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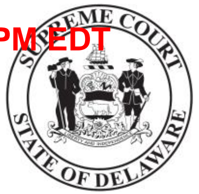


IN THE SUPREME COURT OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| REGINALD WATERS, | ) | |
| | ) | |
| Respondent-Below, | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. 491, 2019 |
| | ) | |
| STATE OF DELAWARE, | ) | |
| | ) | |
| Plaintiff-Below, | ) | |
| Appellee. | ) | |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

**STATE'S ANSWERING BRIEF**

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Dated: May 1, 2020

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## NATURE AND STAGE OF THE PROCEEDINGS

On February 27, 2016, Reginald Waters ("Waters") fatally shot Clifton Thompson ("Thompson") outside Building 10 of the Prides Court Apartments in Newark, Delaware.[1] On March 29, 2016, New Castle County Police Department ("NCCPD") investigators arrested Waters for Thompson's murder.[2] On June 6, 2016, a New Castle County grand jury charged Reginald Waters with Murder in the First Degree, Possession of a Firearm During the Commission of a Felony, Possession of a Firearm by a Person Prohibited, and Possession of Ammunition by a Person Prohibited.[3]

Waters case was specially assigned to a Superior Court judge[4] who, on June 27, 2016, set discovery and motion deadlines, scheduled jury selection for September 21, 2017, and scheduled trial to begin on September 25, 2017.[5] Thereafter, pursuant to its discovery obligations, the State provided Waters information pertinent to the case.[6] Prior to the scheduled trial date, the State sought permission to disclose witness information to defense counsel with provisions to

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[1] A42.

[2] A1 at DI 4.

[3] A1 at DI 1; A81-82.

[4] A1 at DI 3.

[5] A2 at DI 7.

[6] A3 at DI 12; A3 at DI 14; A4 at DI 16.

preserve witness safety,[7] which the Superior Court granted on September 8, 2017.[8] On September 12, 2017, the Superior Court granted Waters' request for a continuance of the scheduled trial.[9] After meeting with counsel, the Superior Court set trial to begin on January 10, 2018.[10]

On January 9, 2018, Waters' counsel, citing a conflict of interest driven by an intense animosity harbored by Waters toward counsel, moved to withdraw from the case.[11] The Superior Court convened a hearing to address the motion[12] and, with Waters' waiver of his right to a speedy trial, permitted counsel to withdraw and granted Waters' request for a continuance.[13] The Court directed the Office of Conflicts Counsel to appoint new counsel for Waters.[14] Thereafter, Waters received new counsel.

On January 17, 2018, the State sought and obtained a protective order that permitted the limited disclosure of witness information to Waters' new counsel.[15]

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[7] A4 at DI 18; A277-281.

[8] A5 at DI 20; A281.

[9] A6 at DI 27; A289-290.

[10] A6 at DI 35.

[11] A8 at DI 41; A299-301.

[12] A303-358.

[13] A9 at DI 43; A343.

[14] A349.

[15] A10 at DI 47, 48.

The State then continued to provide Waters material to prepare for trial.[16] On March 2, 2018, the Superior Court scheduled a case review for April 9, 2018 and trial to begin on May 7, 2018.[17] On May 2, 2018, the Superior Court adjusted the trial schedule, directing jury selection to occur on Thursday, May 10, 2018 and the trial to commence on Monday, May 14, 2018.[18] On Wednesday, May 9, 2018, the Superior Court modified the existing protective order to permit counsel to share information freely with Waters and denied counsel's request for a continuance of trial.[19]

A jury was selected on Thursday, May 10, 2018.[20] On Monday, May 14, 2018, prior to the beginning of the trial, Waters, with the approval of the court and the consent of the State, waived trial by jury.[21] The jury was released and the non-jury trial commenced.[22] On May 23, 2018, following a seven-day trial, the Superior Court Judge found Waters guilty of Manslaughter (as a lesser-included offense of Murder in the First Degree), Possession of a Firearm During the Commission of a

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[16] A10 at DI 49, 51; A11 at DI 54, 56.

[17] A10 at DI 52.

[18] A12 at DI 57.

[19] A12-13 at DI 60, 61.

[20] A13 at DI 62.

[21] A416, A426-429.

[22] A14 at DI 68.

Felony, Possession of a Firearm by a Person Prohibited, and Possession of Ammunition by a Person Prohibited and scheduled Waters to be sentenced on August 10, 2018 "or on a date thereafter set in consultation with counsel."[23]

Waters' sentencing was rescheduled to, among other things, permit him to explore the applicability of the recent United States Supreme Court opinion in *Carpenter v. United States*[24] to his case.[25] On December 17, 2018, Waters filed a motion for a new trial alleging the State failed to follow the requirements set forth in *Carpenter* to secure Historical Cell Site Location Information ("HCSLI") in his case.[26] The State opposed Waters' motion,[27] and Waters replied.[28] On March 14, 2019, the Superior Court heard oral arguments from the parties and reserved decision.[29] On June 13, 2019, the Superior Court denied Waters' motion for a new trial, finding:

> While Defendant is entitled to the retroactive applicability of the recently issued *Carpenter* decision, and even though the Pen Register Order used to obtain Defendant's CSLI was beyond the scope of the Pen Register Statute and was insufficient under *Carpenter* as it did not

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[23] A14 at DI 68, 69; A717.

[24] 138 S.Ct. 2206 (2018).

[25] A748-750.

[26] A17 at DI 88; A757-790.

[27] A19 at DI 92; A987-1016.

[28] A19 at DI 93; A1017-1039.

[29] A19 at DI 94; A1040-1146.

> include a finding of individualized probable cause, Defendant is not entitled to a new trial. Without considering the CSLI evidence and without drawing any inferences from the CSLI evidence, Defendant's guilt was established beyond a reasonable doubt for the crimes of Manslaughter, Possession of a Firearm During the Commission of a Felony, Possession of a Firearm by a Person Prohibited, and Possession of Ammunition by a Person Prohibited. The interest of justice does not require that Defendant be granted a new trial.[30]

On June 19, 2019, the State filed a motion to declare Waters a habitual offender.[31] On November 15, 2019, a Superior Court judge declared Waters a habitual offender under 11 *Del. C.* § 4214(c)[32] and sentenced him to an aggregate 76 ½ years of Level V incarceration followed by home confinement.[33]

Waters appealed. This is the State's answering brief.

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[30] *State v. Waters,* 2019 WL 2486753, *5 (Del. Super. Ct. June 13, 2019); A1149-1154.

[31] A20 at DI 99, 100; A1156-1164.

[32] A22 at DI 110; A1179-1180.

[33] A22 at DI 111; A1214-1216.

## SUMMARY OF THE ARGUMENT

I. Argument I is denied. The Superior Court did not err by denying Waters' continuance request. The State informed Waters counsel, in advance of trial, of the subpoenaed prison recordings it intended to introduce at trial. Waters knew the State secured additional recordings. Despite denying Waters' continuance request, the Superior Court requested the State assist Waters' counsel's review of the remaining calls. The State did so. Waters was properly equipped to examine and cross examine witnesses presented at trial.

II. Argument II is denied. The Superior Court did not err by denying Waters' untimely, mid-trial motion to suppress prison phone recordings. Waters failed to offer good cause for his failure to raise his suppression motion prior to trial. Nonetheless, the Superior Court addressed the merits of his claim and correctly concluded that the State's subpoena of Waters prison phone calls was supported by reasonable grounds of witness tampering.

III. Argument III is denied. The Superior Court did not err by denying Waters' motion for a new trial. Superior Court Criminal Rule 33 authorizes the trial judge, in a non-jury trial to, in the interest of justice, vacate a judgment and direct entry of a new judgment. Based on a United States Supreme Court case decided prior to Waters sentencing, the Superior Court, concluded that certain evidence – cell site location information or CSLI – should not be considered in assessing Waters

guilt. Exercising the wide discretion afforded by Rule 33, the Superior Court concluded that, exclusive of the CSLI evidence offered at trial, sufficient evidence existed to support Waters guilty verdicts.

## STATEMENT OF FACTS

Clifton Thompson ("Thompson") and Cassie Brown ("Brown") celebrated a belated Valentine's Day on Friday, February 26, 2016.[34] They spent the night in a hotel, checked out on Saturday morning – February 27, 2016 – and spent the rest of the day together.[35] Around 5:30 that evening, they picked up their daughter, Kamil, from a friend's house and drove to Thompson's mother's (Jean Cameron ("Cameron")) residence at Prides Court Apartments.[36] They arrived at the apartment complex and, as Brown began backing into a parking space, nine-year-old Kamil complained that she had to use the bathroom.[37] Thompson asked Brown to stop the car so Kamil could run into Cameron's house.[38]

Kamil "never made it inside the house."[39] She ran back to the car and told Brown and Thompson she thought she saw somebody.[40] Brown finished parking the car and she, Kamil, and Thompson exited the vehicle and walked toward Cameron's

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[34] A552.

[35] *Id.*

[36] A551, 552.

[37] A552.

[38] *Id.*

[39] A553.

[40] *Id.*

apartment.[41] "[T]he person that was in the alley start[ed] coming to walk towards the car."[42] That person, "African-American, male, about a couple inches taller than [Brown]," instructed Thompson, "[t]ell your family to go in the house, let me talk to you."[43] Thompson called his mother to open the door to allow them to enter the apartment complex.[44] Cameron opened the door and saw a man in dark clothing standing by a bush near her apartment.[45] Thompson and Kamil entered the apartment, but the door locked behind them, leaving Brown outside.[46]

Brown remained outside "hitting the buzzer" to get in the apartment.[47] The person from the alley, who Brown recognized as Reginald Waters ("Waters"), walked towards her and commented, "[h]e f'ing ran in the house, what type of boyfriend is that."[48] While Waters spoke to Brown, he was also "on the phone talking to someone else."[49] Brown heard Waters refer to the person he was talking

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[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] A554.

[45] A470.

[46] A554; A470.

[47] A554.

[48] *Id.*

[49] *Id.*

to as “Six,” and she stated that Waters seemed upset.[50] After a few minutes, Cameron buzzed Brown into the building.[51]

Brown found a hectic scene within the apartment.[52] Kamil was crying, Cameron was attempting to calm her, and Thompson was on the phone with Six, scared and upset.[53] Thompson secured a gun from under the kitchen sink, telling Cameron that it was for protection.”[54] As the chaos continued within the apartment, Thompson walked out the door.[55] Cameron then heard “four to five” gunshots just in front of her apartment.[56]

Meanwhile, Rapha Moore (“Moore”) – Six[57] – fielded calls from Waters and Thompson as he ran errands with his girlfriend.[58] Moore explained that he knew Thompson for a few years prior to his death and that Thompson went by the nickname “Gip” or “Kip;”[59] Moore knew Waters for over 20 years and he often

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50 A555.

51 A473, A555.

52 A555.

53 A555 - 556, 470.

54 A473.

55 A556.

56 A473.

57 A496

58 A488-489.

59 A485.

called him "Reg" or "Shawn."[60] Moore was responsible for introducing Thompson and Waters.[61] Moore explained that he received calls "from both parties basically saying, you know, when is your boy going to take care of business? And both of them just basically going back and forth."[62] Moore told them to take care of their business and to leave him out of it.[63] Moore "didn't take action . . . [he] told them to meet up face-to-face to handle their business, whatever business they handle, I don't know what it was."[64] Despite Moore's admonitions, "[t]he calls started to escalate with me and Gip. Things started to escalate from both sides, for the accuser and from Gip."[65] Ultimately, Moore went to the scene to attempt to de-escalate the situation.[66] A forensic examination of Moore's cell phone confirmed calls between Moore and Waters and between Moore and Thompson as Moore traveled to the Prides Court Apartment complex.[67]

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[60] A487.

[61] A487-488.

[62] A489.

[63] *Id.*

[64] A490.

[65] *Id.* Moore referred to Waters as the "accuser." A491.

[66] A491.

[67] A629-631.

When Moore arrived at the Prides Court Apartment complex, he saw Thompson come outside with his hand in his pocket.[68] As Moore and Thompson were "feuding a little bit," Moore saw "somebody come from behind [him] . . . in all black, hooded up, head down . . . [a]nd [he] just heard shots."[69] Just prior to the shooting, Moore heard the approaching person tell Thompson to get his hands out of his pockets.[70] As Thompson retreated, Moore told him, "[j]ust pay the man his money, whatever business y'all had, you know, take care of it."[71] Moore testified he "didn't see who shot who" and "turned around and . . . just ran."[72] Moore gathered himself behind the building then came around the corner to find his girlfriend and Brown trying to revive Thompson.[73] Moore then heard people accuse him of the shooting.[74]

During an on-scene interview shortly after the shooting, Moore informed New Castle County Police Corporal Eric Biehl that "Shawn [Waters] walked over as he was talking to Kip [Thompson] in front of building 10 and told Kip to take his hands

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[68] A491.

[69] *Id.*

[70] A495.

[71] *Id.*

[72] A491.

[73] *Id.*

[74] *Id.*

out of his pockets . . . Shawn pulled out a gun and shot Kip."[75] In an affidavit dated January 5, 2018, Moore claimed his statements to investigators were involuntary and that he falsely accused Reginald Waters as the shooter.[76] Moore did not draft the affidavit; rather, a stranger presented it to him for his signature.[77] He "[saw] a little bit of truth to it and then [he] signed it."[78] With "the little bit of truth . . . there [was] a little bit of fear, there [was] a little bit of scared-ness."[79] Brittney Dixon, the mother of one of Waters' children, discussed the affidavit with Waters and provided copies of the document to the Attorney General's Office and "three other places."[80]

After hearing the gunshots, Brown ran out of the apartment and, as she got to the bottom step of Cameron's apartment building, she saw Thompson run past her.[81] Brown ran after him and soon found him on the ground coughing, with blood near his leg.[82] Thompson, blood coming from his mouth, told Brown, "I'm sorry."[83]

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[75] A514.

[76] A359, A601.

[77] A500.

[78] *Id*.

[79] *Id*.

[80] A614.

[81] A556.

[82] *Id*.

[83] *Id*.

When Brown rolled Thompson to his back she saw a gun.[84] She put the gun in her pocket and removed everything from Thompson's pockets.[85] Brown attempted to administer CPR to Thompson until emergency personnel arrived to transport Thompson to the hospital.[86] Thompson died in the hospital.[87]

Brown placed the gun and other items from Thompson's pockets in her coat pocket, then placed the coat in the trunk of her car.[88] Investigators later searched Brown's Buick Lacrosse and found a ladies jacket with a bloody Smith & Wesson .38 Special revolver in the pocket.[89] The revolver, capable of holding five rounds of ammunition was loaded with four.[90] Investigators found four nine-millimeter cartridge casings in the Prides Court parking lot associated with Thompson's shooting. A forensic firearms expert concluded that the four cartridge casings "were all discharged from the same firearm."[91] The expert also concluded that two bullets recovered from Thompson's body "were fired from the same firearm."[92] The expert

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[84] A558.

[85] *Id.*

[86] A557.

[87] A443.

[88] A558.

[89] A449-450.

[90] A450.

[91] A458.

[92] A459.

could not determine whether the two bullets from Thompson's body were fired from the same firearm that ejected the four recovered casings; however, the "38 Special did not fire the cartridge cases or the bullets."[93]

A forensic pathologist from the Delaware Division of Forensic Science examined Thompson's body and determined "his cause of death was multiple gunshot wounds."[94] Toxicology tests revealed the presence of cannabinoids – a byproduct of marijuana consumption – within Thompson's body when he died.[95]

On March 29, 2016, members of the United States Marshals task force found Waters and his girlfriend, Dixon, in a Dover Best Western hotel room.[96] Neither Waters nor Dixon responded to officers' knocks or verbal requests to open the door. After forcing entry into the room,[97] officers arrested Waters.[98]

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[93] *Id.*

[94] A440.

[95] A443.

[96] A610, A627.

[97] A629.

[98] A627.

## I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING WATERS CONTINUANCE REQUEST.

### Question Presented

Whether the Superior Court abused its discretion when it denied trial counsel's continuance request.

### Standard and Scope of Review

This Court reviews a trial court's denial of a continuance request for an abuse of discretion.[99] "Requests for continuances 'are left to the discretion of a trial judge whose ruling will not be disturbed on appeal unless that ruling is clearly unreasonable or capricious.'"[100]

### Merits of Argument

On appeal, Waters claims that the State breached its discovery obligations by failing to provide him copies of all subpoenaed prison telephone recordings. As such, Waters claims the Superior Court abused its discretion when it denied Waters' request for a continuance of trial. He is mistaken.

Superior Court Criminal Rule 16 requires the State "disclose to the defendant and make available for inspection, copying, or photographing" statements made by

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[99] *Secrest v. State*, 679 A.2d 58, 64 (Del. 1996).

[100] *Id.* (quoting *Bailey v. State*, 521 A.2d 1069, 1088 (Del. 1987)).

the defendant.[101] And, the State has a continuing obligation to "promptly notify the [defendant] or [defense counsel] or the court of the existence of [] additional evidence or material."[102] The State met its obligations here. The State informed trial counsel of materials secured during the pendency of the case – prison phone recordings – and provided copies of what it intended to present at trial. Trial counsel, aware additional recordings were captured, admittedly sought no more,[103] yet on appeal he argues the State breached its discovery obligation and that the Trial Court erred by denying his continuance request.[104] Waters' argument is unavailing.

On April 26, 2018, Waters received "about 15 prison calls from the State that they plan[ned] to use at trial."[105] The calls evidenced Waters efforts to manipulate a witness.[106] After receiving the recordings, Waters' counsel "had a conversation with [one of the trial prosecutors] at that time and told him [he] didn't think [he] needed all the calls because [he] believe[d] that if there was any *Brady* material in

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[101] Super. Ct. Crim. R. 16(a)(1)(A).

[102] Super. Ct. Crim. R. 16(c).

[103] A362

[104] Op. Br. at 37.

[105] A362.

[106] A363.

the calls then [the trial prosecutor] would have given it to me."[107] A protective order prohibited trial counsel from discussing the substance of the calls with Waters.[108]

The Superior Court lifted the protective order on May 9, 2018.[109] Waters informed trial counsel "in effect, the State is cherry picking calls which are helpful, but there are other calls which offer context and obviously potential cross examination for Rapha Moore's testimony."[110] Trial counsel then sought a continuance of trial:

> So the bottom line is I think when the State informed me in April they were going to play calls, I think I made a mistake by essentially delegating the review of those calls to the Department of Justice is, in effect, what I did. And I think, to be properly prepared for trial, now that phone calls are in play as of . . . April 26th . . . I need to review all Reginald Waters' prison calls to determine what, if anything, may be useful to the defense at trial. So that necessitates my continuance request.[111]

"[O]n the record of the case . . . and the defendant's own actions which has put him in this position," the Superior Court denied the continuance request.[112]

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[107] *Id.* Trial counsel was referencing the State's duty to disclose exculpatory information under *Brady v. Maryland*, 373 U.S. 83 (1963).

[108] A362.

[109] A12 at D.I. 60.

[110] A363.

[111] A364.

[112] A366, 369.

Waters now posits that "[t]he State did not provide the remaining hundreds of prison phone calls."[113] He is wrong. The Superior Court directed the State to assist trial counsel in locating specific discussions within the recordings.[114] In fact, prior to denying the continuance request, the Superior Court expressed its desire "to decrease the burden on [trial counsel],"[115] and the State proposed to employ its investigators to review calls.[116] On May 11, 2018, the State provided trial counsel recordings and transcripts of additional calls between Waters and Moore.[117] The State also offered to search for additional calls.[118] Waters made no further requests concerning the prison calls.

Waters reliance upon *State v. Hill*[119] is misplaced. In *Hill*, the existence of "over 170 phone calls made by Defendant to various individuals while Defendant was incarcerated," was revealed during the trial testimony of a State Investigator.[120] The State had previously provided defense counsel only six calls; the Superior Court

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[113] Op. Br. at 40.

[114] A369.

[115] A367.

[116] A368.

[117] B1

[118] *Id.*

[119] 2011 WL 2083949 (Del. Super. Ct. Apr. 21, 2011).

[120] *Id.* at *1 (internal citations omitted).

"ordered the State to produce all prison recordings to defense counsel, which it did the following day."[121] A jury convicted Hill.[122] The Superior Court granted Hill's motion for a new trial, finding "[t]he State's failure to comply with Rule 16 in its delayed disclosure of the 164 additional recordings constitutes a discovery violation" and that "[t]his delayed disclosure precluded the Defendant from effectively using the recorded statements at trial and, thus, violated his Sixth Amendment Right to a fair trial."[123] Such is not the case here.

In this case, the State, on April 25, 2018, provided trial counsel with recordings it intended to present at trial.[124] Trial counsel "had a conversation with [a trial prosecutor] and [] told him [he] didn't think [he] needed all the calls, because I believe that if there was any *Brady* material in the calls then he would have given it to me."[125] Trial counsel and the prosecutor discussed that in other murder trials, "the defense attorney gets about 15 disks of prison calls," but did not see a need to review additional materials here.[126] After reviewing the information provided by the State, and aware that the State possessed several other prison calls, trial counsel did

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[121] *Id.* (internal citations omitted).

[122] *Id.*

[123] *Id.* at *6.

[124] A11-12 at DI 56; A362.

[125] A362.

[126] A363.

not request to review any additional material. Rather, Waters sought a continuance on the eve of trial. Nonetheless, the State endeavored to assist trial counsel by expanding its review of the acquired calls to trial counsel's search parameters and provided additional material in advance of trial.[127] Unlike *Hill*, trial counsel was aware of the "remaining hundreds of prison phone calls,"[128] and was afforded the opportunity to review the additional calls in advance of trial. The State affirmatively met its discovery obligation here and the Superior Court did not abuse its discretion by denying Waters' continuance request.

"There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."[129] Ultimately, "[t]here is uniform agreement that trial judges enjoy wide discretion to decide requests for a continuance."[130] This Court has set forth clear standards for assessing a continuance request:

> First, the party seeking the continuance has the burden of establishing a clear record of the relevant facts relating to the criteria for a

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[127] B1

[128] Op. Br. at 40.

[129] *Secrest*, 679 A.2d at 64 (quoting *Riley v. State*, 496 A.2d 997, 1018 n. 27 (Del. 1985) (quoting *Ungar v. Sarafite*, 576 U.S. 575, 589 (1964))).

[130] *Secrest,* 679 A.2d at 64 (citing *United States v. Saccoccia*, 58 F.3d 754, 770 (1st Cir. 1995).

> continuance, including the length of the requested continuance. Second, the party seeking the continuance must show:
>
> (a) That it was diligent in preparing for the presentation of the testimony;
> (b) That the continuance will be likely to satisfy the need to present the testimony; and
> (c) That the inconvenience to the Court, opposing parties, witnesses and jurors is insubstantial to the likely prejudice which would result from the denial of the continuance.[131]

Trial Counsel was aware the State possessed more than the 15 calls it provided on April 25, 2018. The State's review of the remaining calls at Trial Counsel's request satisfied Waters' need to present the testimony. Indeed, after receiving additional recordings from the State, Waters requested no more. Finally, the inconvenience to the court and counsel far outweighed the speculative prejudice to Waters. The Superior Court aptly commented:

> This will be a moving target. It doesn't matter when we try this case. The universe of evidence to review will continue to grow because the defendant himself is creating the evidence. And it seems to me that, based on the State's representations, that they will make an effort to produce or look for, based on what we know, what they might be able to give to [trial counsel].
>
> But also, the defendant himself can identify when he says these conversations took place. And perhaps the State can find them. But it's also possible, as [a trial prosecutor] points out, that this evidence might not exist. It might not exist.
>
> And it seems to me, regardless that its all cumulative here anyway, because once this witness takes the stand, he's already changing his story numerous times. That will be of record for the [factfinder] to

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[131] *Secrest*, 679 A.2d at 66

> consider. And the [factfinder] will make a determination based upon direct and cross and probably redirect and recross of this witness's credibility. And I think that you'll – you have enough to make a good argument on behalf of this defendant.
>
> And, you know based on this universe and given what you have told him today and what your understanding is of the State's evidence, he's not even willing to consider resolving the case in any other way, and that's fair He's presumed innocent; he's entitled to a trial. But he's not entitled to gamesmanship.[132]

The Superior Court did not abuse its discretion by declining to reschedule Waters' trial a third time. When trial counsel presented the motion on May 9, 2018, the Superior Court had already rescheduled Waters' trial twice[133] and granted Waters' original trial counsel's motion to withdraw based on a conflict of interest created by Waters himself.[134] The Superior Court confirmed Waters had access to all of the calls obtained by the State and determined that Waters was well-equipped to examine and cross examine witnesses presented at trial. Waters' claim thus fails.

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[132] A369

[133] A6 at DI 27; A8 at DI 43.

[134] A9 at DI 43; A343.

## II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING WATERS' UNTIMELY MOTION TO SUPPRESS EVIDENCE.

### Question Presented

Whether the Superior Court abused its discretion when it denied trial counsel's untimely motion to suppress evidence secured by an Attorney General's subpoena.

### Standard and Scope of Review

"This Court reviews the Superior Court's denial of a motion to exclude evidence for an abuse of discretion."[135] The Supreme Court reviews "alleged constitutional violations *de novo*."[136]

### Merits of Argument

Waters argues that the Superior Court erred by denying his mid-trial motion to suppress recordings of prison phone calls secured by an "Attorney General's subpoena."[137] By couching his objection as a challenge to the "foundation for

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[135] *Mize v. State,* 2017 WL 3391761 (Del. Aug 7, 2017) (citing *Milligan v. State*, 116 A.3d 1232, 1235 (Del. 2015)).

[136] *Morris v. State*, 2019 WL 2123563, *5 (Del. May 13, 2019) (reviewing denial of timely, pre-trial motion to suppress prison phone call recordings).

[137] The phrase "Attorney General's subpoena" or "AG's subpoena" is commonly used in Delaware criminal proceedings to describe subpoenas issued by the Delaware Department of Justice under 29 *Del. C.* § 2504(4).

admissibility laid by the State,"[138] Waters circumvented established Superior Court procedural rules. His argument at trial and on appeal is that the records should have been suppressed because the State's subpoena failed to comport with Fourth Amendment requirements. He contends the "State was unable to lay a foundation for the reasonableness of the subpoena[s]"[139] and that the subpoenas used to obtain his prison phone calls "are mere boilerplate and give no clue to the actual reason" for their issuance.[140] He is wrong. While the Superior Court could have rejected his mid-trial suppression claim as waived, it denied Water's untimely suppression motion on the merits "under *Whitehurst v. State* . . . [and was] satisfied that the State ha[d] met the standard."[141] The Superior Court did not abuse its discretion by denying Waters' motion.

Superior Court Criminal Rule 12(b) encourages matters "capable of determination without the trial of the general issue" to be raised before trial.[142] And, motions to suppress or exclude evidence "*must* be raised prior to trial."[143] A party's

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[138] Op. Br. at 49.

[139] Op. Br. at 48.

[140] Op. Br. at 49.

[141] A594.

[142] Super. Ct. Crim. R. 12(b).

[143] Super. Ct. Crim. R. 12(b)(3) (emphasis added). It is within the broad discretion of the trial judge to enforce procedural rules. *Barnett v. State*, 691 A.2d 614, 616

failure to move to suppress evidence prior to trial "shall constitute waiver thereof" unless the court grants relief from the waiver for good cause shown.[144] The Superior Court's Rules of Criminal Procedure are to be construed to, among other things, provide fairness in administration.[145] Requiring motions to suppress or exclude evidence to be addressed prior to trial protects the State's ability to appeal adverse rulings.[146] Waters failed to offer exceptional circumstances for his untimely motion to suppress and incorrectly framed his objection as challenging the foundation for admission of evidence.[147] Absent exceptional circumstances, the Superior Court should not have addressed the merits of Water's motion to suppress.[148] It is well established that this Court may affirm a trial court's judgment for reasons different

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(Del. 1997) (abrogated on other grounds by *Lecates v. State*, 987 A.2d 413 (Del. 2009)).

[144] Super. Ct. Crim. R. 12(f).

[145] Super. Ct. Crim. R. 2.

[146] 10 *Del. C.* § 9902(b)

[147] *See e.g. Morris v. State*, 2019 WL 2123563 (Del. May 13, 2019) (addressing, separately, defendant's suppression claim of overbreadth of an Attorney General subpoena and defendant's foundation claim that the State could not prove lack of alteration of recorded calls). Neither at trial nor on appeal does Waters contend the State failed to establish the authenticity or admissibility of his prison calls. *See* D.R.E. 901.

[148] *See Davis v. State*, 38 A.2d 278, 280 (Del. 2012) (citing *Pennewell v. State*, 2003 WL 2008197, *1 (Del. Apr. 29, 2003) (citing *Barnett*, 691 A.2d at 616)) (finding trial court did not abuse its discretion by declining to consider untimely motion to suppress filed two days prior to trial).

than those articulated by the trial court.[149] Nonetheless, the trial court did not err on the merits.

"This Court has held that for Fourth Amendment purposes, prisoners who are notified by prison officials that their communications will be monitored have no expectation of privacy in the mail they send or the telephone calls they make."[150] Although Waters was on notice that his outgoing prison phone calls might be recorded, the Fourth Amendment still requires that a subpoena for his prison calls be "reasonable."[151] "This Court has held that the reasonableness of a subpoena for prison communication is reviewed under the United States Supreme Court's test outlined in *Procunier v. Martinez*."[152] "The *Martinez* standard requires Delaware courts to determine whether "(1) the contested actions furthered an important or substantial government interest . . . , and (2) the contested actions were no greater than necessary for the protection of that interest."[153]

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[149] *Unitrin, Inc. v. American Gen. Corp*., 651 A.2d 1361, 1390 (Del. 1995).

[150] *Johnson v. State*, 2012 WL 3893524, at *1 (Del. Sept. 7, 2012) (*Johnson II*).

[151] *Johnson v. State*, 983 A.2d 904, 921 (Del. 2009) (*Johnson I*).

[152] *Whitehurst v. State*, 83 A.3d 362, 367 (Del. 2013) (citing *Johnson I*, 983 A.2d at 917) (discussing *Procunier v. Martinez*, 416 U.S. 396, 414 (1974)).

[153] *Id*. In *Johnson I,* this Court assessed the reasonableness of subpoenas directed at inmate communications under both the First and Fourth Amendments to the United States Constitution and announced two overlapping tests for reasonableness. First, against the backdrop of the First Amendment, a subpoena must: (1) further an important or substantial government interest, and (2) be no broader than necessary to protect the interest. *Johnson I*, 983 A.2d at 917. Second, against the backdrop of

Waters concedes "it seemed the State had some basis to obtain Mr. Waters' prison calls," yet argues "the State was unable to lay a foundation for the reasonableness of the subpoena."[154] As the Superior Court correctly determined, Waters' subpoena challenge fails.

Detective Sendek testified at trial that, in the fall of 2017, investigators "began monitoring Mr. Waters prison phone calls" because "efforts to speak with and contact regularly with one of the main witnesses, Rapha Moore, proved difficult."[155] Detective Sendek explained that prison phone call recordings were secured by a subpoena through the prosecutor's office.[156] Trial counsel, citing *Whitehurst v. State*, informed the Superior Court, "I need a better foundation than that, or I'm going to move to exclude the prison calls."[157] Detective Sendek then described Moore's hesitation to cooperate with investigators and to "go forward with testifying

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the Fourth Amendment, a subpoena for documents generally (as opposed to communications of incarcerated individuals) must: (1) identify the materials sought with reasonable particularity; (2) require the production of only relevant materials; and (3) not cover an unreasonable time period. *Id.* at 921. While Waters articulates the three-pronged test, he contends "there was no important governmental interest being protected and no reasonable basis to subpoena the calls." Op. Br. at 49. Thus, the reasonableness assessment articulated in *Whitehurst* is most applicable here.

[154] Op. Br. at 48.

[155] A589.

[156] *Id.*

[157] *Id.*

at trial,"[158] and explained Moore "would not physically take [a subpoena]"[159] the detective tried to give him. Trial Counsel, arguing the State failed to offer "reasonable grounds of essentially witness tampering," moved to suppress the prison call recordings.[160]

The trial prosecutor, attempting to properly cabin its proffered evidence, informed the trial court that "the one factor that I would point out that we thought was not appropriate to bring in through Detective Sendek but was a factor when the Department of Justice issu[ed] these subpoenas is the fact that Mr. Waters has previously been convicted of witness tampering."[161] The trial court then framed the question before it, stating:

> [W]e have, number one, a prior conviction for witness tampering, and number two, concerns limited to Rapha Moore, and number three, a detective who testified that he, open quotes, Just to ensure that Moore's hesitation was not coming from Waters, close quote. So, if that's the entirety of the record, the legal question for me is is that enough to meet the reasonableness standard for issuance of the subpoena?[162]

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[158] A590.

[159] A591

[160] A592-593.

[161] A593.

[162] A594.

After a ten-minute recess, the trial court appropriately overruled Waters objection to the admissibility of the prison recordings.[163]

The State had legitimate concerns that Waters may be tampering with witnesses to discourage their participation at trial. Waters' past proven efforts to influence witnesses – that resulted in a criminal conviction – exacerbated these concerns. "This Court has recognized 'that there is a legitimate or substantial government interest if the defendant is engaged in witness tampering.'"[164] "Even if the tip comes from an uncorroborated source, the State has an interest in investigating criminal activity."[165] The Superior Court did not abuse its discretion in finding, "under *Whitehurst v. State* . . . that the State ha[d] met the standard."[166]

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[163] *Id.*

[164] *Whitehurst*, 83 A.3d at 367 (citing *Johnson I*, 983 A.2d at 917-18).

[165] *Id.* at 367-68.

[166] A594.

## III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING WATERS' MOTION FOR A NEW TRIAL.

### Question Presented

Whether the Superior Court abused its discretion when it denied Waters' motion for a new trial.

### Standard and Scope of Review

"Motions for a new trial are addressed to the sound discretion of the trial court[, and] . . . the trial court's ruling on such motions will be reversed on appeal only where there is a clear showing of abuse of discretion."[167]

### Merits of Argument

Waters argues that the Superior Court "erroneously applied legal precepts,"[168] and, in so doing, (1) "erred in establishing the motive for the murder;"[169] (2) "erred in holding that the evidence placed Mr. Waters at the scene;"[170] and "minimize[d] the importance of the CSLI evidence."[171] He is wrong. The Superior Court did not err in denying Waters' request for a new trial.

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[167] *Johnson v. State*, 1993 WL 245374, at *1 (Del. June 22, 1993) (citing *Hutchins v. State*, 153 A.2d 204, 206 (1959); *Blankenship v. State*, 447 A.2d 428, 433 (1952)).

[168] Op. Br. at 53.

[169] *Id.* at 54.

[170] *Id.*

[171] *Id.* at 55

"The [Superior Court] on motion of a defendant may grant a new trial to that defendant if required in the interest of justice."[172] Where, as here, the "trial was by the court without a jury the [Superior Court] on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment."[173]

Here, the Superior Court afforded Waters "retroactive applicability of the recently issued *Carpenter* decision" and found the Pen Register Order used to obtain CSLI "did not include an individualized finding of probable cause."[174] The Superior Court nonetheless concluded:

> Without considering the CSLI evidence and without drawing any inferences from the CSLI evidence, [Waters'] guilt was established beyond a reasonable doubt for the crimes of Manslaughter, Possession of a Firearm During the Commission of a Felony, Possession of a Firearm by a Person Prohibited, and Possession of Ammunition by a Person Prohibited. The interest of justice does not require that [Waters] be granted a new trial.[175]

The Superior Court did not minimize the import of the CSLI evidence. Rather, after thorough briefing and argument, the Superior Court acknowledged the retroactive

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[172] Super. Ct. Crim. R. 33.

[173] *Id.*

[174] *State v. Waters*, 2019 WL 248675, *5 (Del. Super. Ct. June 13, 2019).

[175] *Id.*

applicability of *Carpenter* and expressly removed any CSLI evidence admitted at trial from its consideration as factfinder.

Arguing that the Superior Court erroneously applied legal precepts, Waters misapprehends that court's discussion of the standards of review applicable to motions for judgment of acquittal and motions for new trial as set forth in *State v. Johnson*:[176]

> In reviewing the sufficiency of the evidence for a judgment of acquittal, the standard is settled and straightforward: The Court must examine the evidence in the light most favorable to the State. If a reasonable person could conclude from the evidence that the Defendant is guilty beyond a reasonable doubt, the evidence is sufficient.
>
> The standard for deciding a motion for a new trial based on the weight of the evidence is less clear. While it is settled that such a motion is addressed to the court's discretion and while it also is clear that jury verdicts are entitled to judicial deference, the extent, if any, to which the Court may reweigh the evidence is not entirely clear. In this case, however, any uncertainty about the standard of review is unimportant."[177]

The Superior Court acknowledged a lack of clarity in the standard of review, but did not, as Waters contends, flatly reject a review in the light most favorable to the

[176] Op Br. at 52.

[177] *State v. Johnson*, 1999 WL 458627, at *1 (Del. Apr. 29, 1999) (citing *Vouras v. State,* 452 A.2d 1165, 1169 (Del. 1982); *Hutchins v. State,*153 A.2d 204, 206 (Del. 1959)).

State.[178] Assessing the defendant's motion for new trial after a jury verdict, the Superior Court concluded:

> At trial, Defendant made several interesting arguments about how the jury could view the evidence in such a way as to find him not guilty. Thanks to the trial transcript excerpts attached to the State's memorandum in opposition to Defendant's motion, the Court is reminded that the State presented ample evidence to support the jury's verdict.
>
> As presented above, it may or may not be appropriate for the Court to test a jury's verdict by reweighting the evidence. In this case, however, if the Court were obliged to weigh the evidence on its own, it would find that the scale comes down heavily against Defendant.
>
> In any event, while there were two sides to the story, the jury had more than enough evidence to conclude beyond a reasonable doubt that Defendant did exactly what the State accused him of doing. Defendant's convictions do not turn on the sufficiency of the evidence, but rather on what the jury made of it. The verdict is just and it will stand.[179]

Here, as in *Johnson,* the Superior Court reweighed the evidence and concluded evidence established Waters guilty beyond a reasonable doubt and that the interests of justice did not demand a new trial.[180] In critiquing the Superior

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[179] *Johnson*, 1999 WL 458627, at 1-2.

[180] *Waters*, 2019 WL 248675, *5.

Court's legal analysis, Waters ignores the fact that, on his motion, the court could "vacate the judgment . . . and direct the entry of a new judgment."[181]

Waters "is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of . . . circumstances not adduced as proof at trial."[182] A judge, sitting without a jury, is qualified to differentiate evidence in rendering a verdict.[183] The Superior Court retroactively applied the *Carpenter* decision and excluded CSLI evidence presented at trial from its assessment of the facts of the case.[184] In fact, the Superior Court commented that

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[181] Super. Ct. R. 33.

[182] *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

[183] 75B Am. Jur. 2d. Trial § 1584 (2019). "[A] judge, when deliberating the ultimate decision is capable of distinguishing between admissible and inadmissible evidence." Id. (citing, *Rath v. Rath*, 911 N.W. 2d 919 (N.D. 2018)). "A judge, unlike a juror, is uniquely suited by training, experience and judicial discipline to disregard potentially prejudicial comments and to separate, during the mental process of adjudication, the admissible from the inadmissible, even though he or she has heard both." *Id.* (citing, *Baldwin v. Commonwealth*, 815 S.E. 2d 809 (Va. App. 2019). "[I]t is presumed that the judge will understand the limited reason for disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose." *Id.* (citing *Ambrose v. Roeckman*, 749 F.3d 615 (7th Cir. 2014); *U.S. Bank, N.A. v. UBS Real Estate Securities, Inc.*, 205 F.Supp. 3d 386 (S.D.N.Y. 2016)). "[A] trial judge in a nonjury case should ordinarily admit all evidence which is not clearly inadmissible because a judge, when deliberating the ultimate decision, is capable of distinguishing between admissible and inadmissible evidence." *McKechnie v. Berg*, 667 N.W. 2d 628, 631 (N.D. 2003) (citing *Signal Drilling Co., Inc. v. Liberty Petroleum Co.*, 226 N.W. 2d 148, 153 (N.D. 1975)).

[184] *Waters*, 2019 WL 248675, *5.

"the CSLI evidence presented at trial was not especially probative in that there was ample room for interpretation of the evidence [, and] [t]o the extent the CSLI evidence placed [Waters] at the scene, it was cumulative of the testimony of witnesses and circumstantial evidence."[185]

Waters argues the Superior Court erred in establishing the motive for murder.[186] But, motive is not an element of the charged crimes and the ability, or inability, of the State to establish a motive 'is not fatal to the sufficiency of its other evidence."[187] Nonetheless, the Superior Court found the evidence established an escalating disagreement between Waters and Thompson that resulted in the fatal confrontation.[188] While motive need not be proven beyond a reasonable doubt (or at all), the evidence clearly suggests Waters was angry with Thompson and confronted him directly outside Prides Court Apartments. The Superior Court did not err.

Waters next contends that "the judge erred in holding that the evidence placed Mr. Waters at the scene."[189] Not so. The Superior Court concluded:

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[185] *Id.*

[186] Op. Br. at 54.

[187] *See Morgan v. State,* 922 A.2d 395, 401 (Del. 2007) (citing *Littlejohn v. State,* 219 A.2d 155, 157 (Del.1966)).

[188] *Waters*, 2019 WL 248675, at *3.

[189] Op. Br. at 54.

> The evidence also placed Defendant at the scene of the homicide. Some of this evidence was indirect or circumstantial. Direct evidence of a credible eyewitness also placed Defendant at the scene and identified Defendant as the shooter. Specifically, the State presented various accounts by Six, including an audio/video recording at the scene by an officer's body camera; investigative interviews with officers; an affidavit in which Six contradicted his prior statements; and testimony as a witness at a trial. The Court found Six's statements at the scene and shortly thereafter to be credible and did not find Six's later statements to be credible. Six's reluctance to testify was explained, at least in part, by his own description of 'repercussions from both sides.' The evidence established beyond a reasonable doubt that Defendant was present at the scene, and that Defendant was the shooter. Accordingly, it was established beyond a reasonable doubt that Defendant had opportunity and means to commit the crime.[190]

Contrary to Waters assertion, the Court's exclusion of the CSLI did not change "the landscape of the case" warranting a new trial in the interest of justice.[191] Rather, the Superior Court, sitting without a jury, segregated the evidence and found the remaining evidence supported its verdict beyond a reasonable doubt and, thus, a new trial was not warranted in the interest of justice. The Superior Court did not abuse its discretion when it denied Waters' motion for a new trial.

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[190] *Waters*, 2019 WL 248675, at *4 (internal citations omitted).

[191] Op. Br. at 55.

## CONCLUSION

For the foregoing reasons, the State respectfully submits that this Court should affirm the judgment below.

***/s/ Sean P. Lugg***
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Dated: May 1, 2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| REGINALD WATERS, | ) | |
| | ) | |
| Respondent-Below,<br>Appellant, | )<br>) | |
| | ) | |
| v. | ) | No. 491, 2019 |
| | ) | |
| STATE OF DELAWARE, | ) | |
| | ) | |
| Plaintiff-Below,<br>Appellee. | )<br>) | |

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION**

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 7,455 words, which were counted by Microsoft Word.

Dated: May 1, 2020 /s/ *Sean P. Lugg*