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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| **CHRISTOPHER WHEELER,** | ) | |
| **Defendant Below,** | ) | |
| **Appellant,** | ) | |
| | ) | |
| **v.** | ) | **No. 205, 2015** |
| | ) | |
| **STATE OF DELAWARE,** | ) | |
| **Plaintiff Below,** | ) | |
| **Appellee.** | ) | |

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**ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY**

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# APPELLANT'S AMENDED OPENING BRIEF

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**EXHIBIT "C"**: 4/24/15 Superior Court Sentencing Order[1]

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[1]This Exhibit was not included in Wheeler's Opening Brief, filed on August 10th, 2015. Per Supr.Ct.R. 14(b)(vii), counsel was required to include this final "order of judgment being appealed" as an Exhibit. Counsel appreciates the Court notifying counsel regarding this deficiency. This amended opening brief now includes the Superior Court's April 24th, 2015 sentencing order, as Exhibit "C." The balance of the original brief remains unchanged.

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## NATURE OF PROCEEDINGS

Following the execution of Superior Court search warrants at his Tower Hill residence and office on October 22nd, 2013, Appellant Christopher Wheeler was indicted and charged with 25 identical counts of Dealing in Child Pornography per 11 Del. C. §1109(4). [A10-18]. The case was assigned to the Honorable Eric M. Davis. Undersigned counsel filed a Superseding Motion to Suppress on May 5th, 2014, raising multiple challenges to the search warrants. Along with a series of pleadings filed by both parties, an evidentiary hearing was held on May 23rd, 2014, where the court heard testimony regarding the scope of the initial forensic examination of Wheeler's computers. Following oral argument held on July 11th, 2014, the Superior Court issued a written opinion on September 18th, 2014 (attached as **Exhibit "A"**), denying Wheeler's Motion to Suppress. [A6].

The case was tried on October 7th, 2014, via a bench trial. Per a written opinion issued on December 22nd, 2014 (attached as **Exhibit "B"**), the trial court denied Wheeler's Motion to Dismiss and Motion for Judgment of Acquittal, and rendered his verdict, finding Mr. Wheeler guilty of the 25 indicted counts. [A9]. Wheeler was sentenced on April 24th, 2015 to a minimum 50 years at level V (**Ex. "C"**). Undersigned counsel filed a timely Notice of Appeal in this Court on April 26th, 2015. This is Mr. Wheeler's Opening Brief in support of his direct appeal.

## SUMMARY OF ARGUMENT

I. The trial court erred as a matter of law in denying Wheeler's Motion to Suppress the Superior Court authorized search warrants that were premised upon allegations that Mr. Wheeler had committed "witness tampering," yet the four corners of the affidavits failed to provide any basis to establish that such criminal wrongdoing was afoot. Moreover, the State omitted material information in violation of Franks v. Delaware, 438 U.S. 154 (1978), that would have otherwise undermined any possible finding of probable cause. The affidavits also failed to provide a nexus that evidence of witness tampering would be found in the "places to be searched," to include any and all of Wheeler's computers and digital devices. Finally, the search warrants, copied 'n pasted from unrelated child pornography cases, were constitutionally overbroad, with zero restrictions or conditions limiting the scope of the forensic examination.

II. The trial record lacks sufficient evidence to establish that Wheeler intentionally or knowing possessed the indicted images that were found in the newsgroup cache of his iMac. No evidence was presented that Wheeler ever viewed the images, viewed the newsgroups that contained the images, deliberately downloaded or deleted them, or knew the images even existed in the first place.

## STATEMENT OF FACTS

A) The Search Warrants:

During the evening of October 22nd, 2013, an army of law enforcement officers representing the Attorney General's Office, Delaware State Police and Wilmington Police, descended upon the Tower Hill campus, executing Superior Court issued search warrants as part of an alleged "witness tampering" investigation against Christopher Wheeler, the headmaster at Tower Hill School. The search warrants, for which the accompanying affidavits are nearly identical, authorized a sweeping and unprecedented search for evidence for the alleged crimes of Tampering with a Witness (11 Del. C. §1263(3)) and Act of Intimidation of a Witness (11 Del. C. §3532)[2] that might be found at Mr. Wheeler's residence (1517 Mt. Salem Lane) and Wheeler's office at Tower Hill School. [A19-44]. Leaving no stone unturned, the State also obtained JP Court #20 search warrants seeking the same evidence for Wheeler's Chevy Tahoe and aircraft. [A45-60].

Strangely, the search warrant affidavits never identified the "witness tampering" evidence that was sought. Rather, the court-approved laundry list of "items to be searched for and seized" included: (a) locked or unlocked safes,

[2]In this brief, counsel will often use "witness tampering" to cover both statutes, similar in nature.

boxes, bags, compartments, storage areas; (b) any computer or digital storage device; (c) any cell phone; (d) any camera; (e) the ability to conduct a forensic examination of all of the above, to locate registry entries, pictures, images, video recordings, text messages, buddy lists, temporary internet files, internet history files, chat logs, writings, passwords, user names, screen names, email; and (f) any file, writing, paper, document, billing record or other instrument stored electronically or in printed form. [A19, 31]. Seemingly, nothing was "off limits" per the search warrants. [A193].

Although there was never any child pornography allegation or investigation referenced in the affidavits, the State would later concede that the "items to be searched" were copied and pasted from unrelated cases involving search warrant applications specifically related to child pornography investigations. [A192, 196-197, 230]. Nevertheless, the State remained steadfast that their investigation of Mr. Wheeler was strictly related to "witness tampering." [A189, 191-92].

The affidavits tell a story, but not a story about "witness tampering." Approaching the Attorney General's Office in October 2013, Michael Wagner (age 43) alleged that he was molested by Mr. Wheeler 30+ years ago, during a period when Wheeler, a former student at Westtown School, had resided at the Wagner residence in West Chester, Pennsylvania. [A26]. Michael Wagner stated

that when he was 12 or 13 years old, Wheeler, on one occasion, fondled Michael's genitals and performed oral sex on Michael. [A26]. It wasn't until decades later, in the wake of the Jerry Sandusky/Penn State scandal, when Michael Wagner decided to tell his two brothers (Sam and Tom). [A27].

Upon hearing Michael's account, Sam Wagner disclosed that he too had engaged in oral sex with Mr. Wheeler (5 years older than Sam) on multiple occasions, when Sam was 13-15 years old. [A27]. Tom Wagner, the third brother, conveyed that he and Wheeler never had a physical encounter, but that Wheeler had inappropriate sexual conversations with Tom as a teenager. [A27].

The affidavits reflect that in July 2013, both Michael and Sam decided to each send a letter to Mr. Wheeler, confronting Wheeler about what had transpired years ago. [A27]. Michael's letter read in part, "*I shudder at the notion that you, in your career, have chosen an environment that brings you into daily contact with other boys who are as old as I was when you molested me.*" [A27]. Michael's letter also conveyed that he *"wants nothing to do with Chris Wheeler ever and wants him to stay away from him and his family.*" [A27]. Consistent with Michael's wishes, Mr. Wheeler never attempted to contact Michael. [A27].

Via FedEx, Sam Wagner also sent a similar letter to Mr. Wheeler in July 2013. However, unlike Michael's letter, Sam's letter invited a response, asking

"*What does justice look like for the abuses you perpetuated and the harms that you caused? What role (if any) should you play in determining appropriate resolution to and restitution for the abuses you have caused* ?" Mr. Wheeler responded via a letter dated July 23, 2013, writing "*I will not compound your pain by attempting to deny or in any way deflect responsibility for my actions 35 years ago. I did those things. I am the one responsible. .... I'll wait to hear from you about further appropriate steps towards resolution and restitution.*" [A27]. The affidavits reflect that Sam Wagner had possession of both letters, including the FedEx return envelope from Mr. Wheeler. [A27, 28].

As to Tom Wagner, the affidavits state that Tom, via phone and e-mail, requested and arranged a face-to-face meeting with Wheeler on July 25th, 2013 at Mr. Wheeler's Mt. Salem Lane residence, whereby *"Chris acknowledged he had inappropriate contact with Tom's brothers and was apologetic for his actions. Tom stated that Chris Wheeler stated he was going to meet with Kolya* (Wheeler's adult son) *to tell him about the abuse of the Wagner brothers. Tom also stated that Chris Wheeler conveyed he had contemplated suicide.*" [A28].

The search warrant affidavits also contain information pertaining to Kolya, who Wheeler adopted when Kolya was 12-13 years old. [A27]. Michael Wagner conveyed that Wheeler and Kolya lived with Wagner's parents at their

Pennsylvania home, during a period when Wheeler's Tower Hill residence was being renovated.[3] Mr. and Mrs. Wagner, when interviewed by Delaware authorities on October 21, 2013, relayed that Kolya, while visiting their residence three years earlier, complained that "*his father had abused him.*" When asked what he meant, Kolya replied "*You know. You know.*" [A28].

The affidavits allege that a Delaware investigator spoke with a police officer in Bluffton, South Carolina, who had responded to a 911 call on October 8th at Kolya's residence, where Kolya and Mr. Wheeler were arguing in the driveway. Kolya, smelling of alcohol, "*appeared angry and upset.*" The residence "*revealed several broken doors that appeared kicked in, broken window blinds and a smashed bottle on the floor.*" [A28]. The officer learned that Kolya had been despondent over a recent breakup with his girlfriend, and had previously sent a text message to his father (Wheeler), indicating Kolya was going to kill himself, causing Mr. Wheeler to drive to South Carolina. The Bluffton Police transported Kolya to a hospital for a psychological evaluation. The Bluffton officer relayed to Delaware "*that Kolya told him his dad would penetrate his anus and that he never previously reported this to the authorities because his father would pay him off.*" Kolya further indicated "*it occurred when they lived in Illinois.*" [A28].

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[3]This occurred when Wheeler and Kolya moved from Illinois to Delaware in July, 2005.

B) The Forensic Search for Witness Tampering:

The many items seized from Mr. Wheeler's residence and office on October 22nd, 2013, included nineteen computers and digital devices. [A243]. At the May 23rd, 2014 evidentiary hearing, Sgt. Perna (the State's computer forensic examiner) acknowledged that the Superior Court search warrants contained zero limitations or restrictions, and agreed that "the items to be searched for and seized" were identical to the same list used in child pornography cases. [A192-93, 196-97, 218-220]. The Superior Court search warrant applications were authored by Investigator Robert Irwin, who regularly drafts such applications in child pornography investigations on behalf of the Attorney General's Office. [A191]. Nevertheless, Sgt. Perna wrote in his report and testified that consistent with his verbal marching orders from Irwin, "*the scope of the file search was exclusively for tampering with a witness and/or act of intimidation.*" [A189, 191-93].

One of the seized computers was an outdated iMac found inside a 2nd floor closet at Wheeler's residence, which Sgt. Perna quickly determined had not been used since September 2012, – ten months prior to the Wagner brothers having any communications with Wheeler. [A189, 193]. Sticking to the story that he was not searching for child pornography, yet fully acknowledging that his forensic software had the capability to restrict his forensic examination to word type files,

Sgt. Perna purposely viewed every type of file listed in the forensic file directory of the iMac, including the listing of all video and image files, conceding that such file types had nothing to do with the crimes of witness tampering. [A192, 193-95, 198]. Wheeler's forensic expert explained how easily Sgt. Perna could have filtered out image or video files during his forensic examination, when he was purportedly only conducting a forensic search for evidence of witness tampering. [A200-201].

Viewing the list of every single file contained in the parent directory of Wheeler's computer – an iMac that contained over a million files -- Sgt. Perna "stumbled upon" the titles of two video files labeled "GERBYS II" and "Hippodrome Boys." [A189-90, 206]. Sgt. Perna was admittedly unfamiliar with the nature of such videos, but Perna did not consider either file to be linked to "witness tampering." [A195]. Nevertheless, Sgt. Perna, turning in his swivel chair, asked a colleague about these file names, who told Perna that "GERBYS II" and "Hippodrome Boys" are related to child pornography. [A190, 195]. Shockingly, Delaware's first ever computer forensic search for evidence of witness tampering came to an abrupt end. [A190].

Even though the scope of the original Superior Court search warrants already allowed the State to examine any and all files on Wheeler's computers, the

State, playing out their hand, obtained a new Superior Court (Kent County) search warrant on October 29th, 2013, authorizing a forensic search of all seized computer devices for evidence of "child pornography" in violation of 11 Del. C. §1109(4). [A61-90, 195-96]. But for changing the alleged crime from "witness tampering" to "child pornography," Sgt. Perna conceded that the scope of the Kent County Superior Court search warrant was identical to the scope of the original New Castle County Superior Court search warrants issued October 22nd, 2013. [A196-197].

C) 10/7/14 Bench Trial:

Sgt. Perna, the State's only witness, was tasked with performing the forensic examination of the 19 seized computer devices from Wheeler's residence and office. None were deemed to reveal any evidence of "witness tampering." [A243]. Sgt. Perna admitted that this case was his first "at bat" since becoming an EnCase Certified Examiner in 2013, – the certification recognized as the gold standard among computer forensic examiners. [A198-99, 243].

Unlike Wheeler's case, child pornography cases typically involve the offender using the Internet and/or peer-to-peer software (e.g. Limewire) to deliberately download illegal content into a default or designated folder, leaving no question during a forensic examination that the unlawful video or image was

intentionally selected and downloaded by the offender. [A249, 252-53]. Wheeler had no peer-to-peer software. [A253]. Nor was it ever alleged that Wheeler used the Internet to seek out child pornography. Rather, Sgt. Perna testified that all the images of child pornography were forensically discovered inside the newsgroup "cache," which is a "system generated" repository. [A240-41, 243, 245-46].

Sgt. Perna explained that "Newsgroups," part of the "Usenet" network, are separate and distinct from the "world wide web" or "Internet." [A247]. Newsgroups allow one to exchange, browse, read, or download specific content from a particular newsgroup. [A237-38, 246-47]. Perna agreed that there is nothing illegal about newsgroups, totaling over 100,000 in number, covering a myriad of subject matter. [A247]. Sgt. Perna further explained that newsgroups are hosted by various and competing news service providers (e.g. "newsrazor"). These news service providers, akin to a "library," utilize massive servers to host the 100,000+ newsgroups, and typically charge a monthly flat fee in order to access their server. [A245-47]. By analogy, Sgt. Perna likened each individual newsgroup to a single "book" within the news service provider's massive library. [A247]. In turn, the data and content within each newsgroup are like "pages" within that book. [A247].

Because of the binary nature of the content comprising newsgroups, the

computer user (human) requires "newsreader software" on their computer, in order to view the data contained on the newsgroups, again via a news service provider. [A238, 246-47]. Wheeler's newsreader software was "Unison", a popular newsreader for Apple computer devices. [A246]. There is no fee paid by the user to a newsgroup, but the news service providers' monthly flat rate allows the user to select "x" number of newsgroups. [A247-48]. By merely checking a box on the user's newsreader software, the user "subscribes to" any of the 100,000+ newsgroups. [A247]. Via Unison, Wheeler had selected over 20 newsgroups. [A248].

With newsgroups, one has no control over the existing content within a particular newsgroup, as any and all content from each and every pre-selected newsgroup is automatically uploaded and cached on the user's computer, without ever appearing on one's computer screen. [A250, 252]. Sgt. Perna explained the unique nature in which newsgroup content is automatically uploaded and cached, merely by turning on one's newsreader software:

Q. *Fair to say that every time the user fires up his newsreader, that the news service is going to automatically upload all the newsgroups that you have checked?*
**A. *That's fair to say.***

Q. *[I]f I have subscribed, or selected 20 newsgroups, whenever I go into my Unison, whatever my newsreader is, I fire it up, I am going to get, whoosh, I am going to get all the data from all 20 newsgroups, correct?*

**A.** ***Ones that you checked.***

Q. *Whether or not I go and look at each of the 20 that day, correct, it's going to my cache?*
**A.** ***That database will be cached to your hard drive, and create those folders.***

[A248]. Sgt. Perna agreed that caching is system generated, as opposed to anything done by the human/user. [A246, 251-52].

Sgt. Perna testified that the 25 indicted images of child pornography were forensically discovered inside the newsgroup cache of Wheeler's iMac, last turned on, in September 2012. [A243, 245]. The forensic path for all illegal images was consistent, revealing the newsreader ("Unison") software used by Wheeler, followed by the name of the news service provider ("newrazor.net"), followed by the name of the newsgroup ("alt.fan.air"), followed by the actual image. [A245]. As to the 25 indicted images, one image cached on 9/2/2005; one image cached on 1/1/2010; and the balance of the images cached on specified dates in July and September 2009. [A246].

Sgt. Perna acknowledged that he had limited expertise pertaining to "Newsgroups," and had never before used "Newsreader" software. [A243]. Hence, until reviewing Defendant's Trial Exhibit #1 (the Unison website print-out), Sgt. Perna was unaware that the Unison newsreader's toolbar has a "download" button. [A248]. Sgt. Perna agreed that if any image or data from a

newsgroup is "downloaded" by the user, that image or content will appear in places other than the newsgroup cache, during the forensic examination. [A249]. Sgt. Perna acknowledged that there was no forensic evidence reflecting that Wheeler ever utilized his Unison toolbar to download any images or content from any newsgroups. [A252].

Unison, like all newsreader software, also enables the user to configure the settings, so as to override the massive amount of content on any newsgroup that is stored on the news service providers' servers. [A247]. For instance, one could override the news service provider's advertised 900 days of retention and limit the amount of data to the desired setting, – e.g., the last 24 hours, one week, 30 days, 6 months, etc. [A246-47]. There was no evidence offered to reflect that Wheeler ever engaged such settings on his Unison newsreader software.

Sgt. Perna testified that there is no forensic evidence that Wheeler ever viewed any of the images discovered in the cache, nor is there any forensic evidence that Wheeler ever even opened up and browsed the newsgroups that contained the images of child pornography. [A251-53]. Rather, by Wheeler merely checkmarking various newsgroups, any and all data (dating back as much as 900 days) from the 20 pre-selected newsgroups automatically cached whenever Wheeler's Unison newsreader was turned on, regardless of whether Wheeler

actually viewed a particular newsgroup. [A253].

The State did not present any evidence showing what data (other than images) was contained in the newsgroup cache, as the State never presented any sample content from the newsgroups which Wheeler had selected. Hence, there was no evidence to establish what percentage of the cached newsgroup data contained images versus text, articles, and discussion threads; or what percentage of the cached data contained sexual content; or what percentage of the sexual content contained unlawful images of child pornography versus adult images. Nor did the State present any evidence establishing whether Wheeler was even aware that newsgroup data automatically cached to his computer when he powered on his Unison software, or whether he had the wherewithal to access the newsgroup cache.

The Superior Court, relying upon a "constructive possession" theory, found Wheeler guilty of the indicted counts, in that he "*knew the location of the twenty-five images, had the ability to exercise dominion and control over the images, and intended to guide their destiny.*" Exhibit "B" at p. 25, 29.

## ARGUMENT

### I. THE SUPERIOR COURT ERRED IN DENYING WHEELER'S MOTION TO SUPPRESS.

#### QUESTION PRESENTED

Whether the Superior Court erred in denying Wheeler's Motion to Suppress? [This question was raised below per the filing of a Motion to Suppress, followed by additional pleadings and argument. [A91-111, 173, 208, 221].

#### SCOPE OF REVIEW

A trial court's denial of a Motion to Suppress is reviewed under an abuse of discretion standard; however where the facts are not in dispute, "*and only a constitutional claim of probable cause is at issue, this Court's review of the Superior Court's ruling is de novo.*" McKinney v. State, 107 A.3d 1045, 1047 (Del. 2014)(quoting State v. Holden, 60 A.3d 1110, 1113 (Del. 2013)).

#### MERITS OF ARGUMENT

There is no "Tower Hill Headmaster" exception to the 4th Amendment. In reviewing search warrant cases, "*courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.*" Illinois v. Gates, 462 U.S. 213, 239 (1983). Although a magistrate or judge's finding of probable cause in authorizing a search warrant is typically paid great deference by reviewing

courts, the deference to a lower court's finding of probable cause "*is not boundless.*" United States v. Leon, 468 U.S. 897, 914 (1984). Contrary to State v. Holden, 60 A.3d 1110 (Del. 2013), addressing what degree of deference is owed to the issuing judge/magistrate, this appeal has nothing to do with deference. Rather, and simply put, the Superior Court ignored basic and longstanding jurisprudence governing search warrants.

The four corners of any search warrant affidavit must provide the issuing judge/magistrate with "a substantial basis" to "conclude that a crime has been committed" and that "*there is a fair probability that contraband or evidence of a crime will be found in a particular place.*" Gates, 462 U.S. at 238-39; McKinney, 107 A.3d at 1047; Dorsey v. State, 761 A.2d 807, 811 (Del. 2000). See also 11 Del. C. §2306 . "*Bald conclusions, mere affirmations of belief, or suspicions are not sufficient to support a finding of probable cause.*" State v. Hicks, 147 P.3d 1076, 1087 (Kan. 2006). "*With respect to staleness, it is clear that 'probable cause must be based on current information, not conjecture, for stale information will not support a finding of probable cause.'*" Sisson v. State, 903 A.2d 288, 296 (Del. 2006)(quoting Pierson v. State, 338 A.2d 571, 573 (Del. 1975).

Because search warrants go to places (not people), there must also be a nexus between the items sought and the place to be searched. 11 Del. C. §2306;

Dorsey, 761 A.2d at 811-12; Hooks v. State, 416 A.2d 189, 203 (Del. 1980). "*The critical element in a reasonable search is not that the owner of the property is suspected of a crime, but that there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought.*" Zurcher v. Stanford Daily, 436 U.S. 547, 556 & n.6 (1978).

A) The search warrant affidavits failed to establish probable cause that Mr. Wheeler had committed the crimes of witness tampering.

The explicit purpose of the Superior Court issued search warrants was to locate evidence pertaining to the crimes of Tampering with a Witness, 11 Del. C. §1263(3), and Act of Intimidation of a Witness, 11 Del. C. §3532. Falling squarely in the "I know it when I see it"[4] category of crimes, the statutory elements for these offenses are the same, and require that someone "knowingly and with malice attempts to prevent" any witness or victim from reporting a crime. Given that demanding *mens rea* standard, the affidavits failed to establish probable cause that Mr. Wheeler committed such criminal wrongdoing.

Although the affidavits never identified the person(s) who Wheeler had "intimidated" or "tampered with," the choices are either the three Wagner brothers (Michael, Sam, Tom) , or Kolya Wheeler. Beginning with the Wagner brothers,

[4]Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)(Stewart, J., concurring)

Mr. Wheeler never responded to Michael Wagner's letter, consistent with Michael's expressed wishes, eliminating Michael. Sam Wagner's letter invited Wheeler to reply, which Wheeler did via his July 23rd, 2013 letter, -- Wheeler's one and only communication with Sam. Characterizing Wheeler's letter to Sam Wagner as a knowing and malicious criminal solicitation to "pay off" Sam seems as far-fetched as characterizing Sam Wagner's letter to Wheeler as "extortion." The remaining candidate, Tom Wagner, deliberately reached out to Mr. Wheeler, and requested a face-to-face meeting at Wheeler's residence, where Wheeler was apologetic and forthcoming. [A27-28].

The Wagner brothers sought out Mr. Wheeler, not vice versa. [A27]. Nowhere is it alleged within the four corners that either the Wagners or Wheeler ever once mentioned the word "police." Nor do the affidavits allege that Wheeler ever said or wrote anything threatening or intimidating to the Wagners. A plain reading of the affidavits' described interaction between Wheeler and the Wagners suggest that the parties may have been contemplating a civil resolution, but there is nothing "criminal" that prevents citizens from resolving matters through civil redress, or simply making amends through heartfelt apology and atonement.

As to Kolya Wheeler, the affidavits are silent as to whether the State attempted to contact Kolya to corroborate whether he had been molested, and if so,

whether he had been "paid off" by Wheeler, or any details as to when, where, and how Kolya was paid off. Without any corroboration, "the four corners" also reflect that at the time this statement was allegedly made by Kolya, he was drunk, despondent over a breakup with a girlfriend, had just caused damage to the interior of his own house, and was upset with Wheeler, who had called the police to take Kolya for a psychological evaluation. [A28]. Regardless, the affidavits do not allege that any witness tampering of Kolya occurred in Delaware or within 5 years to satisfy our statute of limitations. 11 Del. C. §204; 11 Del. C. § 205(b)(1).

In denying Wheeler's Motion to Suppress, the trial court wrote that "*[t]he affidavit contains numerous allegations that could support the crimes of Act of Intimidation of a Witness and Tampering With a Witness.*" Ex. "A" at p. 14. Seemingly trying to rescue the warrants, the trial court relied upon (i) Wheeler paying off Kolya[5]; (ii) Wheeler's reply letter to Sam; (iii) the telephone calls and e-mails between Wheeler and Tom Wagner, in scheduling a face-to-face meeting;[6] (iv) Wheeler "*attempting to influence Tom regarding his inappropriate (and illegal) behavior by claiming he was going to tell Kolya of his conduct and was*

[5]Above and beyond the lack of corroboration and credibility issues of Kolya's alleged third party statement, the affidavits do not allege any pay off occurred in recent history, or in Delaware, or involved the use of a computer or any digital device.

[6]There is zero suggestion in the affidavits that Tom Wagner characterized such communications as unpleasant, threatening or intimidating.

*contemplating suicide over the situation*";[7] (v) Wheeler telling Mrs. Wagner that "*Kolya's stories of men having anal sex with other men should be discounted because Kolya had a troubled past;*"[8] and (vi) Wheeler telling South Carolina police that Kolya suffered from Bipolar Disorder "*most likely worked against Kolya's credibility with those police.*"[9] Ex. "A" at p. 15.

In applying the "totality of the circumstances test" in probable cause determinations, a judicial officer must consider both the content of information possessed by the police and its degree of reliability. See Alabama v. White, 496 U.S. 325 (1990); Illinois v. Gates, 462 U.S. 213 (1983). To that end, courts have to assess the degree to which the information contained in the search warrant is corroborated by independent police investigation. McKinney, 107 A.3d 1045, 1048-49 (Del. 2014); State v. Holden, 60 A.3d 1110, 1114 (Del. 2013); LeGrande v. State, 947 A.2d 1103, 1108-09 (Del. 2008). This Court, in Dorsey v. State, 761

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[7]It is complete speculation to suggest that Wheeler was "playing" Tom Wagner. On its face, Wheeler's willingness to confess his sins perpetrated against the Wagner brothers to Kolya, is inconsistent with the prospect that Wheeler was paying off Kolya to keep him quiet.

[8]The affidavits state that Mrs. Wagner (not Wheeler) told Michael Wagner's wife that Kolya had a troubled past in Russia. We don't know whether Mrs. Wagner gathered such information from Wheeler or Kolya or both. However, the conversation about men having anal sex was between Kolya and Carissa Griffing (Michael's wife). [A27-28].

[9]Once again, the trial court misstates the affidavits, which offer zero information that Wheeler was even aware that Kolya ever told a Bluffton, South Carolina police officer that Wheeler had molested him.

A.2d 807, 811-12 (Del. 2000), articulated that probable cause must come from the four corners of the affidavits, as opposed to speculation and inferences gathered from outside the four corners of the affidavit.

Yet, the trial court determined that "the four corners" established that Wheeler, knowingly and with malice, engaged in witness tampering, even though no single person ever approached law enforcement alleging that he was the victim of witness tampering. The trial court failed to identify one single malicious written or oral statement consistent with witness tampering, perpetrated by Wheeler (e.g., "Sam, Tom – I will burn your parents' house down if you ever tell anyone"; "Kolya – call the cops and I'll make your life a living hell"). Moreover, the additional information (omitted from the search warrants) dispels any possible notion that Wheeler was engaged in witness tampering.

B) The State deliberately or recklessly omitted information from the affidavit that was material to the finding of probable cause by the issuing judge.

Rather than acknowledging that their game plan from the start was to find a path to Mr. Wheeler's computers to search for child pornography, the State insisted the investigation was solely about "witness tampering," clinging to the fiction that the affidavits showed "*a pattern in which [Wheeler] is alleged to have sexually abused minor boys and then, in order to keep those individuals from reporting sexual abuse, made an offer of payment or restitution.*" [A118, 227-28].

Yet, in obtaining search warrants designed to steer the Superior Court to believe that Mr. Wheeler had committed the crimes of witness intimidation/tampering, the State did not make the issuing judge aware of the following: (1) no one ever claimed they were victims of witness tampering; (2) none of the Wagner brothers ever mentioned to Wheeler they were contemplating contacting law enforcement; (3) a complete account of Mr. Wheeler's contrite July 2013 reply letter to Sam Wagner revealing a total absence of any malice or intent to intimidate Sam for confronting Wheeler; (4) an accurate account of Tom Wagner's emotional face-to-face meeting with Mr. Wheeler; (5) Wheeler, in his reply letter to Sam Wagner, volunteered he would tell both Kolya and Wagner's parents about the abuse he perpetrated against Michael and Sam Wagner years earlier; and (6) Michael Wagner's remarks to the State that Wagner's parents "*had some questions regarding Koyla's credibility.*" [A148, 154].

The centerpiece of the State's "witness tampering" investigation against Wheeler was Mr. Wheeler's July 23rd, 2013 reply letter to Sam Wagner's query, "*What role (if any) should you play in determining appropriate resolution to and restitution for the abuses you caused?*"[10] Mr. Wheeler's contrite reply letter read:

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[10]Both Sam Wagner's 7/20/13 letter and Wheeler's 7/23/12 reply letter were attached as Exhibits to the State's May 15th, 2014 Response to Wheeler's Superseding Motion to Suppress [A130-33].

*Sam:*

*I will not compound your pain by attempting to deny or in any way deflect responsibility for my actions 35 years ago. I did those things. I am the one responsible. ... I am profoundly sorry. Some things are unforgivable, so I don't expect forgiveness from any of you. Nevertheless, I ask for your forgiveness.*

*You may believe that I have been carefree as I have worn this "mask," as you put it, over the years. ... The truth is that I have carried inside of me a profound and loud dissonance, an ever-present reminder that some evil has been done and it cannot be undone. And I am responsible for it. ... None of that matters because your pain remains. And I am the cause of it. And I am truly, truly sorry for the pain that I have caused you.*

*You ask me what justice looks like for me. .... What I can do is take full responsibility for my actions. I can offer my sincerest apologies. I will not shy away from telling the truth to your parents, if you wish it. I have already asked my son to drive up from his home in the south to tell him the truth. .... My professional life is over. I'm wondering if there is anything positive I can do with the life that remains. ...*

*Regarding my compunction to make right the many wrongs that I have committed, perhaps this letter is evidence of at least a few steps in that direction as well. I'll wait to hear from you about further appropriate steps towards resolution and restitution.* [A133].

In addition to the July 2013 exchange of letters between Sam Wagner and Wheeler, the trial court and counsel were provided with transcripts of the State's 10/22/13 interview with Tom Wagner (A163-172) and their 10/18/13 interview with Michael Wagner (A134-162). Although the search warrant affidavits state that Tom Wagner indicated that Wheeler, during their face-to-face meeting, was apologetic and possibly suicidal, the affidavits failed to demonstrate that there was

any notion of witness tampering afoot. The Wagners never suggested to Wheeler that they were even contemplating contacting law enforcement, nor did the Wagners ever allege that they were victims of "witness tampering." Rather, it was the State who invented the crimes of witness tampering, as the means to obtain their free admission ticket into Wheeler's computers.

Because the four corners of the affidavits failed to provide the Superior Court with probable cause that evidence of alleged witness tampering/intimidation would be found on Mr. Wheeler's computers, it should be academic for this Court to even have to consider Franks v. Delaware, 438 U.S. 154 (1978). Nevertheless, a reverse-Franks claim (grounded in the same principle) challenges information that the State omits from the affidavit, either deliberately or with reckless disregard for the truth, that is material to the finding of probable cause. Sisson v. State, 903 A.2d 288, 300 (Del. 2006). In order to prevail, the defendant must establish by a preponderance of the evidence that the omitted information is such, "*that a reasonable magistrate would want to know*," in making a probable cause determination. Rivera v. State, 7 A.3d 961, 969 (Del. 2010). Stated differently, a reviewing court should "*reconstruct the affidavit with the newly added information, and then decide whether the 'corrected' affidavit would either establish – or undermine – the existence of probable cause*." Rivera, 7 A.3d at

969-70.

Logic dictates that the issuing judge must have been misled, or alternatively, sensed a "code red" request from the State, when presented with the search warrant applications alleging crimes of witness tampering perpetrated by Tower Hill's headmaster against the backdrop of rape. Perhaps the Superior Court judges (who authorized and upheld these search warrants) regard child molestation as such a serious offense that making a case for "witness tampering" just follows naturally, even if the four corners of the affidavits provide no basis that such wrongdoing was afoot here in Delaware during October 2013.[11] Regardless, a fair reading of both Wheeler's reply letter to Sam Wagner and the transcript reflecting Tom Wagner's account of his subsequent "sit down" with Wheeler, do not remotely suggest that Mr. Wheeler was engaged in the crimes of witness intimidation/tampering against the Wagner brothers.

The trial court, rejecting the notion that the State intentionally or recklessly omitted information when the search warrant applications were presented, noted that "*the omitted items may have made it less likely that probable cause existed, but would not have entirely vitiated the Issuing Judge's determinations regarding*

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[11] "*Sex with children is so disgusting to most of us that we may be too liberal in allowing searches when the Government investigates child pornography cases. The privacy of people's computers is too important to let it be eroded by sexual disgust.*" United States v. Gourde, 440 F.3d 1065, 1078 (9th Cir. 2006)(Kleinfeld, J., dissenting).

*probable cause.*" Ex. "A" at p. 21. However, the bigger hurdle for the Superior Court was finding a nexus connecting the alleged crimes of witness tampering to the "places" the trial court authorized to be searched.

C) The search warrant affidavits failed to establish a nexus that evidence of witness tampering would be found in "the items to be searched for and seized."

Assuming arguendo that the four corners of the affidavits reflect that probable cause existed that Mr. Wheeler had committed the crimes of witness tampering, what exactly is the evidence that the State was seeking? Unlike searching for bed sheet stains or hair fibers in a rape case, or stolen goods in a burglary case, or financial records in a financial crimes case, or drugs, cash and firearms in a drug dealing case, witness tampering isn't even a computer based crime by nature. *Compare generally* Neal v. State, 2005 WL 1074397, Del., ORDER (May 4, 2005)(defendant, in lock up, threatened his co-defendant by saying, "*If you said anything, I'm going to beat your ass. I can't wait until we get over to the Hill, because I'm going to fuck you up.*"); State v. Johnson, 2011 WL 4908637, Del. Super., Cooch, R.J. (October 5, 2011)(denying defendant's motion to suppress taped prison phone calls, pressuring witnesses to change their stories).

This Court, in Dorsey, *supra*, emphasized that courts cannot rescue a search warrant by drawing a nexus via speculation and inferences gathered outside the four corners of the affidavits. Dorsey v. State, 761 A.2d 807 (Del. 2000). In

Dorsey, Wilmington Police, investigating a homicide at Dorsey's residence where a tenant was found shot to death, obtained a search warrant for two vehicles belonging to Dorsey, after Dorsey refused to consent to a search of those vehicles. Id. at 808-09. This Court, reversing the Superior Court's denial of Dorsey's Motion to Suppress, reiterated that the information contained within the four corners of a search warrant affidavit, "*must demonstrate why it was objectively reasonable for the police to expect to find the items sought in those locations.*" Id. at 812. Employing that standard, this Court concluded that the four corners of the search warrant for Dorsey's vehicles provided "*no logical deductive basis for a neutral judicial determination that there was probable cause to believe that either bloody clothing or a hand gun would be found in Dorsey's vehicles.*" Id.

Even in cases where search warrants specifically seek evidence for "child pornography," courts have consistently ruled that no nexus exists to justify such a search, based solely upon the premise that persons who commit sexual offenses against children, are likely to collect child pornography. See United States v. Pavulak, 700 F.3d 651 (3d Cir. 2012)( no nexus to search computers, where convicted sex offender, under investigation by the Delaware State Police for failing to provide correct information as a sex offender, was working and living part-time at an office, where a co-worker had seen Pavulak accessing sexually

suggestive images of teenage children on office computers); Virgin Islands v. Johns, 654 F.3d 412 (3d Cir. 2011)( no nexus where 6th graders informed school officials and police that their teacher (Johns) had sexually assaulted them, and that Johns maintained spiral notebooks about his students, that he carried home each day); United States v. Zimmerman, 277 F.3d 426 (3d Cir. 2002)(no nexus where police obtained a search warrant to search the residence of a high school teacher, based upon several students alleging that Zimmerman had forced them to perform oral sex on him, touched their genitalia, and spoken with them about graphic sexual matters, and had shown them adult pornography on his home computers).

Perhaps familiar with that caselaw, the State decided their best play was to obtain search warrants for the crimes of "witness tampering," even though the only alleged written "witness tampering" communication by Wheeler was his contrite July 2013 letter to Sam Wagner, already in the State's possession. [A28]. Hence, the evidence sought was boilerplate, generic, and bereft of limitations such as relevant time period and file extension types: "e-mails and other electronically stored communications that may be stored on a computer hard drive," text messages, internet history, and any computer file. [A29]. After all, where else does a person maintain evidence of his witness tampering? Oh yeah, of course, -- his airplane.

Aside from Wheeler's single July 2013 letter to Sam, there were no other electronic communications with the Wagners, other than e-mails and phone calls between Tom Wagner and Wheeler, scheduling their meeting. Once again, the affidavits are devoid of any suggestion that the alleged "pay offs" to Kolya were written, or memorialized in any format, much less communicated via a computer or cell phone. Given that the alleged wrongdoing against Kolya occurred in Illinois, before July 2005, any sought evidence would, quintessentially, be "stale."

Nevertheless, the trial court ruled that "*the Issuing Judge properly determined that there was a nexus between the crimes purportedly committed and the evidence sought at Mr. Wheeler's home and office*," as the crimes "*arose out of communication between Mr. Wheeler and Sam, Tom, and Kolya*," that "*took place through text messages, cellular telephone calls, e-mail and written correspondence.*" Ex. "A" at 15-16. In seemingly bootstrap fashion, the trial court reasoned that Judge Rocanelli "*had a substantial basis for concluding that a fair probability existed that Mr. Wheeler used his home or office computers, notebooks, cellular phones and digital devices and that these devices could contain relevant information ... that could be retrieved through a forensic process, to the asserted crimes.*" Ex. "A" at 16.

D) The search warrants were constitutionally overbroad in scope.

The "sleight of hand" behind the State's successful efforts in obtaining search warrants for "witness tampering" (as their ticket to go fishing for child pornography) is that on one hand, the affidavits never identified the suspected computer/digital evidence of "witness tampering" that they sought to uncover, yet on the other hand, the search warrants allowed them to search anywhere and everywhere without limitations for "it". Even assuming the evidence sought was the July 2013 letter to Sam Wagner and/or e-mails with Tom, the Superior Court allowed the State to "seize the haystack to look for the needle." United States v. Hill, 459 F.3d 966, 975 (9th Cir. 2006).

"The purpose of requiring specificity in warrants is to avoid general exploratory searches, leaving little discretion to the officer executing the warrant." Fink v. State, 817 A.2d 781, 786 (Del. 2003)(quoting Randy J. Holland, The Delaware State Constitution: A Reference Guide, 37 (G. Allen Tarr, ed., 2002). In fact, the "general warrant" was the "*specific evil ... abhorred by the colonists.*" Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). Elaborating, the United States Supreme Court wrote, "*[T]he problem [posed by the general warrant] is not that of intrusion Per se* [sic], *but of a general, exploratory rummaging in a person's belongings.*" Andresen v. Maryland, 427 U.S. 463, 480 (1976)(quoting

Coolidge, 403 U.S. at 467). Hence, the 4th Amendment's requirement that a search warrant provide a particularized description of the things to be seized is "not an inconvenience to be somehow 'weighed' against the claims of police efficiency." United States v. U.S. Dist. Court for E. Dist. of Mich, S. Div., 407 U.S. 297, 315 (1972)(quoting Coolidge, 403 U.S. at 481). In other words, "*[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant.*" Marron v. United States, 275 U.S. 192, 196 (1927).

The Fourth Amendment explicitly protects "papers" from unreasonable search and seizures. Our nation's framers believed that "papers are often the dearest property a man can have." Entick v. Carrington, 95 Eng. Rep. 807, 817-18 (C.P. 1765).[12] Notwithstanding that "*the ultimate touchstone of the Fourth Amendment is reasonableness*," Ohio v. Robinette, 519 U.S. 33, 39 (1996)(quoting Florida v. Jimeno, 500 U.S. 248, 250 (1991)), the Superior Court's authorized extensive laundry list of "items to be searched for and seized" can best be described as "The Bridge to Everywhere."

Astonishingly, the search warrants' wide open authorization to both seize

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[12]The United States Supreme Court, to this day, regards the Entick decision as a monument of freedom, "'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law' with regard to search and seizure." United States v. Jones, __ U.S. __, 132 S.Ct. 945, 949 (2012)(quoting Brower v. County of Inyo, 489 U.S. 593, 596 (1989)

and forensically examine Wheeler's entire digital universe failed to set any restrictions as to the relevant time period (e.g., July - Oct 2013) or types of digital files (e.g., letters or e-mails between Wheeler and the Wagners), and is made worse when considering the State was already in possession of Sam Wagner's letter to Wheeler and Wheeler's reply, along with the FedEx envelope. At least in Fink, the search warrant sought "client files .... and the personal banking records of Fink," in which this Court concluded, "*[t]here is no question about what the searcher should have been seeking or that there were reasonable limitations inherent in the scope of the search.*" Fink, 817 A.2d 781, 786 (Del. 2003).

The trial court's 22 page decision denying Wheeler's Motion to Suppress, sidestepped the issue of whether the search warrants were constitutionally overbroad in scope, despite Wheeler repeatedly raising this "stand alone" issue. [A107, 180, 214, 222, 225-6]. Rather, the trial court simply addressed whether Sgt. Perna exceeded the fictional scope of his verbal marching orders from Investigator Irwin. In this appeal, Wheeler does not assert that Sgt. Perna's initial forensic examination exceeded the scope of the search warrants, because the scope was boundless at the time the initial search warrants were authorized.

Upholding the original search warrants that permitted the State to forensically examine any and all of Wheeler's computers (including the iMac last

used in September 2012)[13] without any search restrictions, the trial court wrote, "*[t]he reasonable inference in today's 'high tech' society is that Mr. Wheeler used a computer and not a typewriter to compose the written communications.*" Ex. "A" at 16. The trial court's open-ended view of the Fourth Amendment and Art. I, §6 of our State Constitution, should raise significant privacy concerns for every Delaware citizen, who in effect, now risk being subject to a technological "general warrant" for their computers and digital devices, whenever Delaware law enforcement, in search of a single scrap of digital information, can access our medical history, financial status, political and religious affiliations, employment history, sexual orientation, consumer habits, and a host of other data.

As the Second Circuit Court of Appeals articulated in United States v. Galpin, 720 F.3d 436 (2d Cir. 2013):

> The potential for privacy violations occasioned by an unbridled, exploratory search of a hard drive is enormous. This threat is compounded by the nature of digital storage. Where a warrant authorizes the search of a residence, the physical dimensions of the evidence sought will naturally impose limitations on where an officer may pry: an officer could not properly look for a stolen flat-screen television by rummaging through the suspect's medicine cabinet, nor search for false tax documents by viewing the suspect's home video collection. .... Once the government has obtained authorization to search the hard drive, the government may claim that the contents of every file it chose to open were in plain view and, therefore,

[13]There certainly could not be any logical, deductive basis for Sgt. Perna to believe that evidence of witness tampering would be found on a computer that he had determined hadn't even been turned on in the ten months prior to the alleged crimes, yet his forensic search proceeded.

> admissible even if they implicate the defendant in a crime not contemplated by the warrant. There is, thus, "a serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant."

Galpin, 720 F.3d at 446-47 (quoting United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1176 (9th Cir. 2010)(internal citations omitted)). Emphasizing those same sentiments in ruling that police may not rummage through cell phones incident to arresting drug dealers, the Supreme Court articulated that such searches, without a warrant, "*would typically expose to the government far more than the most exhaustive search of a house.*" Riley v. California, 573 U.S. __, 134 S.Ct. 2473, 2491 (2014).

Other courts issuing search warrants have quickly adapted to our "high tech society" by setting "ex ante" search restrictions and conditions related to applications to seize and examine computers and digital devices, addressed at length by the Vermont Supreme Court in In re Appeal of Application for Search Warrant, 71 A.3d 1158 (Vt. 2012). In that Vermont case, Burlington Police, investigating an identity theft/credit card fraud case, narrowed their focus to a residence matching the IP address of the person who applied for the credit card. Id. at 1160-61. Like our case, the search warrant application in Vermont used boilerplate language allowing them to search "*any computers or electronic media, including hard disks ... compact disks ... cell phones or mobile devices ... and*

*removable storage devices such as thumb drives.*" Id. However, the judicial officer reviewing the application imposed ten conditions/restrictions,[14] as opposed to blindly "rubber stamping" the detective's application. Id. at 1162-63. The State of Vermont then sought an extraordinary writ, asking their Supreme Court to undo the ten search conditions. Id. at 1163. The Vermont Supreme Court denied the petition, emphasizing the need to guard against "*general warrants*" and "*ensuring the particularity of a search.*" Id. at 1170 ("*Even in traditional contexts, a judicial officer may restrict a search to only a portion of what was requested - a room rather than an entire house, or boxes with certain labels rather than an entire warehouse.*"). See also United States v. Otero, 563 F.3d 1127, 1132-33 (10th Cir. 2009) ("particularity requirement [is] that much more important" for computer searches, concluding that the search warrant failed to limit scope to relevant dates and crimes alleged).

Given the affidavits' unique proposition that evidence of witness tampering would be found somewhere within Wheeler's digital universe, the Superior Court should have, at the very least, required that the State's warrant application be "*carefully tailored to its justifications.*" Maryland v. Garrison, 480 U.S. 79, 84

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[14]These conditions were similar to those used in the litigation surrounding the investigation of Major League baseball players suspected of steroid use in United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162 (9th Cir. 2010).

(1987). It is disingenuous for the State to maintain that the authorized search warrants – virtual copies of an off-the-shelf search warrant for child pornography – were "carefully tailored" to the justifications enumerated in the four corners of the affidavits. Clearly, the "object" of the October 22nd search warrants was undefined, phantom evidence of "witness tampering;" yet the Superior Court authorized scope provided the State with an unfettered, wide-ranging exploration of Wheeler's computers and property, rendering the Fourth Amendment irrelevant.

Even assuming there was probable cause that Wheeler was engaged in witness tampering and probable cause that evidence would be found on his computers, the Superior Court could have set reasonable restrictions and conditions. The trial court erred as a matter of law in denying Wheeler's Motion to Suppress the Superior Court search warrants issued on October 22, 2013. All evidence seized and recovered thereafter by the State represents fruit of the poisonous tree.

## II. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT WHEELER FOR DEALING IN CHILD PORNOGRAPHY ABSENT EVIDENCE THAT WHEELER WAS AWARE OF THE IMAGES' EXISTENCE IN HIS NEWSGROUP CACHE.

### QUESTION PRESENTED

Whether the Superior Court erred in denying Wheeler's Motion for Judgment of Acquittal? [This question was raised below per the filing of a written Motion for Judgment of Acquittal and subsequent argument. [A256, 271].

### SCOPE OF REVIEW

The scope of review following a trial court's denial of a Motion for Judgment of Acquittal "*is de novo and the standard of review is whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt of all the elements of the crime.*" Brown v. State, 967 A.2d 1250, 1252 (Del. 2009).

### MERITS OF ARGUMENT

The Indictment's twenty-five (25) identical counts, in violation of §1109(4), alleged that Wheeler "*on or about the 22nd day of October, 2013, in the County of New Castle, did intentionally compile, receive, exchange, disseminate, or otherwise possess an image, file, or other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act.*" [A10-18].

The trial record establishes that any and all data from 20+ newsgroups (to include articles, discussion threads, photos, etc.) automatically cached on Mr. Wheeler's computer, merely by Wheeler activating his newsreader software. Sgt. Perna, the State's forensic expert, conceded that no forensic evidence existed to prove that Wheeler, even once, viewed a single image of child pornography, or that Wheeler ever viewed or accessed the newsgroups that contained the images of child pornography. [A251-53]. Sgt. Perna also conceded that there was no forensic evidence suggesting that Wheeler, even once, utilized Unison's "download" button to deliberately download an image or any newsgroup data onto his computer for future access. [A252].

The record is devoid of any evidence to establish that Wheeler (who is not a computer forensic expert) had the wherewithal to access the newsgroup cache. The most recent image of child pornography cached on 1/1/2010. Even assuming Wheeler's Unison settings allowed for the maximum 900 days of data retention, the last time Wheeler could have clicked on that image would have been sometime in June 2012, assuming Wheeler turned on Unison, opened up that newsgroup, and read page for page for 900 days, back to 1/1/2010. [A251].

In the trial court's verdict, Judge Davis did not find that Wheeler ever viewed any images of child pornography, and agreed that "viewing" child

pornography, by itself, is not covered by 11 Del. C. §1109(4), stating "[*t*]*o the extent that the Court finds that Mr. Wheeler only viewed child pornography ...* , the Court must grant Mr. Wheeler's request for relief under Criminal Rule 29."[15] Ex. "B" at p. 24. Nevertheless, the trial court found that there was sufficient evidence to support a case of "constructive possession." Exhibit "B" at p. 25, 29.

In rendering his verdict, Judge Davis relied upon People v. Kent, 970 N.E.2d 833 (N.Y. 2010). Wheeler agrees that Kent provides a helpful legal framework, when analyzing whether one knowingly possessed cached images. In Kent, a college professor's hard drive was found to contain child pornography in both the allocated and unallocated spaces of his hard drive. Id. at 836. In the professor's allocated space, which includes "saved items and items sent to the 'recycle bin,'" the police forensic expert found images of child pornography in the Internet "cache", which "contains images or portions of a Web page that are automatically stored when that page is visited and displayed on the computer screen." Id. In the professor's unallocated space, "which contains material deleted from the allocated space," the police found a video and over 130 images of child pornography that "had been downloaded and stored in the allocated space of

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[15]Other courts agree that "viewing" child pornography, without more, is insufficient to establish that a defendant "possessed" child pornography. See State v. Barger, 247 P.3d 309 (Or. 2011); Worden v. State, 213 P.3d 144, 147-48 (Alaska Ct. App. 2009).

defendant's computer" before being deleted. Id.

Regarding the images found in the Internet cache, New York's highest court ruled that there was insufficient evidence to establish that the professor knowingly possessed those images without "*evidence that defendant downloaded, saved, printed or otherwise manipulated or controlled the image while it was on his screen.*" Id. at 841. The court stated, "[*t*]*his is necessarily so because a defendant cannot knowingly acquire or possess that which he or she does not know exists.*" Id. at 840. However, as to the video and images found in the unallocated space, the court ruled that the evidence was sufficient because "*at some point defendant downloaded and/or saved the video and images, thereby committing them to the allocated space of his computer, prior to deleting them.*" Id. at 841-42.

Given the Superior Court's reliance on Kent, logic dictates that Wheeler should have been acquitted. Unlike the Internet cache where websites actually appear on the user's screen, the newsgroup cache is a different animal, where the newsgroup data systematically and automatically uploads to one's cache, merely by turning on the software, without the user even accessing the newsgroup, much less the data and content. [A248]. Even assuming that Wheeler did view the unlawful images, Sgt. Perna agreed that there was no forensic proof that Wheeler ever intentionally downloaded the images onto his hard drive. [A252]. The

State's evidence never established that Wheeler exercised "dominion and control" over the images in his newsgroup cache, much less knew they were there.

Nevertheless, the trial court relied upon other evidence in attempting to connect Wheeler to the images discovered in the iMac newsgroup cache, to include evidence that the "NetShred X" program had been previously activated on Wheeler's laptop located in the office of Wheeler's residence, when the authorities executed the search warrants. [A241-42, 244]. Judge Davis stated that "*the reasonable inference here is that Mr. Wheeler activated NetShred X because he had child pornography on his computer and he tried to remove it before the State could forensically examine the computer.*" Ex. "B" at p. 29.[16]

It appears the trial court was confused about the testimony. Sgt. Perna correctly explained that "NetShred X" is software that only deletes Internet browser history, cookies, and all previous Internet activity. [A238]. Conversely, "ShredIt X" is the software one would use to delete all other computer content to include newsgroup data. [A239]. Above and beyond acknowledging that such software is legal, Perna testified that there was no child pornography found on this laptop. [A244]. Sgt. Perna did state that his examination of this laptop revealed

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[16]Per note 119 of the trial court's verdict, this alleged "consciousness of guilt" suggests that such evidence was the cornerstone of the trial court's constructive possession finding.

that Wheeler had visited various adult websites and chatrooms, which Sgt. Perna also agreed were perfectly lawful. [A244]. The fact that Perna was able to retrieve website history on the laptop, yet found nothing illegal, makes the "NetShred It" evidence irrelevant to "constructive possession" and refutes the trial court's assertion that "Mr. Wheeler developed a pattern of Internet browsing for child pornography." Ex. "B" at 27.

The trial court also relied upon Sgt. Perna's finding over 2000 images of child pornography on three of the nineteen seized computer devices, concluding that the sheer volume of unlawful images reasonably infers that Wheeler knowingly possessed the child pornography. Ex. "B" at p. 28.[17] It is misleading, however, to suggest that the number of images supports the inference that Wheeler intentionally possessed child pornography. The same newsgroup cache for each device also contained thousands of other data (articles, blogs, photos), possibly dating back 900 days, that systematically cached when Wheeler activated his Unison newsreader software. The State never presented a sample from any newsgroup that would provide the fact-finder with a barometer to establish what

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[17]Two images (not indicted) were found on a PowerBook, in which the images automatically cached in July 2005. [A243-44]. A loose hard drive allegedly contained several images (not indicted) that also cached at an unknown point in time. [A244]. The iMac, found in the closet of the piano room, contained the large number of cached images, to include the 25 indicted ones. [A243].

percentage of the cached data was illegal.

The State's case was based upon speculation that Wheeler necessarily knew the newsgroups he checkmarked/selected via his newsreader, contained child pornography. As Sgt. Perna testified, there is nothing illegal about newsgroups. [A247]. Moreover, subscribing to a newsgroup is protected speech under the First Amendment. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245-46 (2002)(internal citation omitted)("*Congress may pass valid laws to protect children from abuse, and it has. The prospect of crime, however, by itself does not justify laws suppressing protected speech.*"); Reno v. ACLU, 521 U.S. 844, 851 (1997)(specifically protecting newsgroups in ruling that provisions of a federal statute violated the First Amendment.) Although recognizing the Government's interest in protecting children, the Reno court asserted, "*But that interest does not justify an unnecessarily broad suppression of speech addressed to adults.*" Reno at 875.

Establishing that Wheeler exercised "dominion and control" over the twenty-five indicted images should require some proof that Wheeler, at a minimum, at least knew the images existed. Compare United States v. Romm, 455 F.3d 990 (9th Cir. 2006), *cert. denied*, 549 U.S. 1150 (2007), where the offender admittedly used the Internet to seek out images of pornography, which he enlarged

on his computer screen, viewed them for five minutes and sometimes masturbated, before deleting the images. Romm, at 993-95. Even after the images went to Romm's Internet cache, the images could be retrieved, copied, printed, or e-mailed to others. Id. at 998-99.

This trial record lacks sufficient evidence to establish that Wheeler intentionally or knowing possessed the images that were found in the newsgroup cache of his iMac. No evidence was presented that Wheeler ever viewed the images, viewed the newsgroups that contained the images, deliberately downloaded or deleted them, or knew the images even existed in the first place.

## CONCLUSION

For the reasons and upon the authorities set forth herein, it is respectfully requested that Mr. Wheeler's convictions and sentence be vacated, and the case remanded to Superior Court for a dismissal.

Respectfully submitted,

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