[116] Additionally, there were significant differences in Wright's statements as his behavior varied throughout the interrogation. At times he was quiet and wrote in small print and then ate the paper so no one could hear or see his answers. B0415. Other times, he spoke directly to the officers. B0420. As in both *Marc* and *Hanton*, the nature of the detective's interrogation escalated from a non-fatal accidental shooting to an intentional homicide unrelated to the initial arrest.

Because the elements of Mr. Wright's custodial statement touched on each of the *Ledda* factors and is analogous to similar cases, it was a proper exercise of the court's discretion to conclude that Det. Mayfield was required to re-administer

[116] *See* B0330, B0331, B0505 (Detectives Merrill, Burke, Moser, Mayfield).

Miranda warnings. The court's factual conclusions were based not only on the expert testimony adduced at the evidentiary hearing, but also on the detective's own testimony; therefore, the court properly determined that Det. Mayfield was required to re-administer the *Miranda* warnings.

3. The *Miranda* Warnings Provided To Wright Were Not Adequate

Det. Mayfield told Wright that whether he could have an attorney depended on "if the State thinks you're diligent and needs [sic] one." A192. This garbled rendition misstated Mr. Wright's right to the presence of an attorney independent of the State's assessment of his need. This error failed to communicate one of the basic tenets of the *Miranda* warnings and prevented Wright from knowingly and intelligently waiving his right to be free from self-incrimination.

The State has the burden of proving by a preponderance of the evidence that Mr. Wright was properly advised of all four *Miranda* rights, that he knowingly and intelligently waived them, and that the waiver was a voluntary act.[117] The four invariable *Miranda* warnings are:

> A suspect must be warned prior to any questioning 1) that he has the right to remain silent, 2) that anything he says can be used against him in a court of law, 3) that he has the right to the presence of an attorney, and 4) that if he cannot afford an attorney one will be appointed for him prior to any questioning, if he so desires.[118]

---

[117] *See Edwards*, 451 U.S. at 482-84 (holding that the knowing and intelligent determination is a separate analysis from the voluntary analysis). *See Howard v. State*, 458 A.2d 1180, 1183 (Del. 1983) (stating that it is the State's burden to show a valid waiver of *Miranda* rights).
[118] *Florida v. Powell*, 559 U.S. 50, 59-60 (2010).

Each warning must be "clarion and firm" and "not one of mere impressionism."[119]

The State cites a series of Supreme Court opinions that describe the lower limits of constitutionally adequate *Miranda* warnings. In none of the cases, however, did the recitation fall to the low — and plainly inaccurate — warnings given to Mr. Wright. In *Duckworth v. Eagan*, the Supreme Court held that an officer sufficiently communicated the *Miranda* rights when he stated that the suspect

> …had the right to remain silent, that anything he said could be used against him in court, that he had the right to speak to an attorney before and during questioning, that he had this right to the advice and presence of a lawyer even if [he could] not afford to hire one, and that he had the right to stop answering at any time until [he] talked to a lawyer.[120]

The officer additionally included that a lawyer would be appointed to the suspect "if and when you go to court."[121] The Court held that the statement "if an when you go to court" did not limit or constrict the right to an attorney, but instead explained when the attorney would be provided. Therefore, the warnings were adequate.[122]

---

[119] *United States v. Garcia*, 431 F.2d 134, 134 (9th Cir. 1970).
[120] *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (internal quotations omitted).
[121] *Id*.
[122] *Id*.

In *Florida v. Powell*, the Court essentially restated and reaffirmed the holding of *Duckworth*, discussed above.[123] In *Powell*, the Court held that the statement that a suspect has a "right to talk to a lawyer before answering any of the [officer's] questions" combined with the statement that the suspect could invoke the right "at any time…during th[e] interview" satisfied the *Miranda* requirements.[124] Although the statement was not clear, it did not "entirely omit" any essential *Miranda* information and was sufficient.[125]

In *California v. Prysock*, the Supreme Court held that *Miranda* rights do not need to be communicated in a particular form as long as the substance of the rights is communicated.[126] In *Prysock*, an officer went through each right with a juvenile offender, explained the right individually, and then asked the juvenile whether he understood the right before he continued.[127] He told the defendant that he had the right to an attorney "at no cost to [him]self." When his mother asked about whether he could have an attorney at a future time, the officer informed them that the juvenile could have an attorney before, during, and after questioning.[128] The appellate court reversed the conviction because although the officer said the defendant could have an appointed attorney and that he could have an attorney

[123] 559 U.S. 50 (2010).
[124] *Id*. at 62 (internal quotations omitted).
[125] *Id*. at 64.
[126] 453 U.S. 355, 355 (1981).
[127] *Id*. at 356-57.
[128] *Id*. at 358-59.

before, during and after questioning, the officer did not say that he could also have an appointed attorney before questioning as well.[129]

The Supreme Court held that there is no "talismanic incantation' required to adequately convey the warnings, as long as the substance of the warnings is conveyed.[130] It further distinguished cases where the right to appointed counsel was limited by a future action, such as appointing counsel only "if" a person was charged with a crime in the future.[131] Because the officer in *Prysock* did not convey any limitation to the right to appointed counsel, the recitation was adequate.[132]

In contrast, in *United States v. Connell*, the Ninth Circuit Court of Appeals held that two different *Miranda* recitations, one written and one oral, were "affirmatively misleading" because although one of the warnings had indicated the right to have an attorney present through the interrogation, a subsequent rendition equivocated as to whether the attorney would be provided free of charge.[133] Because the officer communicated an ambiguous right to procure an attorney, the warnings were constitutionally infirm.[134] The *Connell* court differentiated between situations wherein a suspect was given a combination of warnings that conveyed

---

[129] *Id*.
[130] *Id*. at 359-61.
[131] *Id*.
[132] *Id*.
[133] 869 F.2d 1349, 1352-53 (9th Cir. 1989).
[134] *Id*.

the full substance of the warnings in contrast to situations wherein a conflicting, ambiguous, incorrect, or confusing rendition was provided.[135]

In *United States v. Warren*, the Third Circuit held that a *Miranda* warning was not the "clearest possible" rendition, but that it was sufficient because it did not communicate a restriction or limitation on the right to counsel.[136] The officer told the suspect that he had the right to speak with an attorney "before answering any of our questions" and that he had "the right to use any of these rights at any time you want during this interview."[137] Because the right to have an attorney "before questioning" did not conflict with the statement that the right could also be used at any time, the recitation was permissible.[138]

Det. Mayfield's warnings communicated an inaccurate limitation on the right to have appointed counsel and were inadequate. Unlike in *Duckworth*, *Prysock*, and *Powell* where the law enforcement officers touched all four of the *Miranda* bases and included information that did not limit or constrain the breadth of the rights, here, Det. Mayfield told Wright that an attorney would be provided to him *only if the State determined* that he needed one or if he was "diligent." He was not told that he could have unfettered access to appointed counsel, but rather that

---

[135] *Id*.
[136] 642 F.3d 182, 184, 186-87 (3rd Cir. 2011).
[137] *Id*.
[138] *Id*. *But see People v. Bolinski*, 67 Cal. Rptr. 347, 356 (Cal. Dist. Ct. App. 1968) (holding that the warning that appointed counsel would be provided "if" the defendant was "charged" was insufficient to communicate the right to appointed counsel during the interrogation).

the State would decide whether he should have counsel and if so, they would appoint him an attorney if he was diligent. This conveyed a limitation on the right to appointed counsel and violated *Miranda's* clear mandate.

The State incorrectly argues that the substance of the rights had been communicated because Det. Mayfield's limiting instruction that an attorney would be appointed at the State's discretion was at best ambiguous and at worst misleading and inaccurate. The warning is not inadequate solely on Det. Mayfield's "malapropism," as the State contends,[139] but also because Mayfield told Wright that an attorney would be provided *only if* the State felt that he needed one. A92; OB at 35. Thus, the detective conditioned the right to an appointed attorney on the State's sole discretion.

The State further attempts to remedy the error by indicating, in bold, that the detective told Wright that he could have an attorney present. OB at 30. However, the detective's recitation that Wright could have an attorney present does not convey the right to have an *appointed* attorney present at any time. The right to counsel and the right to appointed counsel are two distinct warnings, as indicated in *Miranda*:

[139] Despite the State's assertion that Mayfield committed an isolated "malapropism," the record reflects that he incorrectly recited the warnings to Mr. Wright's co-defendant, Lorenzo Dixon as well. B0785. He told Mr. Dixon that he could "request a lawyer…if he could afford it" or if "the state finds that you're negligent for it." B0785.

> In order fully to apprise a person interrogated of the extent of his rights…, it is necessary to warn him not only that he has the right to consult with an attorney, but also that is he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one.[140]

Mr. Wright was young, intoxicated, and possessed mental deficiencies. For over thirteen hours, he was alone with police while they interrogated him. The interrogation procedure in combination with Wright's personal circumstances was an unquestionably coercive environment, precisely the type of situation for which the Court instituted the *Miranda* requirements.[141] The trial court held that Det. Moser did not provide *Miranda* warnings and that Det. Mayfield was required to re-administer warnings under this Court's precedent. Because Det. Mayfield communicated a limitation to appointed counsel, one of the invariable *Miranda* requirements, the warnings were inadequate as a matter of law. Consequently, the trial court did not abuse its discretion when it suppressed Mr. Wright's custodial statements.

Finally, Mr. Wright has not waived his knowing, intelligent and voluntary claims.[142] Counsel agreed to defer the ruling on that argument so that the trial judge

---

[140] *Miranda v. Arizona*, 384 U.S. 436, 473 (1966).
[141] *Id*. at 469-70 (stating "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators").
[142] OB at 36.

would independently assess the merits of the *Miranda* adequacy claim. A484. On the State's motion, the case was dismissed before the court ruled on the outstanding issues. B0315-B0319. Because there was no final order as to those claims, neither party can, or did, appeal.[143] If the State intended to raise those issues, it should have requested the ruling on the outstanding claims before certifying the case for appeal.[144]

[143] *See Wright*, 91 A.3d at 985.
[144] *Id*. at 984-85.

III. NOT ONLY DID THE TRIAL COURT PROPERLY DENY THE STATE'S RECUSAL MOTION, BUT THIS COURT ALSO LACKS JURISDICTION TO ENTERTAIN THE STATE'S RECUSAL ISSUE AND SHOULD NOT ALLOW THE STATE TO SKIRT THE JURISDICTIONAL REQUIREMENTS BY RAISING THE ISSUE AS A REQUEST FOR A NEW JUDGE IN A HYPOTHETICAL RETRIAL

A. Question Presented

Whether the State may raise an issue in a direct appeal that it did not certify and that does not relate to the suppression of evidence.

B. The Standard And Scope Of Review

Issues of statutory interpretation and jurisdiction involve questions of law and are reviewed *de novo*.[145] The review of a judge's decision not to recuse himself is reviewed for an abuse of discretion.[146]

C. Merits of The Argument

1. This Court Lacks Jurisdiction To Hear An Appeal Under 10 Del. C. § 9902(b) That Does Not Relate To The Suppression Of Evidence And Which The State Did Not Certify

The State does not have a common law right to appeal in a criminal case.[147] The State's right to appeal is limited by statute.[148] 10 Del. C. §9902 provides the specific limited situations in which the State may appeal as a matter of right. The provision in question, 10 Del. C. §9902(b), permits the State to appeal

[145] *Rapposelli v. State Farm Mut. Auto. Ins. Co.*, 988 A.2d 425, 427 (Del. 2010)
[146] *Los v. Los*, 595 A.2d 381, 385 (Del. 1991).
[147] *State v. Bailey*, 523 A.2d 535, 537 (Del. 1987).
[148] *Id*.

> When any order is entered before trial in any court *suppressing or excluding substantial and material evidence*, the court, upon certification by the Attorney General that the *evidence is essential to the prosecution of the case*, shall dismiss the complaint, indictment or information or any count thereof to the proof of which the evidence suppressed or excluded is essential.[149]

In *State v. Bailey*, this Court dismissed the State's appeal where the trial court had dismissed an indictment for insufficient evidence.[150] In that case, the State could not perfect its appeal under 10 Del. C. §9902(a), because the subsection only permitted appeals involving dismissals based on statutory defects.[151] The appeal of the acquittal did not involve a statutory defect and thus was unauthorized.

This Court's jurisdiction is statutorily or constitutionally conferred and without such authorization, the Court lacks jurisdiction to review the matter.[152] Because the statute does not confer jurisdiction for State's appeals of recusal orders, the State cannot seek relief in this Court for the denial of its Motion to Recuse. Furthermore, the State did not include the recusal issue in the certification required by the statute to appeal.

In August 2014, the State filed a Motion for Recusal requesting that the trial judge recuse himself from the retrial. After a hearing on the matter, the judge

---

[149] 11 *Del. C*. §9902(b) (emphasis added).
[150] *Bailey*, 523 A.2d at 539.
[151] *Id*.
[152] *Id*; *see also Wright*, 91 A.3d at 984.

issued an opinion on December 16, 2014 denying the State's request. Citing his duty to preside over the matter, judicial efficiency concerns, and comparing the State's request to judge shopping, the judge determined that the request was meritless. B0231-B0286. Thereafter, on January 30, 2015, the trial judge issued his written opinion suppressing Mr. Wright's custodial statement.

The State sent a letter to the Superior Court on January 30, 2015 requesting certification under 10 Del. C. 9902(b). B0315-B0319. The letter informed the judge that the suppressed evidence, specifically Mr. Wright's custodial statement, was essential to the State's case and requested the judge sign a form order to dismiss the indictment. B0315-B0319. Thereafter, the State filed a Notice of Appeal and included both the 2014 opinion on recusal and the 2015 opinion suppressing evidence.

In its brief, the State professes to raise the issue of "[w]hether in light of Superior Court's failure to accept this Court's prior findings of fact and conclusions of law in this case, a different judge should be assigned to Wright's *new trial* to ensure the public's confidence in the administration of justice."[153] However, on the same page, the State also alleges that the issue before this Court is whether the trial judge abused his discretion in denying the State's *prior* motion for recusal.

[153] OB at 43 (emphasis added).

The State thus attempts to do by the "backdoor" what it could not do as of right- appeal the Superior Court's denial of its recusal motion. The State cannot raise the denial of the recusal motion under 10 Del. C. § 9902(b) because the claim does not relate to "suppressing or excluding substantial and material evidence."

The State did not include the recusal issue in its certification letter to the trial judge or its form order. 10 Del. C. 9902(b) plainly confers jurisdiction to this Court only to review orders that relate to the suppression of essential evidence. As the recusal motion has no effect on the admissibility of any evidence, the issue is not properly before this Court and it lacks jurisdiction to review the denial of the Recusal Motion. Permitting the State to raise the recusal issue by obscuring it in a request for future relief countermands the limited jurisdictional authority of this Court. The Court should not acquiesce in the State's attempt at judge-shopping.

2. The Trial Judge Did Not Abuse His Discretion When He Properly Held That He Had A Duty To Sit In The Absence Of Impropriety

The State sought recusal for essentially three reasons: 1) it alleged that the trial judge was biased because he had previously ruled adversely to the State, 2) he made "public comments" that raised the appearance of impropriety, and 3) the court's previously disclosed professional relationship with a detective who played a minor role in the investigation into the HiWay Inn murder created a conflict mandating recusal. The judge properly held that he had a duty to sit and should not

recuse himself, but even if the State's argument had merit, which it plainly does not, the State previously waived the issue on the record.

a. Judges Have a "Duty To Sit"

Delaware courts have recognized that a judge's duty to sit is as weighty as the duty to recuse, and that recusal should not be lightly granted. In the case, *In re Will of Stotlar*, then-vice chancellor Hartnett held that his characterizations of the evidence and the parties in a prior hearing were not sufficient bases for recusal.[154] The vice chancellor stated that a judge has a duty to preside over cases unless there is a reasonable factual basis upon which to recuse.

Similarly, in *State v. Desmond*, the Superior Court reviewed the history of the "duty to sit" doctrine and concluded that although the standards of the doctrine have changed over time, there continues to be a "strong duty to sit when there is no legitimate reason to recuse…"[155] Moreover, there is a strong presumption against recusal absent reasonable evidence to avoid "invariably imping[es]" on other judges' responsibilities and avoiding judge-shopping.[156] Because the State's allegations in this case do not reasonably show prejudice or bias, the trial judge had a duty to remain in a case that has already required the investment of considerable judicial resources.

---

[154] *See In re Will of Stotlar*, 1985 WL 4782, at *1-2 (Del. Ch. Dec. 19, 1985).
[155] 2011 WL 91984 (Del. Super. Jan. 5 2011).
[156] *Id*. at *9-11.

b. The State's Complaint About The Trial Judge's Previous Adverse Rulings Is Not A Valid Basis For Recusal

Judicial rulings themselves will almost never constitute a valid reason for recusal.[157] A judge must recuse on the basis of a judicial ruling only in the case where he/she has shown "such deep-seated favoritism or antagonism as would make fair judgment impossible."[158] Additionally, a judge's opinions based on the factual record and the evidence adduced during the proceedings is similarly not a basis for recusal.[159] The United States Supreme Court commented in *Liteky* that it is "normal and proper" for a judge to hear a case upon remand and in "successive trials involving the same defendant." [160]

Judges must evaluate two considerations when determining whether to recuse themselves.[161] First, the judge must subjectively believe that she can hear the case free from bias or prejudice.[162] Second, she must undertake an objective analysis to determine whether there exists an "appearance of bias sufficient to cause doubt as to the judge's impartiality."[163]

In *Liteky*, the defendant claimed that the trial judge should have recused himself because he had previously heard evidence in a related but earlier and

---

[157] *Liteky v. United States*, 510 U.S. 540, 541 (1994).
[158] *Id*.
[159] *Id*.
[160] *Id*. at 551.
[161] *Los,* 595 A.2d at 384.
[162] *Id*. at 384-85.
[163] *Id*.

distinct trial eight years prior, displayed animosity and disregard for the defendants in the new trial, and made statements throughout the trial that the defendants felt were biased.[164] The Court held that the trial judge properly denied the recusal motion because it was based on rulings, "routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel and to witnesses."[165] A judge, as arbiter of adversarial trials, must by the very nature of the position render decisions and form opinions.[166] It is reasonable and proper for a judge to form opinions of the evidence or to continue to sit in a trial on remand.[167]

Here, the State alleged the following constituted "a deep-seated favoritism…that would make fair judgment impossible:" 1) the judge gave "repetitive and public comments stating in effect that he believed Wright was innocent," the trial judge was biased because of 2) his prior relationship with a minor witness, and 3) his "*sua sponte* raising of the sufficiency of Wright's *Miranda* warnings."[168] The State has egregiously misrepresented the record.

[164] *Liteky*, 510 U.S. at 542-43.
[165] *Id*. at 556.
[166] *Id*. at 551.
[167] *Id*.
[168] OB at 43, 54.

c. Judge Parkins Did Not Make Repetitive "Public Comments" And His Statements Were Directly Related To The Issues Before Him For Decision

Initially, the State cites the trial judge's comments about having "grave concerns over the sufficiency of the evidence" as indicative of his bias. OB at 44. The State grossly misrepresents this comment by wrenching it out of a transcript and presenting it out of context. The judge's comment about the insufficiency of the State's evidence came directly after the judge had suppressed Mr. Wright's custodial statement.

Since there was no other evidence in the case, as the State itself has certified in appealing the suppression ruling, the judge's statement was an accurate assessment of the case posture after suppression of Mr. Wright's statement. Moreover, this Court agreed with the judge's assessment in its 2014 opinion.[169] This Court specifically stated, "[t]he postconviction evidence led the Superior Court to conclude that it had no confidence in the outcome of the trial. Neither do we."[170] The trial court cannot be considered biased for making a determination about the sufficiency of the evidence that this Court then expressly approved.

Next, the State cites judge's admonitions about errors in the recusal motion as evidence of bias. OB at 44. As the Supreme Court stated in *Liteky*, "expressions of impatience, dissatisfaction, annoyance, and even anger" are not grounds for

[169] *Wright*, 91 A.3d at 994.
[170] *Id*.

recusal and do not establish bias or partiality.[171] Therefore, the State's complaints regarding the judge's criticisms of the State's deficiencies are meritless.

The State also contends that the trial judge made "repetitive and public comments."[172] The prosecutor conceded, however, in the recusal hearing that the judge had never made public comments about the case outside the confines of a court hearing or a written opinion. A319. As the Court in *Liteky* stated, adverse rulings or opinions based entirely on the evidence presented almost never constitute a "deep-seated favoritism or antagonism."[173] In fact, when the judge questioned the State about whether he had made any comments that were "discourteous or [that] treated the State's attorneys unfairly." A319. The State replied, "…no. And we haven't raised that." A319.

In the recusal hearing, the State told the judge that the "only [public] comments we're referring to are the ones recited in the motion…" A319. The State identified these "public comments" as essentially the court's commentary in the 2012 bail hearing regarding his "concerns over the sufficiency of the evidence…" A319. As already mentioned, these are not only proper, but also an accurate description of the State's case following the court's rulings. Furthermore, the comments were also not expounded out of thin air. During the bail hearing, the

[171] 510 U.S. at 556.
[172] OB at 43.
[173] 510 U.S. at 555.

judge was required[174] to determine whether there was a "fair likelihood" that the State could convict Mr. Wright of a capital offense.[175] His concerns about the sufficiency of the evidence directly related to whether the evidence supported the proof positive standard.

The State's allegations of bias and impropriety are veiled attempts at judge-shopping. The judge repeatedly gave the State equal opportunities to brief issues and argue the merits of its case. At one point during a hearing in 2009, the judge indicated that he was going to permit the defendant to amend his postconviction motion. B0777. He told the parties,

> I think it's unfair for me to make that decision [to permit the defendant to amend the motion] until I have allowed the State an opportunity to tell me why it is that it would be prejudiced by such a late amendment. I am not speaking in terms of the procedural bars under Rule 61, but any prejudice it might suffer as a result of the timing of the amendment. B0777.

Despite the State's characterization otherwise, this excerpt from the transcript illustrates that the trial judge was fair and impartial. He provided the State with ample opportunity to make the case that allowing an amendment prejudiced them. The State has taken bits of the transcript out of context for its use in judge shopping with the hope that another judge may

[174] At the time, the issue as to whether a bail hearing should be heard was an issue of first impression. This Court has since ruled on that issue. *Wright*, 67 A.3d at 322.
[175] *See In re Steigler*, 250 A.2d 379, 382, 383 (Del. 1969).

be more inclined to agree with its position.[176] This is an expressly discouraged procedure and this Court should not hear the State's claim or validate its attempts at manipulation.

The State also argues that the judge's July 2, 2014 request for a meeting to discuss scheduling, including "resolving *whether the defendant may seek to suppress the statement* from him, and if so, *whether* any such motion should be granted" is indicative of his bias. A174 (emphasis added). The notion is absurd. The judge presided over the fourth postconviction hearing and wrote more than a 100-page opinion addressing the merits of the case and specifically the adequacy and voluntariness of the custodial statement. When the case was remanded, it was proper for him to anticipate that motion practice would be forthcoming. As the case administrator, it was not only proper but expected that he manage the schedule in an orderly fashion.

The trial judge's letter did not suggest in any way that he would be predisposed to determining the substantive issues one way or another. Rather, his request put both parties on notice that he expected counsel to come prepared to discuss threshold issues as to what briefing would be permitted. The letter did not permit the filing of a motion, but rather asked "whether" any motions could be raised. Consequently, the suggestion that the scheduling conference request was

[176] *See Stotlar*, 1985 WL 4782 at *1-2.

indicative of bias unfairly characterizes the court's legitimate steps to manage scheduling and to anticipate potential case issues. Consequently, the "public comments" the State refers to amount to appropriate judicial action and is both reasonable and proper.

d. The Trial Judge Was Obligated To Address Meritorious Claims

Second, the State complains that the court itself raised the issue of *Miranda* adequacy and that it considered Wright's *Miranda* adequacy claim "despite the fact that the issue had been exhaustively litigated before the Defendant's first trial and again on appeal…" A173. While the judge may have initiated questions about the adequacy of *Miranda* warnings, he did not address the issue until both parties provided the court with multiple rounds of briefing and Mr. Wright included the adequacy issue in an amended postconviction motion. B0692-B0694, B0777, B0243-B0245. Considering the due process implications and the interests at stake in death penalty litigation, it was reasonable and proper for the judge to ask questions about the adequacy of *Miranda* warnings during testimony regarding Mr. Wright's understanding of the warnings and the circumstances surrounding the custodial statement.[177]

[177] *See Baker v. State*, 906 A.2d 139, 151 (Del. 2006) (stating that it is proper for judges to intervene *sua sponte* in the interests of justice to ensure the fundamental fairness of proceedings).

The record belies the State's argument that the issue had been "exhaustively litigated." A173. As Wright has argued and as the judge himself determined in his 2015 opinion, no prior court has decided the adequacy of the *Miranda* warnings claim until the court's 2012 opinion. B0174. The judge did not raise the issue multiple times. Mr. Wright specifically argued and briefed the issue in his amended postconviction motion and again— following this Court's remand for a new trial— in his motion to suppress. B0174. Consequently, the judge was obligated to address the issue at both opportunities and it is not evidence of bias or impartiality.

e. The State Waived Any Objection To The Judge's Relationship With A State's Witness, Any Bias Would Have Favored The State, And The Judge Properly Ruled That The Relationship Was Not Ground For A Recusal

Det. Browne investigated a robbery that occurred in a similar timeframe as the HiWay Inn robbery. B0740-B0769. He was also a member of a SWAT team that executed the search warrant of Mr. Wright's home. B0740-B0769. When the trial judge became aware of Det. Browne's identity during the fourth postconviction hearing, he immediately alerted both parties that he had a prior professional relationship with Browne. B0740-B0769. The judge described the relationship again at a teleconference and again on the record with Mr. Wright at a subsequent hearing. A193. He gave the parties an opportunity to discuss the

implications. B0740-B0769. Both parties subsequently waived the conflict. A193; B0775.

Assuming that Det. Browne would testify at a trial involving Mr. Wright, his testimony would relate to the investigative details of a robbery that occurred at a separate location for which Mr. Wright was never identified as a suspect. If Mr. Browne's credibility were at issue, it would not be the judge, but rather a jury, that determined the accuracy or veracity of the testimony. Therefore, the judge will not be in a position to assess Det. Browne's credibility. Since Det. Browne is a minor witness whose testimony is neutral and uncontroverted, it would be a misuse of judicial resources to reassign this complex and voluminous case to another judge on that basis alone.

Even assuming that there is a conflict of interest, the State has waived it. B0775. In a teleconference on September 10, 2009, the State told the judge,

> Just one short one on the William Browne issue. Your Honor, the State thinks that we might be able to resolve that issue entirely if counsel for Mr. Wright will waive any claim that you should not be able to decide the case based on that testimony and also having Jermaine Wright himself acknowledge that. **Then that issue would go away.** B0775.

In a hearing on September 14, 2009, Judge Parkins summarized his relationship with Det. Browne and asked Mr. Wright if he waived any potential conflict. A193. Mr. Wright agreed to do so, as did his counsel. A193. Consequently, the State has

waived any claim because defense counsel and the defendant himself waived the conflict issue to the State's satisfaction, which they submitted was sufficient.

Courts have repeatedly recognized the validity of criminal defendants' waiver of grounds for recusal through guilty pleas or mere passive failure to object.[178] Mr. Wright's affirmative waiver before the court on the record is consequently valid. The same standard applies to the State. Its representatives indicated that they would be satisfied respecting any grounds for recusal if Mr. Wright waived any claim. Therefore, even assuming *arguendo* that a basis for recusal exists, the State has waived any claim on that basis.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be AFFIRMED.

/s/Allison S. Mielke
Eugene J. Maurer, Jr. (#821)
Allison S. Mielke (#5934)
Eugene J. Maurer, Jr., P.A.
1201-A King Street
Wilmington, DE 19801
(302) 652-7900

Herbert W. Mondros (#3308)
Margolis Edelstein
300 Delaware Avenue, Suite 800
Wilmington, DE 19801
(302) 888-1112

[178] *See Wilson v. State*, 2010 WL 572114 (Del. Feb. 18, 2010).