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Case Number 91,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DIAMONTE TAYLOR,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	No. 91, 2020
v.	)	
	)	
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 REPLY BRIEF

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DATED: December 21, 2020

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CLAIM I. THE SUPERIOR COURT ERRED IN HOLDING THAT A SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE DESPITE THAT IT FAILED TO ESTABLISH ANY NEXUS BETWEEN THE ALLEGED CRIME COMMITTED AND THE CELL PHONE TO BE SEARCHED.

In April 2018—two weeks after Appellant was found guilty in the instant case—this Court issued its decision in *Buckham v. State*.[1] *Buckham* explicitly held that where the police have nothing beyond (1) evidence a cellular phone was upon a defendant's person upon arrest; (2) evidence the defendant posted on social media about getting arrested while at-large, and (3) a generalized suspicion that evidence of a crime will be located on a telephone of a defendant because "criminals often communicate through cellular phones," probable cause does not exist to search the device.[2] The instant warrant establishes at least two of the same factors present in *Buckham*, as Appellant's device was found on his person when he was arrested by the authorities and Detective Kirlin voiced her belief that "persons involved in criminal acts will utilize . . . cellular telephones to further facilitate their criminal acts and/or communicate with co-conspirators."[3] Whereas the *Buckham* affidavit established definitively that the defendant had posted on

[1] 185 A.3d 1 (Del. 2018).

[2] *Id*. at 17.

[3] A0258-59.

social media about being arrested prior to his arrest, Detective Kirlin's affidavit merely establishes that there were "numerous postings [on social media] referencing the recent crimes," as well as posts "referencing the ongoing gang feud"—no such post is actually attributed to Appellant.[4] There is, at best, as much information in the instant warrant regarding Mr. Taylor's cellular phone as there was in the *Buckham* warrant, and likely less.

Buckham, simply put, is dispositive to the issue of whether police established probable cause to search Mr. Taylor's phone. Had *Buckham* been decided prior to the Superior Court's decision on Mr. Taylor's suppression motion, the trial judge would have been left with no choice but to grant it. Yet, despite that this Court's ruling must turn on its 2018 decision, Appellee inexplicably cites *Buckham* one time, and only to contextualize the Superior Court's finding that a warrant failed to satisfy the particularity requirement in a 2019 decision.[5]

Appellee makes no attempt to explain why, despite the marked similarities between this case and *Buckham*, the Superior Court's decision on Appellant's motion to suppress should stand. Appellee does not articulate additional facts within the instant affidavit that serve to establish a nexus between the information

[4] A0259.

[5] Ans. Br. at 39-40 (discussing *State v. Reese*, 2019 WL 1277390 (Del. Super. Ct. Mar. 18, 2019)).

sought and Appellant's electronic device that were not present in *Buckham*. Instead, Appellee attempts to indirectly upend *Buckham* by asking this Court to establish a rule that, where a crime is suspected to involve multiple participants, a defendant's phone can be searched so long as police express a generalized suspicion the alleged "criminals used cellphones to communicate."[6]

In so arguing, Appellee relies upon a Superior Court decision, *State v. Albert*.[7] Preliminarily, it must be noted that *Albert* was decided approximately three years prior to *Buckham*.[8] Importantly, however, the rationale employed in *Albert*—that a police officer's knowledge, based upon training and experience, that criminals often communicate through cellular phones, can establish a nexus between the crime and a defendant's phone[9]—was expressly rejected in *Buckham*.[10] Indeed, *Buckham* held the officer's statement that "criminals often communicate through cellular phones" was "[p]articularly unpersuasive," rhetorically asking "who doesn't in this day and age?"[11]

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[6] Ans. Br. at 32 (discussing *State v. Albert*, 2015 WL 7823393 at *4 (Del. Super. Ct. Dec. 3, 2015)).

[7] 2015 WL 7823393.

[8] *Compare id*. (decided on December 3, 2015) *with Buckham*, 185 A.3d 1 (decided on April 17, 2018).

[9] *Albert*, 2015 WL 7823393 at *4.

[10] *Buckham*, 185 A.3d at 17.

[11] *Id*.

The *Albert* Court's reliance on the officer's belief that criminals used cellular phones was buttressed, however, by the fact that more than one person was suspected of committing the crime in question.[12] It was this factor for which the trial court turned to the Eastern District of Michigan decision in *United States v. Gholston*—a case relied upon here by the State[13]—for the rule that an officer's statement of his training and experience combined with evidence a defendant committed a crime with another individual "supported an inference that searching the cell phone would reveal evidence of the identities of the others involved or their possible pre-planning and coordination of criminal activity."[14] This reasoning, however, was tacitly rejected by *Buckham* as well.

The *Buckham* defendant was suspected of committing Assault in the First Degree and other offenses in connection with a shooting.[15] The State's theory was that Buckham shot the victim from the passenger seat of a vehicle driven by Imean Waters.[16] Waters was charged in connection with the incident and entered a guilty

[12] *Albert*, 2015 WL 7823393 at *4.

[13] *See* Ans. Br. at 32 (quoting *United States v. Gholston*, 993 F.Supp.2d 704 (E.D. Mich. 2014)).

[14] *Albert*, 2015 WL 7823393 at *4 (internal citations omitted).

[15] *Buckham*, 185 A.3d at *4.

[16] *Id*. at 5-7.

plea prior to Buckham's trial.[17] Thus, the defendant was accused of committing a crime with another known individual. Nevertheless, this Court rejected the State's contention that probable cause to search the phone existed because "criminals often use cell phones to talk about their criminal activity."[18]

A plain reading of *Buckham* reveals no portion of *Albert*'s holding—at least as it relates to the finding of probable cause to support a search of a cellular phone—remains good law. Consequently, this Court should reject Appellee's argument that police may search the cellular phone of any individual suspected of committing a crime with another person so long as the officer has a generalized suspicion that criminals use such devices to communicate.

The State also raises two claims about the substance of the warrant that require clarification. Appellee contends that the "application shows that police believed Taylor and Harris-Dickerson communicated about gang-related activities using cell phones."[19] Unless Appellee is relying upon the boilerplate language within the warrant that "persons involved in criminal acts will utilize . . . cellular telephones to further facilitate their criminal acts and/or communicate with co-

[17] *Id*. at 6.

[18] *Id*. at 16-17.

[19] Ans. Br. at 33.

conspirators," no such averment can be found within the affidavit.[20] Even if such information were in the warrant, the officer's "belief" that Appellant communicated with Harris-Dickerson about gang-related activities would be rank speculation unhelpful to a probable cause analysis.[21]

The State additionally contends that Appellant was a member of the STK gang and was "known to frequent 508 Shearman Street."[22] This is overstated at best, and ultimately contributes nothing to an analysis of whether there was probable cause to search Mr. Taylor's phone. The affidavit alleges the residence "was frequented by 'STK' gang members."[23] The application contains a hearsay statement that Appellant was a member of the gang.[24] The warrant does not establish that Appellant frequented the residence, but only details one instance when he was observed at 508 Sherman Street—the day he was arrested.[25]

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[20] *See* A0256-60.

[21] *See Dorsey v. State*, 761 A.2d 807, 813 (Del. 2000) (the constitutional "requirement of demonstrating probable cause is not to deny law enforcement officers the support of usual inferences which reasonable individuals draw from objective evidence, but to require those inferences to be drawn by a detached judicial officer rather than the police officer.") (citing *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)).

[22] Ans. Br. at 33.

[23] A0277.

[24] A0275.

[25] A0277.

Finally, Appellant discussed at length in his Opening Brief how the State's contention that Detective Kirlin made a scrivener's error in her affidavit was illogical when reading the application in its entirety.[26] The State ignored the substance of that argument, and instead merely restated the trial prosecutor's challenged claim that there was such an error, as well as the trial court's ultimate acceptance of that assertion. Nevertheless, Appellee's contention that a scrivener's error was made renders the affidavit wholly illogical when reading the application *in toto*.

[26] Op. Br. at 24-29.

<u>CLAIM II</u>. THE SUPERIOR COURT ERRED BY ALLOWING INTO EVIDENCE CELL PHONE DATA AND MESSAGES THAT WERE SEIZED AS PART OF AN IMPERMISSIBLE GENERAL WARRANT.

To satisfy the particularity requirement of the United States and Delaware Constitutions, an application seeking a warrant to search a cellular phone "must describe what investigating officers believe will be found on [the device] with as much specificity as possible under the circumstances," and should also narrowly tailor their search to a relevant time frame.[27] A warrant can include a temporal limitation and still fail the particularity requirement if, for example, it authorized the search of items or areas for which no probable cause exists, or vice versa.[28]

Appellant raises two claims under the particularity requirement in the instant appeal: (1) the warrant was overly broad as it authorized a "top-to-bottom" search of his phone by permitting authorities to rummage through "[a]ny/all data stored by whatever means" on the device[29], and (2) the warrant failed to include any temporal limitation, blatantly evidenced by the results of the search yielding eleven years' worth of digital data.[30]

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[27] *See Wheeler v. State*, 135 A.3d 282, 304 (Del. 2016).

[28] *See id*. at 304-7.

[29] A0254-55.

[30] A0296.

Appellee predominantly ignores Mr. Taylor's first argument, offering no rebuttal to his contention the warrant was overly broad in the areas through which it permitted the authorities to peruse other than a brief discussion of the Superior Court's decision in *State v. Anderson* that the warrant at issue there "specifically list[ed] the various categories of data to be searched."[31] The State does not analogize Mr. Taylor's first argument to *Anderson*, but merely recites the lower court's holding.[32]

Nevertheless, *Anderson* does not overcome Appellant's challenge to the denial of his motion to suppress on the grounds that the search authorized was overly broad. First, the language in *Anderson* differs substantially from the instant warrant, authorizing police to search "[a]ny and all store[d] data contained within the internal memory of the cellular phones, including but not limited to, incoming/outgoing calls, missed calls, contact history, images, photographs and SMS text messages."[33] The warrant to search Mr. Taylor's phone explicitly included many more areas of the device.[34] The *Anderson* warrant was limited to

[31] Ans. Br. at 38 (quoting *State v. Anderson*, 2018 WL 6177176 at *4 (Del. Super. Ct. Nov. 5, 2018)).

[32] Ans. Br. at 38.

[33] *Anderson*, 2018 WL 6177176 at *1 (emphasis in original).

[34] *See* A0274.

the internal memory of the electronic device, whereas the instant warrant allows the search of data stored "by whatever means"—including any SIM card or removable storage device.[35]

It is also worth noting that the *Anderson* decision has not been reviewed by this Court, and Appellant disagrees that the *Anderson* warrant satisfied the particularity requirement as to its scope. Any warrant that allows the search of "any and all stored data" on a cellular phone permits a top-to-bottom search of that device, regardless of any language listing specific types of data that may be searched, especially when the warrant clarifies that the list is inclusive, not exhaustive.[36]

Additionally, while the State discusses the trial court's 2019 decision in *State v. Reese*—which specifically noted it was not following its prior holding in Mr. Taylor's case as it no longer constituted good law in light of *Buckham*[37]—Appellee fails to offer any argument as to why *Reese* was wrongly decided.[38]

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[35] A0274.

[36] *See Buckham*, 185 A.3d at 18 ("Modern smartphones store an unprecedented volume of private information, and a top-to-bottom search of one can permit the government access to far more than the most exhaustive search of a house.") (internal citations and quotations omitted).

[37] 2019 WL 1277390 at *7 (Del. Super. Ct. Mar. 18, 2019). The language as to the scope of the warrant in *Reese* is substantively identical to that in the disputed warrant here. *Compare id*. at *1 *with* A0255.

[38] Ans. Br. at 40.

Rather than mete out an argument as to why the warrant was sufficiently particular as to the areas of the phone that were to be searched, Appellee instead focuses almost exclusively on Mr. Taylor's argument that the warrant failed to establish a temporal limitation as to the data to be searched that was stored on the phone.[39] Yet in so doing, Appellee ignores Mr. Taylor's primary argument that the most significant evidence that the warrant lacked any sort of temporal limitation was that execution of the warrant generated data dating back eleven years and yielded a report in excess of 4,500 pages.[40]

Preliminarily, Appellee correctly observes that the warrant itself, contrary to Mr. Taylor's initial contention, does appear to incorporate the affidavit by reference.[41] But as Appellant's argument to this Court is not that the trial judge erred by incorporating the affidavit by reference—but rather the affidavit itself failed to establish temporal limitations—the discrepancy is moot.

The State places substantial focus on the trial court's holding in *State v. Waters* that the court "may limit the scope of permissible evidence to that for which probable cause is present in the warrant" when a warrant is broader than the

[39] *See generally* Ans. Br. at 34-42.

[40] A0295-96.

[41] Ans. Br. at 42 (quoting A0254).

probable cause that supports it.[42] Specifically, the State finds significant *Waters'* holding that an overly broad warrant need not necessarily be a general warrant and, consequently, portions of the fruits of the search can be excised and saved within the section of the application that established probable cause.[43] The State overlooks the fundamental difference between *Waters* and the instant case, however, which militates a different result here.

While *Waters* discusses *Wheeler*, *Buckham*, and other cases dealing with the search of cellular phones in considerable depth, the case itself falls within the penumbra of *Carpenter v. United States*, not *Wheeler* or *Buckham*.[44] *Carpenter* held that prior to obtaining cell-site location information ("CSLI") from a wireless carrier, authorities must generally obtain a search warrant supported by probable cause.[45] Like *Carpenter*, *Waters* dealt with a warrant seeking historical CSLI from a wireless carrier, *not* digital information from a cellular phone.[46] Such distinction is paramount to the ultimate holding of the Superior Court.

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[42] Ans. Br. at 40-42 (quoting *State v. Waters*, 2020 WL 507703 at *4 (Del. Super. Ct., Jan. 30, 2020)).

[43] *Id*.

[44] *Carpenter v. United States*, 138 S.Ct. 2206 (2018).

[45] *Id*. at 2221.

[46] *Waters*, 2020 WL 507703 at *1.

The *Waters* court held that while the warrant at issue was overly broad because it allowed historical CSLI for dates outside the ambit of the probable cause establishing within the four corners of the affidavit, it ruled that the warrant itself was not a general warrant.[47] Such was the case, according to the Superior Court, because the warrant "seeks only [CSLI] and only over a specific period of time and does not authorize a 'general rummaging' through all data on a cell phone."[48] A general warrant, as the court observed, is invalid precisely because it "vests the executing officers with unbridled discretion to conduct an exploratory rummaging through [the defendant's] papers in search of criminal evidence."[49] There was no private data through which the *Waters* authorities could rummage—merely CSLI that contained no personal information outside of approximate location information of the device itself. The Superior Court allowed the State to admit portions of the materials seized pursuant to the warrant, as it reasoned that only for a general warrant is "suppression of all of its fruits" the appropriate remedy.[50]

Not so here. The authorities executed a general warrant upon Appellant's phone which generated results spanning eleven years' worth of information. The

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[47] *Id*. at *4.

[48] *Id*.

[49] *Id*. (quoting *United States v. Yusaf*, 461 F.3d 374, 393 n.19 (3rd Cir. 2006)).

[50] *Id*. at *4.

authorities were free to rummage through all of the private, intimate details of Appellant's life located within the digital universe of his phone.[51] As the *Waters* Court observed, the appropriate remedy was complete suppression of all of the fruits of the search.[52] Yet the trial court here offered no remedy for the State's use of a general warrant and erroneously allowed Appellee to utilize evidence for which it had not established probable cause to obtain.[53]

Finally, Appellee contends that even if this Court finds that the trial court erred in denying Mr. Taylor's motion to suppress, such error was harmless because "none of the [evidence derived from the search of Appellant's phone] was critical to the prosecution of this case."[54] A review of the record suggests otherwise.

The State entered the extraction report into evidence as State's Exhibit 286.[55] Fifteen photographs from within that report were entered as separate

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[51] There is no doubt the authorities examined contents of the phone outside of the temporal window the State alleged existed within the affidavit, as the prosecution attempted to admit material seized from Appellant's phone into evidence that were created prior to May 16, 2016. *See* A1015-16.

[52] *Waters*, 2020 WL 507703 at *4.

[53] *See, e.g., Dorsey v. State*, 761 A.2d 807, 821 (Del. 2000) ("Without a constitutional remedy, a Delaware 'constitutional right' is an oxymoron that could unravel the entire fabric of protections in Delaware's two hundred and twenty-five year old Declaration of Rights.").

[54] Ans. Br. at 43.

[55] A1048; *see also* A1092-1187.

exhibits denoted as Exhibits 286-A through 286-O.[56] The prosecutors questioned Latasha Pierce about the contents of Mr. Taylor's cellular phone.[57] The same was done of Kevon Harris-Dickerson.[58] The cell phone evidence was so important to the State's case that the last witness the jury heard before the State rested its case was Detective Kirlin, testifying exclusively about the extraction report.[59]

The State's closing argument was replete with references to the contents of Mr. Taylor's cellular phone. The prosecutor argued:

> So, direct evidence, you have eyewitnesses, surveillance video, codefendant testimony, the defendant's own statements, as you have seen from social media and his cell phone content. Photographs, circumstantial evidence is evidence that you can draw inferences from.[60]
>
> [. . .]
>
> Diamonte Taylor's cell phone download in its contact section has as a contact for "Shango from east," and the picture associated with it, Shango Miller. His cell phone download also contains text messages

[56] A1062-1231.

[57] *See* A1062-66.

[58] *See* A1202; A1226.

[59] A1227-42. *See, e.g., People v. Knobee*, 2020 WL 238712 at *8 (Colo. App. Jan. 16, 2020) ("Case law has relied on the principles of primacy and recency and their effect on memory and perception, and has recognized that those principles can be considered in determining whether to reverse a criminal conviction.") (citing *Dudley v. State*, 951 P.2d 1176, 1180 (Wyo. 1998) ("[W]e recognize[ ] the accepted psychological impact of the testimony of witnesses presented first or last under the theory of 'primacy and recency.'")).

[60] A1276.

that he sent, that he sent, "when I hit Shango." You have these in evidence (indicating.)

"GS got booked with the pole and had that dumb ass hat on, the same hat when I hit Shango. Did anybody see you when you hit Shango? Yes, we were wanted for that shit but I got low on 'em."

Another text that the defendant sent: "I just scored on some crazy shit, babe, but I don't think he died." Well, that doesn't mean Shango, but look at the time when that text was sent. May 17th, 2016, at 2:03 a.m., and we knot that when we're dealing with Diamonte's cell phone, we have to subtract four hours, that text was sent at 10:03 p.m. The video surveillance shows the shooting happed at eight, within two hours this is the text Diamonte is sending.[61]

[. . .]

Now, we saw a lot of things out of Diamonte Taylor's cell phone download, one of the things you didn't see in his download was mention of the Overby shooting, which supports the fact that Diamonte Taylor wasn't there that day. Kevon Harris-Dickerson didn't just gratuitously place him there, he didn't say Diamonte Taylor was the triggerman, he didn't say Diamonte was in the car, Diamonte was not there.[62]

[. . .]

What other supporting evidence is there? We talked about Diamonte's cell phone download, let's take a look at it. (Indicating.) If you look at that time stamp, May 31st, 2016, at 1:29 a.m., we know that we have to subtract four hours for Diamonte's cell phone, so that means that on the exact same day, that Aggravated Menacing incident took place, at 9:29 p.m. Diamonte Taylor sends this text message: "We're getting him out of there, but they boys was on his ass. 'Cause we seen Teed, Tiheed and some boy, so GS jumped out at him and tried to blow but didn't shoot, but people was out there so he was hot.

[61] A1278.

[62] A1279.

> Take a look two or three lines above that at the very top where he sends a text indicating, "Scrap wasn't with us, and we had one pole, a gun left, you know, it would" -- or then -- "if I had that Nina, RS, but I wasn't poled." May 19th was the day Brandon Wingo was walking home from school and had no idea that he was being hunted as he walked down Clifford Brown Walk.[63]

The State also discussed the extraction report during its rebuttal argument:

> And if there's any question as to who's saying what in a cell phone, look at the language itself, it's not just, okay, maybe someone's on someone else's cell, when the person sends a text message to say, "GS got booked with the same hat he was wearing when I hit Shango," it's pretty clear Diamonte is talking about having shot Shango and referencing that Grimey Savage/Zaahir Smith got arrested with the same hat that he had in that case, and the other case, and on Facebook, again and again.[64]

Finally, just as the State made sure before resting its case-in-chief that the last evidence the jury heard was Detective Kirlin discussing the contents of Appellant's phone, so too did the prosecutor end his rebuttal by talking about the contents of the device:

> Diamonte Taylor in his own cell phone confesses to killing Brandon Wingo when he said, "I just bodied" an "N" word. When he took picture after picture of himself holding the murder weapon. Those, ladies and gentlemen, are confessions, and they come from Diamonte Taylor, one of two people responsible for Brandon Wingo's murder, and ultimately the person who pulled the trigger to end his life.

[63] A1279.

[64] A1290.

> And for those reasons, we ask that you find him guilty beyond a reasonable doubt.[65]

The final argument the jury heard prior to deliberating whether to convict Appellant of a crime that carried a mandatory life sentence was to consider his purported confession that he shot and killed Brandon Wingo. Such evidence should never have been in front of the jury and cannot be considered harmless.[66]

The cell phone evidence was critical to the State's case at trial. The prosecution confirmed as much during oral argument on Mr. Taylor's motion for a new trial filed prior to sentencing.[67] The State contended the case did not hinge on the ballistic evidence at issue, and enumerated what it viewed to be critical evidence during its case-in-chief, including the following:

> You'll recall that when the suspects would commit one of these shootings, they would post a Delaware Online article soon after taking credit for having committed the shooting, posts that show Diamonte Taylor with a black handgun tucked in his pants showing him in what appeared to be clothing identical to the surveillance video of the day that he fled from Brandon Wingo murder; cell phone evidence from Diamonte Taylor, indicating at least in one text that Zaahir Smith got arrested wearing the same hat that he was wearing when, quote, I hit Shango, which was the incident where he was convicted of shooting Shango Miller.

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[65] A1292.

[66] *See, e.g., Domingo-Gomez v. People*, 125 P.3d 1043, 1052 (Colo. 2005) ("Rebuttal closing is the last thing a juror hears from counsel before deliberating, and it is therefore foremost in their thoughts.").

[67] *See* A1542.

> Another one, I just scored on some crazy shit, babe, but I don't think he died though. Later on even we seen Heed and some boys, so GS jumped out on him and tried to blow it, but it didn't shoot. Another text I just bodied a N-I-G-G-A"; photos that show the defendant with this 9 millimeter that his co-defendant said -- testified and said was the murder weapon; direct messenger communications two days after the murder indicating that he was on the run; Messenger messages that he wanted to trade the strap. I got a 9 for you.[68]

The State devoted a considerable portion of its presentation to the jury to Mr. Taylor's cellular device. Included in those materials were an alleged confession to the murder of Brandon Wingo. The judge erred by allowing those materials to go before the jury by failing to grant Appellant's motion to suppress, and such error was not harmless.

[68] A1542-44.

CLAIM III. THE SUPERIOR COURT ERRED BY FAILING TO DECLARE A MISTRIAL AFTER THE STATE FIRST VIOLATED *BRADY* BY WITHHOLDING IMPEACHMENT EVIDENCE FROM THE DEFENSE SO AS TO ELICIT AN IMPROPER IDENTIFICATION FROM A WITNESS BORNE FROM INADMISSIBLE HEARSAY, THEN FAILED TO CORRECT THE WITNESS'S PATENTLY FALSE TESTIMONY FOR DAYS, THUS TAINTING THE JURY'S PERCEPTION OF THE EVIDENCE PRESENTED.

The State Failed to Discharge Its Obligation Under Brady

The State contends in its Answering Brief that it did not violate the dictates of *Brady v. Maryland*[69] because "the delay was brief – the witness had made the inconsistent statement only the day before – and the State alerted defense counsel that Sullivan stated she had previously seen Taylor before Det. Kirlin took the stand."[70] Appellee also contends that "the statement had no impeachment value until Taylor elicited incorrect information from Sullivan on cross-examination."[71] The State is incorrect as to each point.

Sullivan provided a statement the day before her testimony inconsistent with her initial disclosure to the police mere weeks after the incident. In her initial statement to the police on June 1, 2016, she said she did not see the shooter's face.[72] On March 22, 2018, Sullivan told Detective Kirlin not only that she *did* see

[69] 373 U.S. 83 (1963).

[70] Ans. Br. at 52.

[71] Ans. Br. at 53.

[72] B-18 ("I'm really like telling, you know, saying to her like, I don't -- I didn't see his face, do you know?").

the shooter—and that it was Mr. Taylor—but that she had seen him days earlier holding a gun on a street corner.[73]

The State knew that Sullivan was testifying the next day. The prosecution knew that the defense was aware of her 2016 statement, and had been in active conversations with Mr. Taylor about redactions to witnesses' prior statements should such interviews need to be admitted pursuant to Section 3507 of Title 11.[74] The State was aware that Sullivan's new statement contradicted her 2016 interview. Given those facts, there is no reasonable explanation why the State did not disclose the new inconsistent statement immediately—let alone prior to Sullivan taking the witness stand—other than to unfairly disadvantage the defense.

Appellee contends it discharged its *Brady* obligation because it disclosed Sullivan's inconsistent statement *after* she had already testified, before Detective Kirlin took the stand. *Brady* disclosures must be made in such a manner that the defendant had the opportunity to use the information effectively.[75] This Court has held that "[e]ffective cross-examination is essential to a defendant's right to a fair trial" as it is the "'principal means by which the believability of a witness and the

[73] A0825-26.

[74] *See* A0747; A0939; A0947.

[75] *Atkinson v. State*, 778 A.2d 1058, 1062 (Del. 2001).

truth of his testimony are tested.'"[76] Disclosing an inconsistent statement after the witness has already testified wholly deprives the defense the opportunity to effectively utilize such information on cross-examination.

Finally, the State contends that the statement had no impeachment value until the defense elicited false testimony from Sullivan. Not so. The false testimony offered by Sullivan was that she was shown a photographic lineup on June 1, 2016 and identified Mr. Taylor.[77] Nothing about her statement one day before her testimony affected what had occurred during her interview with Detective Kirlin two years prior.

The new statement was impeaching on its face as it constituted a dramatic departure from her initial statement. In June 2016, she did not see the shooter's face or the "actual characteristics of his face."[78] In 2018, she did see his face.[79] In 2016, in response to whether there was "anything else that [Sullivan could] think of" that was important to the investigation, the witness answered in the negative.[80]

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[76] *Jackson v. State*, 770 A.2d 506, 515 (Del. 2001) (quoting *Fensterer v. State*, 493 A.2d 959, 963 (Del. 1985)).

[77] A0827.

[78] B-14.

[79] A0825-26.

[80] B-17.

In 2018, Sullivan suddenly revealed she not only could identify Mr. Taylor as the shooter, but that she had seen him days earlier with a firearm in the area.[81] A witness whose story changes dramatically in favor of the prosecution as trial draws closer is ample grounds for cross-examination and goes substantially to establishing bias. Her new statement was self-impeaching, and the State was required to turn it over.

Sullivan's Identification of Mr. Taylor Was Based on Hearsay

Mr. Taylor contended in his Opening Brief that the prosecution knowingly introduced Sullivan's identification of Mr. Taylor despite that it was aware it was based on inadmissible hearsay. The State did not respond to this argument.

Instead, the State expanded the record on appeal to include Sullivan's June 1, 2016 statement. It is clear from that interview that any belief Sullivan had that Mr. Taylor was the shooter came from statements made from various children.[82] Nevertheless, the State told the trial judge that Sullivan had informed the prosecution team the day before that "she had seen the individual running towards her previously. And she could identify him. And she had seen him within three days of the incident holding a gun on the corner of Clifford Brown Walk and

[81] A0825-26.

[82] *See* B-14-18.

Shearman Street."[83] The State made it seem as though all of this information was new. There was no reference to the fact that her ability to identify the shooter was based on hearsay statements from various children.

The defense was aware from Sullivan's initial statement that she had been told by children that Mr. Taylor was the shooter. Such statements would not have been admissible, and had Sullivan's prior statement needed to have been played pursuant to Section 3507 of Title 11, they would have been redacted as they were wholly objectionable. The State managed to have the evidence admitted anyway, however, by concealing Sullivan's latest statement and, during its proffer as to the substance of that statement, failing to mention that she "knew" the shooter was Mr. Taylor "[f]rom the children."[84]

The State Failed to Correct Sullivan's False Testimony When It Occurred

In his Opening Brief, Mr. Taylor made a constitutional claim under the Fourteenth Amendment, that based on the Supreme Court of the United State's decision in *Napue v. Illinois*[85] and this Court's decision in *O'Neal v. State*[86], the prosecution was required to immediately correct the testimony from Sullivan

[83] A0824.

[84] A0825.

[85] 360 U.S. 264 (1959).

[86] 247 A.2d 207 (Del. 1985).

which it knew to be false then and there, as it appeared.[87] The State in its Answering Brief did not acknowledge the substance of Appellant's claim, instead urging this Court to analyze the issue under *Pena v. State*.[88]

The *Pena* rubric is employed when there is an unsolicited response or outburst by a witness.[89] This Court has utilized the *Pena* test to examine, *inter alia*, a witness's unexpected statement that he was in the witness protection program[90]; a police officer's testimony that the defendant told him he traded drugs for a firearm[91]; a witness's statement that a defendant was "locked up"[92]; and a witness's reference to a defendant's criminal history and plea negotiations with the State.[93] *Pena* has never been utilized to assess whether, in violation of the Fourteenth Amendment, the State abdicated its responsibility under *Napue* and *O'Neal* to swiftly correct testimony it knew to be false. Such should be so here, where Sullivan did not make an unsolicited comment, but rather testified falsely

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[87] Op. Br. at 64.

[88] Ans. Br. at 53 (citing *Pena v. State*, 856 A.2d 548 (Del. 2004)).

[89] *See, e.g., Justice v. State*, 947 A.2d 1097, 1102 (Del. 2008).

[90] *Phillips v. State*, 154 A.3d 1146, 1154 (Del. 2017).

[91] *Lowman v. State*, 2015 WL 5120818 at *2 (Del. Supr. Aug. 28, 2015).

[92] *Payne v. State*, 2015 WL 1469061 at *2 (Del. Supr. Mar. 30, 2015).

[93] *Smith v. State*, 963 A.2d 719, 723 (Del. 2008).

that she participated in a photo lineup that, in fact, never occurred. *Pena* does not apply. *Napue* and *O'Neal* mandate reversal.

CONCLUSION

For the reasons stated herein and in his Opening Brief, Mr. Taylor respectfully requests that this Honorable Court reverse his convictions and remand the case for a new trial.

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