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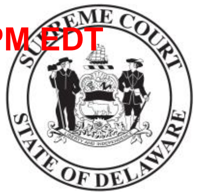

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEFFREY PHILLIPS,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 511, 2015
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF

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DATED: April 19, 2016

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NATURE AND STAGE OF THE PROCEEDINGS

The Defendant was arrested in July 2012 and later charged by indictment with the offenses of murder first degree (2 counts), gang participation, conspiracy first degree, assault second degree, reckless endangering first degree, riot, conspiracy second degree, assault third degree, and four firearm offenses. (A1, 33-61). He was found guilty of the charged offenses, but on one murder count, he was found guilty of the included offense of manslaughter, and on the riot offense, he was found guilty of the included offense of disorderly conduct, but acquitted of conspiracy second degree and assault third degree. (A1).

A penalty hearing was conducted after trial, but the jury recommended, and the Superior Court imposed, life imprisonment. Exhibit A attached to Opening Brief.

A notice of appeal was docketed for the Defendant. This is the Defendant's Opening Brief on appeal.

SUMMARY OF THE ARGUMENTS

1. The trial court abused its discretion when it denied Jeffrey Phillips' motions for mistrial following the state's failure to disclose impeachment materials which caused the admission of prejudicial evidence.

2. The trial court abused its discretion by denying the Defendant's motion for relief from the protective orders which prohibited the defendant and his counsel from discussing the content of witness statements, including co-defendants' statements, before trial.

3. The trial court abused its discretion by denying the defendant's motion for severance.

4. There was insufficient evidence that Jeffrey Phillips was guilty of gang participation.

5. The gang participation jury instructions read to the jury undermined the members' ability to return a verdict.

STATEMENT OF FACTS

At approximately 2:30 p.m. on July 8, 2012, Wilmington Police were called to Eden Park, which is located in the 700 block of New Castle Avenue in response to a report of shots fired and subjects struck. Two victims were located at Eden Park – Herman Curry and Alexander Kamara. Curry was the organizer of the soccer tournament taking place at Eden Park that day, and Kamara was a participant. A short while later, a third victim was located nearby in a vehicle that had just been in an accident at the intersection of C Street and New Castle Avenue. There, police located Sheldon Ogle who was suffering from gunshot wounds that he would ultimately succumb to. Located in the same vehicle were two handguns, a nine millimeter semi-automatic and a .40 caliber semi-automatic. Several blocks from the scene of the accident at C Street and New Castle Avenue, police located Otis Phillips and Jeffrey Phillips in the backyard of a residence. .[1] Jeffrey Phillips had sustained a gunshot wound to his left leg. Jeffrey Phillips was taken to the Wilmington Hospital where he was treated for his injury. Following that, he was interviewed by detectives with the Wilmington Police Department. He was then arrested and charged with offenses related to his participation in the shoot-out at Eden Park. (A-31).

[1] The codefendants are not related. Because they coincidentally have the same last name, they will be referred to by their first names.

Wilmington Police began developing evidence that the gun battle at Eden Park was related to a rivalry between two gangs, the Sure Shots and a Jamaican gang known as Gaza. Specifically, the police believed that the Eden Park shooting was in part retaliation for a homicide that had occurred the night before at a Gaza party where a member of the Sure Shots, Kirt Williams, was shot and killed. Police also believe that Herman Curry was killed because he supposedly witnessed Otis Phillips shoot and kill Christopher Palmer in 2008. Ultimately, sixteen individuals were charged in a fifty-four count indictment alleging various criminal acts committed by the Sure Shots, including the 2012 Eden Park homicides, the 2008 homicide of Christopher Palmer and Gang Participation. The State sought the death penalty against Jeffrey Phillips for his role in the Curry and Kamara homicides. (A-33).

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED JEFFREY PHILLIPS' MOTIONS FOR MISTRIAL FOLLOWING THE STATE'S FAILURE TO DISCLOSE IMPEACHMENT MATERIALS WHICH CAUSED THE ADMISSION OF PREJUDICIAL EVIDENCE.

Question Presented

Whether the trial court committed error in denying defendant, Jeffrey Phillips' motions for mistrial following the State's failure to disclose exculpatory information pursuant to *Brady v. Maryland*, and the resulting introduction of highly prejudicial evidence. The question was preserved by defendant's motions for mistrial. (A-138,140).

Standard and Scope of Review

This Court reviews a trial judge's denial of a motion for a mistrial for abuse of discretion. *Flowers v. State*, 858 A.2d 328, 332 (Del. 2004). "Questions of law and constitutional claims, such as claims that the State failed to disclose exculpatory evidence, are reviewed *de novo*." *Wright v. State*, 91 A.3d 972, 982 (Del. 2014).

Merits of Argument

On August 6, 2012, counsel for Jeffrey Phillips served on the State a discovery letter which requested, among other things, production of "[a]ll information and materials in the possession of the State which fail within the ambit of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny." (A-64). On

October 21, 2014, the State informed defense counsel that Maria DuBois had entered into a witness protection agreement with the State. At this point, the defendant requested that the Court require the State to identify any other witnesses that had entered into witness protection agreements with the State as well as an accounting of the financial benefits that they had received pursuant to those agreements. (D.I. 119, 10/21/14, pp.111-128). Over the next several days, the State provided the defendants with the witness protection agreements of four co-defendants, as well as an accounting of the financial benefits paid to or on behalf of these State witnesses. Three of these witnesses testified. The witness protection agreements were written agreements that provided financial benefits in exchange for the witnesses' cooperation in the prosecution of various Sure Shot defendants, including Jeffrey Phillips. The agreements required the witnesses "to testify truthfully if called as a witness" at trial, and gave the Chief Deputy Attorney General of the Department of Justice "the sole authority to finally determine whether a material breach of this agreement by… the witness [had] occurred and the appropriate remedies and sanctions." (A-78-79).

It was clear to counsel and Court that the witness protection agreement evidence had the potential to cause substantial prejudice. First, their existence implied that the witness was in danger from any or all of the co-defendants in

the case to such an extent that the State was willing to expend thousands of dollars to protect the witness. On the other hand, the very fact that the witnesses were receiving financial benefits as a result of their decision to testify against defendants, had the potential to demonstrate substantial bias on behalf of each testifying co-defendant/witness. (D.I. 119, 10/21/14, pp.116-119). Prior to the testimony of Maria DuBois, the Court ruled that the State could not ask any witness about witness protection; however, the defense could cross-examine the witness about the financial benefits received as a result being in witness protection. The Court warned the State that they may wish to discuss this issue with their witnesses in advance of testifying, and that if the State raised the issue in its case-in-chief they did so at their "own peril". (D.I. 119, 10/21/14, pp.119,126). Counsel for Jeffrey Phillips elected not to raise the issue of witness protection during the cross-examination of Maria DuBois or Michael Young, because neither of these witnesses testified in a manner that inculpated Jeffrey Phillips.

This calculus changed, however, when the State's most significant witness, Kelmar Allen, took the stand. It was Allen's testimony that would be used by the State to establish that Jeffrey Phillips was both a member of the Sure Shots, was a willing participant in the shootout that took place in Eden Park on July 8, 2012, and had received a loaded .40 caliber semi-automatic

handgun from the leader of the Sure Shots, Seon Phillips (no relation to Jeffrey Phillips) just prior to going to Eden Park on July 8, 2012. Prior to trial, Kelmar Allen had pleaded guilty to Gang Participation. (A-65-67). The sentence imposed by the trial judge was a period of incarceration suspended for time served (119 days) followed by level III probation.[2]

Kelmar Allen was called by the State to the witness stand on October 24, 2014. After a few foundational questions, the State placed Allen's plea agreement in front of him and asked him the following question:

> Q: Now, without again looking at the document, what, if any, benefits did the State promise you in exchange for your plea?
> A: Just that, just that, like, witness protection.

(A-137).

The parties immediately went to sidebar where the State informed the Court, "I've instructed this witness multiple times that I was not allowed to ask about witness protection…[s]o I don't know why he mentioned that." *Id.* Counsel for Jeffrey Phillips initially asked for a curative instruction, but then requested a mistrial due to the prejudicial statements made by Kelmar Allen concerning the fact that he was in witness protection. (A-137-138).

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[2] The State also failed to apprise the defense that Kelmar Allen had violated his probation while in witness protection by staying out past curfew. The State further failed to reveal to the defense that an administrative search by probation officers of Allen's witness protection residence revealed a pellet gun, empty bags of heroin and a marijuana pipe. (A-68).

The Court denied counsels' motion for mistrial and instead chose to give a cautionary instruction concerning the evidence the jury had just heard. (A-138). The Court then permitted counsel to examine Kelmar Allen outside the presence of the jury. During that examination, Allen revealed that he was in witness protection as a result of his fear of "everything that's going on", but not as a result of threats made by Jeffrey Phillips. (A-139). Concerning what the State had told Kelmar Allen to say about witness protection, the following exchange occurred upon questioning by counsel for Jeffrey Phillips:

> Q: Mr. Allen, the prosecutors met with you before you testified, correct?
> A: Yeah.
> Q: And they instructed you not to talk about the witness protection, correct?
> A: No, they didn't tell me not to talk about a witness protection – they didn't instruct me to talk about a witness protection.
> Q: Not to talk about it?
> A: No. I said they didn't instruct me. They just told me to tell the truth.
> Q: There's never any discussion with you and the prosecutors about talking – not talking about witness protection?
> A: No.

(A-139).

The State then asked Allen questions concerning prior discussions with him about witness protection:

> Q: Did the State, did I today explain to you about witness protection?
> A: Yes.
> Q: Do you recall, do you recall me telling you that I wasn't going to ask you about witness protection?

A: Yes.

Q: Did I explain to you that defense counsel would then ask you about witness protection?

A: Yes.

Q: Then did I explain to you that I would then be able to stand up and ask you more?

A: After more, yeah.

Q: So what was your understanding with what I would ask you about witness protection?

A: Can you repeat that question to me?

Q: Yeah. What did you understand me saying when I said I wasn't going to ask you about witness protection and that only they could?

A: I didn't even really understand that.

(A-140).

Counsel for Jeffrey Phillips then renewed his motion for mistrial, highlighting the fact that the State had not made it clear to their witness that evidence concerning witness protection was not to be discussed unless specifically asked by the defense. Defendants also argued that a curative instruction was insufficient to undo the damage done by such powerful evidence in this case. The Court denied the renewed motions for mistrial. (A-141). Counsel for Jeffrey Phillips then informed the Court of their intent to explore the issue of payments made to Kelmar Allen pursuant to the witness protection agreement, which counsel for Otis Phillips objected to. Each party sought severance and a mistrial at this point, which applications were likewise denied by the Court. (A-141-42, 144-50).

In essence, the State benefited from its own failure to produce discovery

that the defendants were clearly entitled to. Had the witness protection agreements been produced pre-trial, the Court and counsel could have sorted out the parameters for admission of the evidence and witnesses could have been instructed in clear and certain terms that this was an area that they should not discuss unless asked by the defense. Instead, the State withheld the evidence, gave poor instructions to its witness, failed to ascertain that he understood those instructions and asked a bad question that arguably called for the response given by the witness. This had the effect of putting in front of the jury evidence that Kelmar Allen was in witness protection, and left for the jury to speculate as to the reason why. The State not only violated the rules of discovery, but benefited from that violation, to the substantial prejudice of Jeffrey Phillips.

Effective cross-examination is essential to a defendant's right to a fair trial. *Davis v. Alaska*, 415 U.S. 308, 320 (1974); *Fensterer v. State*, 493 A.2d 959 (Del. 1985). It is the "principle means by which the believability of a witness and the truth of his testimony are tested." *Fensterer*, 493 A.2d at 963.

> An important form of impeachment during cross-examination is to expose a witness' bias, prejudices or motives. 'Cross-examination on bias is an essential element of the right of an accused under the Delaware Constitution to meet the witnesses in their examination,' which makes it an essential element of the constitutional right of confrontation. Moreover, 'evidence of bias is always admissible to impeach a witness'. 'Evidence [that] the defense can use to impeach a prosecution witness by showing bias or interest … falls within the *Brady* rule. It falls within *Brady* because 'such evidence is favorable to an

> accused' so that, if disclosed and used effectively, it might make the difference between conviction and acquittal.'' This is because 'a jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. Indeed, it is upon such subtle factors as the possible interest of the witness in testing falsely that a defendant's life or liberty may depend.'

Jackson v. State, 770 A.2d 506, 515 (Del. 2001) (internal citations omitted).

In this case, the state withheld important and discoverable information that would have demonstrated bias on the part of cooperating co-defendant witness, Kelmar Allen. Allen had received (and continued to receive) nearly $25,000.00 in benefits from the State while in witness protection. (A-151-52). The *quid pro quo* for receiving those benefits was Allen's agreement to testify against Jeffrey Phillips in his capital murder trial. Clearly, this information was discoverable under *Brady v. Maryland*. *See, e.g., State v. Bracy*, 703 P.2d 464, 472 (Ariz. Supr. 1985) ("As to the [witness protection] benefits Arnold Merrill received, we find that they were exculpatory in nature and were never disclosed to defendant.") Rather than produce the agreements and the amounts paid to each of the cooperating co-defendants in a timely fashion, the State instead revealed their existence during trial. As a direct result of this failure to disclose, highly prejudicial evidence was placed in front of the jury.

The trial court warned the State that they raise the issue of witness protection in their case in chief "at [their] own peril". The State compounded

their *Brady* violation by either failing to instruct Kelmar Allen not to testify about witness protection unless asked by the defense, or (in the light most favorable to the State) inadequately explaining to him that he should not discuss this evidence unless first asked by the defense.

Disclosure of the fact that a State witness is participating in witness protection is a matter that must be handled delicately. *See United States v. Parton*, 552 F.2d 621, 644-45 (C.A. 5 1977); *United States v. Ciampaglia*, 628 F.2d 632, 640 (C.A. 1 1980); *United States v. Vastola*, 899 F.2d 211, 235 (C.A. 3 1990). To appreciate the power of this evidence, the Court should consider the context of this case. The State was prosecuting Otis Phillips and Jeffrey Phillips for their joint elimination of a witness to a homicide, Herman Curry. Furthermore, the State's argument in this case was that Jeffrey Phillips was firing into the crowd of other attendees at the soccer game in order to intimidate them. As a result, any evidence of the need to put their most important witness, Kelmar Allen, in witness protection sent the message to the jury that the State was willing to pay large sums of money to insure his safety from Jeffrey Phillips who would seek to intimidate and eliminate him like Otis Phillips eliminated Herman Curry. This *innuendo* stood in sharp contrast to the fact that there was not one shred of evidence that Jeffrey Phillips had done anything to warrant witness protection for any of the State's witnesses.

Courts have held that a witness's testimony concerning threats the witness has received, when no connection is shown between the defendant and the threats, can amount to an "evidential harpoon." *Dudley v. Duckworth*, 854 F.2d 967, 970 (C.A. 7 1988) (quoting *Keyser v. State*, 312 N.E.2d 922, 924 (Ind. App. 1974). "Such evidence becomes so prejudicial to a defendant that no jury could be expected to apply it solely to the question of the credibility of the witness before it and to substantial prejudice of the defendant." *Id.* (quoting *Keyser*, 312 N.E.2d at 924).

In this case, the State introduced the evidence (whether intentionally or recklessly) of witness protection after being warned by the trial judge not to. By its very nature, such evidence implies that the defendant is the reason that witness protection was necessitated. In the context of a case where the intimidation and elimination of State witnesses was the very theme upon which the prosecution built their case for conviction and penalty, the insinuation became the proverbial "evidential harpoon" which could not be cured by a simple instruction from the Court.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING THE DEFENDANT'S MOTION FOR RELIEF FROM THE PROTECTIVE ORDERS WHICH PROHIBITED THE DEFENDANT AND HIS COUNSEL FROM DISCUSSING THE CONTENT OF WITNESS STATEMENTS, INCLUDING CO-DEFENDANTS' STATEMENTS, BEFORE TRIAL.

Question Presented

Whether the trial court abused its discretion in granting Jeffrey Phillips relief from two pretrial protective orders forbidding, among other things, defense counsel to discuss with their client the identity of cooperating co-defendants and the contents of their statements produced in discovery. The question presented was preserved for review by the defendant's motion for relief from protective order. (A-81).

Standard and Scope of Review

This Court reviews a trial court's decision on whether or not to grant access to discovery for abuse of discretion. *Seward v. State*, 723 A.2d 365, 374 (Del. 1999). A defendant's right to present a defense is protected by the Sixth Amendment of the United States Constitution and by Article I, § 7 of the Delaware Constitution. This Court reviews the denial of a constitutional right *de novo*. *Hartman v. State*, 918 A.2d 1138, 1140 (Del. 2007).

Merits of Argument

On April 16, 2014, upon *ex parte* application by the State, the trial judge

entered a protective order pursuant to Superior Court Criminal Rule 16(d). Specifically, the order prohibited counsel for each defendant from sharing with their clients, the friends, family and associates of their clients, or with counsel's employees or agents, the identification of the cooperating co-defendants who had given statements as well as the contents of those statements. (A-75). On August 14, 2014, upon application by the State, the Court entered another protective order that prohibited counsel for the defendants from disclosing the identity of the witnesses whose statements were to be provided to counsel on August 15, 2014, and further prohibited counsel from sharing with their client, the friends, family and associates of their clients or any employee of defense counsel, the contents of statements made by these witnesses. (A-90). On August 15, 2014, the State provided defense counsel fifty-four transcripts of witness statements. On August 22, 2014, counsel for Jeffrey Phillips filed a motion for relief from the protective orders. (A-92). On September 3, 2014, the Court held a pre-trial conference where the parties and the Court addressed the motion for relief from protective order. (A-123). Ultimately, the limited relief from the two protective orders that counsel was able to obtain from the trial court was that the defendants could share the protected statements with their staff, but not their investigators. Counsel was still prohibited from discussing the identity and content of the cooperating co-defendants' statements

as well as the content of the statements of the forty-seven other witnesses whose identity had yet to be provided. The State agreed to the Court granting relief from the protective orders following jury selection but before the beginning of the guilt phase.

The protective orders entered by the Court in this case completely removed any meaningful discussion between counsel and Jeffrey Phillips about the evidence confronting Phillips during the guilt phase of his capital murder trial. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("Government violates the right to effective assistance [of counsel] when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.") (citations omitted).

In *Roviaro v. United States*, 353 U.S. 53 (1957) the U.S. Supreme Court recognized the government's privilege to withhold certain evidence, particularly the identity of informants. Nevertheless, the Court qualified the privilege stating that courts must "balance[e] public interest in protecting [this source] of information against the [defendant's] right to prepare [a] defense." *Id.* at 62. In balancing these interests, Courts must "tak[e] into consideration the crime charged, the possible defenses, the possible significance of the informant's testimony and [any] other relevant factors." *Id.* Similarly, courts have concluded that it is necessary to weigh a defendant's discovery rights and the

Sixth Amendment right to counsel against the State's interest in safeguarding witnesses, thereby preserving the integrity of the judicial process. *See e.g., Coleman v. State*, 583 A.2d 1044 (Md. Ct. App. 1991).

In this case as a result of these two protective orders, Jeffrey Phillips' discovery rights as well as his Sixth Amendment right to the effective assistance of counsel, were eviscerated because of the State's unsubstantiated and non-specific allegation that, were Phillips to enjoy those constitutional rights, the safety of State witnesses would be in jeopardy. The Court granted both of these motions without input from counsel for Jeffrey Phillips and without any evidence that Phillips had ever engaged in any act of witness intimidation or violence against a witness.

In order to prepare for trial, defense counsel must be permitted to communicate with their client concerning the identity of co-defendants who had given statements and made proffers to the State, as well as the content of those statements.

> Defendants have a right to participate in their defense. Moreover, defense counsel need to be able to consult with their clients about the nature of the prosecution's expected proof. Often, the defendants alone possess information that may be critical in refuting the government's evidence or in discrediting expected prosecution witnesses. Defense counsel must be free to communicate freely with their clients and discuss with them the anticipated testimony against them.

United States v. Garcia, 406 F. Supp. 2d 304, 305 (S.D.N.Y. 2005).

With respect to the cooperating co-defendants' statements, in preparation for cross-examination of witnesses against the defendant, it often is the defendant alone who can point out untruths being offered by such co-defendants and can provide the most useful information to expose their lies on cross-examination before the jury. *Lancaster v. State*, 978 A.2d 717, 733-34 (Md. Ct. App. 2009).

"[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Rule 16(d)(1) of the Superior Court Criminal Rules permits "[u]pon a sufficient showing" the issuance of protective orders in criminal cases. Nevertheless, prior to the entry of a protective order courts generally require "a particularized, specific showing" of cause for the entry of the order. See, e.g., *United States v. Bulger*, 283 F.R.D. 46, 52 (U.S.D.C. Mass. 2012); *United States v. Wecht,* 44 F.3d 194, 211 (C.A. 3 2007) ("Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing."); *United States v. Carriles*, 654 F. Supp.2d 557, 565 (W.D. Tex. 2009). The State made no such showing in this case. There is no dispute that, at the time both protective orders were entered, Jeffrey Phillips was being held without bail. Likewise there is no dispute that all of the cooperating co-defendants that the State intended to call as witnesses at trial

were in witness protection at the time that the protective orders were entered in this case. Finally, there was no allegation at the time of the entry of the protective orders that Jeffrey Phillips had in any way, shape or form attempted to threaten, intimidate, or do violence to any of the cooperating co-defendant witnesses or any witness in this case. Accordingly, there was no "sufficient showing" for the Court that there was a need for such a broad protective order as was imposed on Jeffrey Phillips. Nevertheless, the Court entered an order pretrial which prohibited Phillips and his counsel from discussing the identity of the cooperating co-defendants as well as (most importantly) the content of their statements.

The Superior Court abused its discretion in denying relief to Jeffrey Phillips from the protective orders without a sufficient showing of cause by the State. By prohibiting Jeffrey Phillips and his counsel from discussing the identity of co-defendants who would be testifying against him at trial and prohibiting counsel and Phillips from discussing the content of those cooperating co-defendants' statements, Phillips was denied his Sixth Amendment right to investigate and present a defense in this case.

III THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING THE DEFENDANT'S MOTION FOR SEVERANCE.

Question Presented

The question presented is whether the Superior Court abused its discretion by denying the Defendant's motion for severance. (A81).

Standard and Scope of Review

The scope or review is abuse of discretion as to trial court's denial of severance. *Younger v. State*, 496 A.2d 546 (Del. 1984).

Argument

Severance of Defendants

The Defendant's trial should have been severed from that of his codefendant, Otis Phillips. There was significant disparity in alleged involvement in each of several charged incidents over five years. Otis was charged with shooting Antoine Harris outside a club at 8th and Adams Street in Wilmington in May 2007. Otis was also charged with shooting and killing Christopher Palmer in a club on Locust Street in Wilmington in January 2008. Otis was identified by several witnesses at trial as a member of the "Sure Shots," a gang that had been dealing drugs and committing assaults in Wilmington for more than ten years. Otis was also charged with the murder of Herman Curry, a witness to the January 2008 murder on Locust Street, at Eden

Park and Alex Kamara, a participant at the soccer game at Eden Park in Wilmington on July 8, 2012. The Defendant, Jeffrey Phillips was charged with murder arising from only this last incident because he had emigrated from Jamaica and moved to Wilmington in 2011. He was also charged with an alleged offense of riot at a Shore Stop Convenience store in Bridgeville, Delaware, on February 26, 2012, but Otis was not charged in that incident because he was believed to be in hiding after the January 2008 murder on Locust Street. Otis was charged in three serious incidents, two of which led to his being charged with murder, but Jeffrey was only charged with Otis in the last incident in Eden Park and there was no evidence that they had any association before then. Although Jeffrey was not charged with the two prior shootings, there was a strong potential that the jury could be influenced by a spill-over effect of all of the prior evidence of criminality and the sheer mass of charges in assessing his guilt for the July 2012 Eden Park murders. *State v. McKay*, 382 A.2d 260 (Del. Super. 1978). At times in the trial, each defendant's respective trial strategies conflicted with the interests of the other co-defendant. When the State introduced evidence that Kelmar Allen, a critical prosecution witness against each defendant, was in the State's witness protection program, Otis was satisfied with a curative instruction to disregard it, while Jeffrey acknowledged its prejudicial effect and sought to mitigate the prejudice and

explore it further with specific details about money payments to him in order to demonstrate bias for the prosecution. (D.I. 118, 10/24/14, pp. 95-116). Numerous crimes of others who were alleged to be members of the gang from years before were introduced into evidence when Jeffrey was still in Jamaica. (D.I. 164, 10/28/14, pp. 108-117; D.I. 129, 11/7/14, pp. 5-22). Jeffrey moved for severance due to his codefendant's antagonistic cross-examination of witnesses against him and the finger-pointing to his involvement. (D.I. 127, 11/10/14, pp. 55-61). In closing arguments, Otis suggested that the evidence was sufficient to convict Jeffrey of the Eden Park murders and starting a gunfight the night before, but that Otis could not credibly be placed in the events leading up to the Eden Park murders. (D.I. 118, 10/24/14, pp. 95-116). This produced substantial injustice if the jury could not accept Jeffrey's argument that there was a reasonable doubt that he participated in the Eden Park murders while part of Otis' defense strategy was that Jeffrey, not Otis, was involved. *Bradley v. State*, 559 A.2d 1234, 1241-42 (Del. 1987). The jury also could have had difficulty segregating the evidence against each defendant under these circumstances. *Floudiotis v. State*, 726 A.2d 1196, 1210 (Del. 1999).

Severance of Charges

As well as severing the serious charges with in which Otis was allegedly involved but Jeffrey was not, the Superior Court should have severed the

Defendant's Gang Participation and Riot charge. The additional offenses were not "of the same or similar character," as the Eden Park homicides and were not "acts or transactions connected together or constituting parts of a common scheme or plan." Superior Court Criminal Rule 8.[3] The only alleged gang activity that the Defendant was allegedly involved in before then was the alleged Shore Stop riot in Bridgeville and the Defendant was acquitted of that offense. The commonality was that the Defendant was charged with committing two independent sets of offenses. Offenses should only be tried together "where offenses are of the same general character, involve a similar course of conduct and are alleged to have occurred within a relatively brief span of time." *Younger*, 496 A.2d at 550. The Bridgeville "riot" and the Eden Park homicides do not meet the criteria, particularly where the Defendant had not been involved in alleged gang activities before then. There is a danger that a jury would cumulate the evidence and general criminal disposition and bad character of the Defendant. *Wiest v. State*, 542 A.2d 1193, 1195 (Del 1988). The evidence in the cases, if tried separately would not be independently

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[3] Superior Court Criminal Rule 8(a) permits two or more "offenses to be charged in the same indictment or information in separate counts for each offense if the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting part of a common scheme or plan." However, Superior Court Criminal Rule 14 provides that the Court may order severance where defendants or the State is prejudiced by the joinder of defendants or offenses.

relevant and reciprocally admissible. They were not inextricably intertwined and did not occur at the same time or place. It was unfairly prejudicial because the Defendant could not realistically assert a defense through his own testimony that he was not a gang participant, but merely associated with some member of that gang due to his interest in music while at the same time not testifying, as was his right under the Fifth Amendment, concerning the Eden Park incident and challenging the State to prove its case beyond reasonable doubt. Under these circumstances, the jury could cumulate the evidence against his as well as cumulate the criminality of others, the jury could infer a general disposition on his part, and he was also subject to "embarrassment or confusion in presenting different and separate defenses to different charges." *Id.*[4]

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[4] A defendant may suffer prejudice from joinder when: "1) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find; 2) the jury may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crime or crimes; and 3) the defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges." *Wiest*, 542 A.2d at 495.

IV. THERE WAS INSUFFICIENT EVIDENCE THAT JEFFREY PHILLIPS WAS GUILTY OF GANG PARTICIPATION.

Question Presented

Whether there was sufficient evidence that Jeffrey Phillips actively participated in the Sure Shots and was guilty of gang participation. On November 10, 2014, Jeffrey Phillips moved for judgment of acquittal on the gang participation charge. (D.I. 127, 11/10/14, pp. 25-29). The trial court reserved judgment, but the charge was presented to the jury.

Standard and Scope of Review

"When a defendant challenges the sufficiency of the evidence to support a conviction, we review the evidence to determine whether a rational trier of fact, considering the evidence in the light most favorable to the prosecution, could find the essential elements of the offense beyond a reasonable doubt." *Poon v. State*, 880 A.2d 236, 238 (Del. 2005).

Merits of Argument

There was insufficient evidence that Jeffrey Phillips actively participated in the Sure Shots, knew of the Sure Shots' pattern of criminal activity, or knowingly promoted, furthered, or assisted the Sure Shots. Therefore, the gang participation conviction should be reversed.

Illegal gang participation occurs when:

> (1) A person . . . actively participates in any criminal street gang[;]
> (2) [W]ith knowledge that its members engage in or have engaged in a pattern of criminal gang activity[;] and
> (3) [W]ho knowingly promotes, furthers or assists in any criminal conduct by members of that gang which would constitute a felony under Delaware law.

11 *Del. C.* §616(b).

a. Actively participates

There was insufficient evidence to prove that Jeffrey Phillips actively participated in the Sure Shots. This Court expanded upon the definition of "actively participates" in the only other known Delaware gang participation case, *Taylor v. State*, 76 A.3d 791, 799 (Del. 2013). This Court wrote, "[o]ne who 'actively participates in any criminal street gang' performs some role to benefit the gang. Mere association with a street gang, without more, does not constitute forbidden conduct under the statute. The defendant must engage in conduct — do something — with the group. Moreover, even active participation is not a criminal offense without knowledge that the gang has engaged in a pattern of criminal activity, and without knowingly assisting the gang's criminal conduct." *Id.* at 798.

In *Taylor*, this Court relied upon other states' gang participation

statutes, *id.* at 798-99,[5] including California.[6] In its analysis of "actively participates," the California Supreme Court stated: "[G]iving these words their usual and ordinary meaning, we construe the statutory language 'actively participates in any criminal street gang' . . . as meaning involvement with a criminal street gang that is more than nominal or passive." *People v. Castenada*, 3 P.3d 278, 281 (Cal. 2000).

In the instant case, three Sure Shots members testified: Kelmar Allen, Maria DuBois, and Michael Young. Neither Young nor DuBois, an active Sure Shots member into 2014, mentioned that Jeffrey Phillips was a member of the Sure Shots. (D.I. 117, 10/22/14, pp. 48; D.I. 119, 10/21/14, pp. 151; D.I., 166, 10/23/14, pp. 104). Furthermore, Jeffrey Phillips was acquitted of the riot charge, an enumerated offense in the gang participation statute. 11 *Del. C.* §616(a)(1)(i).

b. Pattern of criminal gang activity

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[5] This Court cited to statutes from California, Colorado, Georgia, Indiana, Iowa, Minnesota, and Ohio. *Taylor*, 76 A. 3d at 798 n.8.

[6] "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years." *Cal. Penal Code* §186.22(a).

There was insufficient evidence that Jeffrey Phillips knew that there was a pattern of criminal gang activity. "Conclusional testimony that gang members have previously engaged in the enumerated offenses, based on nonspecific hearsay and arrest information which does not specify exactly who, when, where and under what circumstances gang crimes were committed, does not constitute substantial evidence." *In re Jose T.*, 230 Cal. App. 3d 1455, 1462 (Cal. App. 2d Dist. 1991). Here, certified criminal records were admitted of testifying and non-testifying witnesses. Even though Jeffrey Phillips did not arrive to the United States until 2011, the trial court did not limit any evidence predating his arrival.

c. Knowingly promotes, furthers or assists

There was insufficient evidence that Jeffrey Phillips knowingly promoted, furthered, or assisted the Sure Shots' criminal activities. Due to the lack of Delaware gang participation cases, turning to other states' gang participation jurisprudence is instructive. Specifically, this Court relied upon case law from Ohio, Indiana, and Georgia in *Taylor*, 76 A. 3d at 798 n.8.

States have interpreted the knowledge requirement for criminal gang activity to mean that the defendant himself must have committed the

predicate offenses. In applying Ohio's statute,[7] the Ohio Court of Appeals determined that "the statute requires an *express showing* that (1) *the individual* actively participates in a criminal gang, with knowledge of the criminal gang; (2) *the individual* engages in or has engaged in the pattern of criminal gang activity; and (3) *the individual* purposely promotes, furthers, or assists any criminal conduct." *State v. Stallings*, 778 N.E.2d 1110, 1115-16 (Ohio App. 2002) (emphasis added). The court stated, "the statute does not impermissibly establish guilt by association alone." *Id.* at 1116 (quotations and citations omitted). Ohio reversed two defendants' criminal gang activity convictions because of insufficient evidence of gang participation, despite their presence in a gang house. *State v. Hairston*, C. A. Nos. 23663 and 23680, 2008 Ohio App. LEXIS 765, at *9-13 (Ohio Ct. App. Mar. 5, 2008).

The Ohio Court of Appeals wrote that the knowledge requirement is important because it must be shown that one acted with knowledge of the gang's criminal purpose: "The limiting language of this legislation, in

[7] "No person who actively participates in a criminal gang, with knowledge that the criminal gang engages in or has engaged in a pattern of criminal gang activity, shall purposely promote, further, or assist any criminal conduct, as defined in division (C) of section 2923.41 of the Revised Code, or shall purposely commit or engage in any act that constitutes criminal conduct, as defined in division (C) of section 2923.41 of the Revised Code." *Ohio Rev. Code Ann.* §2923.42(A).

particular, requiring that the participant must be acting with knowledge of the gang's activities and with specific intent to further those illegal activities and interests, serves to clarify the statute and substantially diminish the viability of any vagueness challenge." *State v. Woodbridge*, 791 N.E.2d 1035, 1040 (Ohio App. 2003). The *Woodbridge* court stated that the statute is limited to "active gang members" and does not "unconstitutionally punish nominal, inactive purely technical, or passive membership, even if such is accompanied by knowledge and intent." *Id.* at 1041.

In reviewing Indiana's gang participation statute[8], the Indiana Supreme Court reversed a conviction where, "The State's case on this offense consisted only of evidence that Ferrell, at some point, was a member of a gang that commits criminal offenses. That is not enough." *Ferrell v. State*, 746 N.E.2d 48, 51 (Ind. 2001). In *Klein v. State*, the Indiana Supreme Court stated, "The State must prove that the individual was aware of the gang's criminal purpose." 698 N.E.2d 296, 300 (Ind. 1998).

Under a similar racketeering statute in Georgia[9], the Court of Appeals

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[8] "'[C]riminal gang' means a group with at least three (3) members that specifically: (1) either: (A) promotes, sponsors, or assists in; or (B) participates in; or (2) requires as a condition of membership or continued membership; the commission of a felony or an act that would be a felony if committed by an adult or the offense of battery (IC 35-42-2-1)." *Ind. Code Ann.* §35-45-9-1 (§35-49-9-3 further defines the terms used in §35-45-9-1).

[9] "Engaging in at least two acts of racketeering activity in furtherance of one or more incidents, schemes, or transactions that have the same or similar intents, results,

of Georgia found that the two predicate offense requirements were met where the jury found each defendant guilty of two predicate theft counts. *Thompson v. State*, 440 S.E.2d 670, 672 (Ga. App. 1994). "This charge made it clear that in order to find a defendant guilty of the RICO count, the jury must find that *each defendant* committed at least two predicate acts." *Id.* at 673 (emphasis added). According to this interpretation, a defendant must be convicted of predicate gang-related offenses in order to be convicted of gang participation.

The State must prove every element of a crime beyond a reasonable doubt. *State v. Baker*, 720 A.2d 1139, 1151 (Del. 1998). It was necessary to show that Jeffrey Phillips not only knew of, but also engaged in a pattern of gang activity. Jeffrey Phillips did not arrive to the United States until 2011. There was no evidence that he had knowledge of the prior gang activity. Therefore, the motion for judgment of acquittal should have been granted.

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accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such acts occurred after July 1, 1980, and that the last of such acts occurred within four years, excluding any periods of imprisonment, after the commission of a prior act of racketeering activity." *Ga. Code Ann.* §16-14-3(8)(A).

V THE GANG PARTICIPATION JURY INSTRUCTIONS READ TO THE JURY UNDERMINED THE MEMBERS' ABILITY TO RETURN A VERDICT.

Question Presented

Whether the jury instructions read to the jury, which did not include sufficient explanations of the gang participation statute, undermined the jury's ability to intelligently return a verdict. The Superior Court rejected the Defendant's proposed jury instruction. (D.I. 131, 11/14/14, pp. 10-11, 23-39; D.I. 140, 11/17/14, pp. 21-22).

Standard and Scope of Review

A defendant is not entitled to a particular jury instruction, but "does have the unqualified right to a correct statement of the substance of the law." *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983). "[T]his Court will reverse if the alleged deficiency in the jury instructions 'undermined . . . the jury's ability to 'intelligently perform its duty in returning a verdict.'" *Id.* (quoting *Newnam v. Swetland*, 338 A.2d 560, 562 (Del. 1975)).

Merits of Argument

First, the trial court did not give the appropriate jury instruction. Defense counsel submitted a proposed jury instruction, based on California's

instruction,[10] which was rejected by the Court.[11] (D.I. 131, 11/14/14, pp. 10-11, 23-39; D.I. 140, 11/17/14, pp. 21-22). The instruction read to the jury failed to properly define *mens rea* requirements as well as other elements of the offense. Second, the trial court should have provided a limiting instruction on the use of the gang evidence. *D.R.E.* 105; *see People v. Hernandez*, 94 P.3d 1080, 1087 (Cal. 2004). Defense requested a limiting instruction, but it was not provided to the jury. (D.I. 164, 10/28/14, pp. 109-10). Therefore, the gang participation conviction should be reversed.

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[10] *Jury Instructions: Revisions to Criminal Jury Instructions*, Judicial Council of California, 104 (Aug. 23, 2013), http://www.courts.ca.gov/documents/jc-20130823-itemA.pdf; *Judicial Council of California Criminal Jury Instructions*, Judicial Council of California, 1031-39 (Feb. 2016), http://www.courts.ca.gov/partners/documents/calcrim_2016_edition.pdf.

[11] Ex. C is Jeffrey Phillips' proposed jury instruction. Ex. D is the jury instruction that the Court used.

CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant's convictions and sentences should be reversed.

Respectfully submitted,

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