EFiled: Sep 08 2020 04:08PM EDT
Filing ID 65910651
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 OPENING BRIEF

THE LAW OFFICE OF
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DATED: September 8, 2020

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NATURE OF THE PROCEEDINGS

Arrest and Indictments

Appellant, Diamonte Taylor, was arrested on June 1, 2016.[1] On June 6, 2016, a Grand Jury returned an Indictment against Mr. Taylor and his codefendant, Zaahir Smith.[2] Mr. Taylor was charged with a number of offenses, including Assault in the First Degree, Robbery in the First Degree, and multiple weapons charges.[3]

On June 20, 2016, the State secured a Reindictment from the Grand Jury.[4] Kevon Harris-Dickerson and Latasha Pierce were added to the charging document as codefendants, and the State lodged additional charges against Mr. Taylor, including, *inter alia*, Murder in the First Degree and Gang Participation.[5]

The Grand Jury returned a final superseding Indictment against Mr. Taylor and his three codefendants on November 13, 2017.[6] Therein, Mr. Taylor stood accused of the following charges: one count of Gang Participation, one count of

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[1] A1040.

[2] A0002; A0023.

[3] A0023-30.

[4] A0003; A0031.

[5] A0031-46. The docket reflects a third indictment on

[6] A0009; A0124-42.

Robbery in the First Degree, one count of Attempted Robbery in the First Degree, four counts of Possession of a Firearm During the Commission of a Felony, one count of Assault in the First Degree, two counts of Reckless Endangering in the First Degree, two counts of Aggravated Menacing, one count of Conspiracy in the Second Degree, one count of Possession of a Firearm by a Person Prohibited ("PFBPP"), one count of Conspiracy in the First Degree, and one count of Murder in the First Degree.[7]

First Motion to Sever

On September 5, 2017, Mr. Taylor filed a Motion to Sever with the Superior Court.[8] Mr. Taylor sought to sever the charges against him so that each separate criminal transaction would be tried together, with a separate trial for the Gang Participation charge.[9] Mr. Taylor also sought to be tried separately from Smith, Harris-Dickerson, and Pierce.[10]

The State filed its response to Mr. Taylor's motion on December 26, 2017.[11] Therein, Appellee opposed severing any of Mr. Taylor's charges from one

[7] A0124-42.

[8] A0007; A0070.

[9] A0070-90.

[10] A0070.

[11] A0010; A0144.

another—with the exception of his PFBPP charge—as well as severing any of the codefendant cases other than Pierce's.[12]

The Superior Court held a hearing on Mr. Taylor's severance motion on February 16, 2018.[13] Ultimately, the trial court adopted the State's position and severed Mr. Taylor's PFBPP charge from the other offenses, and severed Pierce's case from her three codefendants.[14] All other charges and cases were to be tried together.[15]

Motions to Suppress

On October 4, 2017, Mr. Taylor filed a motion to suppress challenging the constitutionality of a statement taken by the authorities subsequent to his arrest.[16] On January 22, 2018, Mr. Taylor filed a second suppression motion, seeking to exclude evidence obtained through a search warrant for his cellular phones, contending the warrant: (1) failed to establish a sufficient nexus between the crimes alleged and the place to be searched, (2) failed to describe with particularity the places within the device to be searched, and (3) failed to establish a temporal

[12] A0144-57.

[13] A0012; A0282.

[14] A0290; A0304.

[15] A0290; A0304.

[16] A0008; A0109-23.

limitation on the search itself.[17] The State filed a response to both motions on February 12, 2018.[18] The State agreed not to admit the contends of Appellant's recorded statement, thus concluding the Superior Court need not rule on that issue.[19] The State argued, however, that the search of Mr. Taylor's cell phones was constitutional.[20]

The Superior Court addressed Mr. Taylor's suppression motions on February 16, 2018.[21] The trial court ultimately granted Mr. Taylor's first suppression motion regarding his custodial interrogation as unopposed, but denied the second motion challenging the search of his cell phones.[22]

Second Motion to Sever

Mr. Taylor filed a Renewed Motion to Sever on March 8, 2018.[23] The Superior Court heard argument on the motion during an Office Conference on

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[17] A0011; A0230-65.

[18] A0012; A0266-81.

[19] A0267.

[20] A0267-71.

[21] A0012; A293-303.

[22] A0013; A0304-05.

[23] A0015; *see* A0444-521. Mr. Taylor's Renewed Motion to Sever was filed under seal because it discussed witnesses who eventually testified at trial whose identities were protected under a Protective Order issued by the Superior Court on January 9, 2018. *See* A0011, D.I. 51. The Renewed Motion still appears to be under seal by Order of the Superior Court. *See* A0015, D.I. 70. Because the Appendix in this matter will be provided to Appellant and the Renewed Motion

March 9, 2018.[24] Mr. Taylor contended that in light of codefendant Harris-Dickerson's recent proffer and guilty plea, the defenses presented by Appellant and codefendant Smith would be antagonistic in nature.[25] The Court granted Mr. Taylor's request for severance from Smith over the State's objection, and ordered that the two remaining codefendants be tried individually.[26]

Trial

Jury selection occurred over two days on March 12 and March 14, 2018.[27] Trial began on March 19, 2018 and lasted for ten days, concluding on April 4, 2018.[28] The jury returned a mixed verdict after deliberating, finding Mr. Taylor not guilty of one count each of Robbery in the First Degree, Attempted Robbery in the First Degree, and two counts of Possession of a Firearm During the Commission of a Felony.[29] The jury found Mr. Taylor guilty of all remaining

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to Sever is still under seal, the pleading was not included in the Appendix out of an abundance of caution. The Renewed Motion is not germane to any issue raised by Mr. Taylor on appeal.

[24] A0016; A0444-521.

[25] *See* A0448.

[26] A0016; A0504.

[27] A0016.

[28] A0017.

[29] A1310-12.

charges, including Murder in the First Degree.[30] The State entered a *nolle prosequi* as to the severed PFBPP charge.[31]

Motion for New Trial

Mr. Taylor filed a Motion for New Trial on August 2, 2019, alleging that the State violated the dictates of *Brady v. Maryland*[32] by failing to disclose prior to trial that Carl Rone—who had been in possession of and examined ballistics evidence prior to his suspension—was suspended for misconduct that ultimately led to his criminal prosecution.[33] The State filed a Response to Mr. Taylor's motion on August 6, 2019.[34] Mr. Taylor filed a Reply on August 9, 2019.[35]

The Superior Court heard argument on Appellant's Motion for New Trial on August 23, 2019.[36] The trial court reserved decision, issuing a written order denying the Motion on November 26, 2019.[37]

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[30] A1310-12.

[31] A0017; A1313.

[32] *Brady v. Maryland*, 373 U.S. 83 (1963).

[33] A0019; A1329-1438.

[34] A0019; A1439-48.

[35] A1449-62.

[36] A0019; A1526-62.

[37] A0019-20; A1563-72.

Sentencing

Mr. Taylor was sentenced by the Superior Court on January 31, 2020.[38] The court imposed a statutorily-mandated life sentence in connection with Mr. Taylor's conviction for Murder in the First Degree.[39] The trial court imposed an additional eleven years of Level V incarceration in connection with his other charges.[40]

A timely notice of appeal was filed on March 2, 2020.[41] This is Mr. Taylor's Opening Brief.

[38] A0020; A1573-90.

[39] A1591-92.

[40] A1591-96.

[41] A0020.

SUMMARY OF ARGUMENT

1. The trial court erred in finding that a search warrant for Appellant's cell phones sufficiently established a nexus to show probable cause to search Mr. Taylor's devices for evidence of Murder in the First Degree. Because the affidavit of probable cause amounted to no more than the officer's hunch that information would be found on the devices, the warrant was constitutionally deficient.

2. The trial court erred by allowing into evidence cell phone data that was seized as part of a general warrant that did not include a temporal limit, thereby violating the particularity requirement of both the United States and Delaware Constitutions.

3. The trial court erred in failing to grant a mistrial after the State: (1) failed to disclose impeachment evidence under *Brady v. Maryland* related to a witness's prior inconsistent statements; (2) elicited an identification of Appellant as the individual fleeing the murder scene with a firearm that was based on impermissible hearsay; and (3) failed to correct the same witness's false testimony as soon as possible so as to ameliorate the prejudice to Mr. Taylor, instead waiting until after a weekend recess to do so.

STATEMENT OF FACTS

May 6, 2016 – Attempted Robbery of Jonathan Rivera and Gerard McDonald

On May 6, 2016, Jonathan Rivera and Gerard McDonald traveled from downstate Delaware to Newark to meet with a young woman they knew.[42] Upon arrival at her apartment complex, the two men saw the young woman's brother—who the men knew as "Hotep"—and his friend—known as "Nice"—outside.[43] "Hotep" is Zaahir Smith[44], and "Nice" is Mr. Taylor.[45] Rivera and McDonald took Smith and Appellant to a gas station nearby and returned to the apartment complex soon thereafter.[46] Upon returning, Smith told Rivera where to park.[47] After parking, Smith pulled a gun out and pointed it at Rivera and McDonald, telling them to give him all of his belongings.[48] Smith and Appellant left the vehicle, and Rivera and McDonald called the police.[49]

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[42] A0637.

[43] A0639; A0652.

[44] A0661.

[45] A0565.

[46] A0639-40.

[47] A0640.

[48] A0650.

[49] A0651.

May 16, 2016 – Assault of Shango Miller

On May 16, 2016, Shango Miller was on the front stoop of a residence on Lombard Street in Wilmington when he was shot, resulting in injury.[50] Two individuals—contended to be Smith and Mr. Taylor by Kevon Harris-Dickerson—are seen on video in the area at the time of the shooting.[51] Police collected ballistic evidence from the scene of the shooting.[52]

May 18, 2016 – Robbery of Temijiun Overby

On May 18, 2016, police responded to a robbery of Temijiun Overby in the area of 1600 Thatcher Street in Wilmington.[53] Police identified two individuals as suspects, Zaahir Smith and Kevon Harris-Dickerson.[54] The two individuals followed Overby and robbed him.[55] When Overby refused to hand his property over, Smith shot him, causing injury.[56]

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[50] A0712-13; A0717-20; A0726-30.

[51] A0711; A1205.

[52] A0722-25.

[53] A0696.

[54] A0696.

[55] A1201.

[56] A0716-20; A1201.

May 19, 2016 – Murder of Brandon Wingo

On the afternoon of May 19, 2016, Brandon Wingo was walking home from school with a group of friends when a man in a black hoodie walked down the sidewalk toward the group on Clifford Brown Walk.[57] Once the individual got close to the group, he yelled something out before pulling a firearm from his pocket.[58] He fired three shots, striking Mr. Wingo.[59] The man then begins to run, passing Nadana Sullivan in the street.[60] Two weeks later, Ms. Sullivan informed the police that she could not see the man's face, yet testified at trial that she could identify Mr. Taylor as the man with the gun because that's what unidentified children told her.[61]

Minutes before the shooting, Treasure Evans—Sullivan's daughter—observed a car driving on Clifford Brown Walk with Mr. Taylor seated in the passenger seat.[62] Appellant was wearing a black hoodie.[63] Ms. Evans knew Mr.

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[57] A0782-85.

[58] A0784-85.

[59] A0794-95.

[60] A0821.

[61] A0825-28.

[62] A0812.

[63] A0812.

Taylor because they attended grade school together.[64] When the shots were fired, Ms. Evans saw a man in a black hoodie, but could not see his face.[65]

Police responded to the scene and collected evidence, including ballistics.[66] Examination of the ballistic evidence showed that the same firearm was used in the shootings of Shango Miller, Temijiun Overby, and Brandon Wingo.[67]

May 30, 2016 – Aggravated Menacing of Tiheed Roane and Shawn Garrett

On May 30, 2016, Tiheed Roane and Shawn Garrett were walking over the 11th Street Bridge in Wilmington Delaware when a green vehicle approached.[68] According to Roane, Smith exited the vehicle and pointed a gun in his and Garrett's direction.[69] Roane also informed the police that Mr. Taylor was a passenger in the vehicle and motioned for Smith to shoot Roane.[70]

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[64] A0812.

[65] A0846.

[66] A0777-80.

[67] A0997-99.

[68] A0973-74.

[69] A0974.

[70] A0974.

Gang Participation

The State presented a multitude of social media evidence contending that Mr. Taylor was a part of the Shoot to Kill gang along with, amongst others, Smith and Harris-Dickerson.[71] Additionally, Harris-Dickerson testified that all three were in the gang.[72]

[71] *See, e.g.*, A0541-81.

[72] A1195-1205.

ARGUMENT

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.

A. Question Presented

Whether the sentencing court erred in denying a motion to suppress where the police failed to establish a nexus between the alleged crime committed and the cell phone to be searched in the search warrant. This issue was preserved via the filing of a suppression motion challenging the search warrant.[73]

B. Standard and Scope of Review

This Court applies a *de novo* standard when considering constitutional claims that a search warrant was issued upon an insufficient showing of probable cause.[74]

C. Merits of Argument

Police officers illegally searched Mr. Taylor's cell phone when there was no nexus between the alleged crime committed and the cell phone to be searched. The Fourth Amendment of the United States Constitution provides:

[73] A0011; A0230-65; A0293-303.

[74] *Valentine v. State*, 207 A.3d 566, 570 (Del. 2019).

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.[75]

Police may lawfully search a person's property upon the issuance of a search warrant by a neutral magistrate in response to a specific and delineated request supported by probable cause.[76] The Court uses a "four-corners test" to determine if, within the four corners of the affidavit of probable cause, there are sufficient facts to create a reasonable belief that evidence exists within a particular place.[77] "An affidavit establishes probable cause to search only where it contains a nexus between the items sought and the place to be searched."[78] A mere statement by a police officer that probable cause exists based on the officer's own knowledge and training is insufficient to establish probable cause.[79] A search warrant must allege

[75] U.S. Const. Amend. IV. *See also* Del. Const. Art. I § 6.

[76] 11 *Del. C.* § 2306.

[77] *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

[78] *State v. Adams*, 13 A.3d 1162, 1173 (Del. Super. 2008).

[79] *State v. Cannon*, 2007 WL 1849022 at *6 (Del. Super. Ct. June 27, 2007).

specific facts to adequately support an invasion of a person's expectation of privacy.[80]

Upon issuance of a search warrant, a magistrate must have a reasonable belief that "a crime has been committed . . . [and] 'the property to be seized will be *found in a particular place*.'"[81] Satisfying a warrant's particularity requirement becomes challenging when the warrant is for digital information stored on electronic devices, like a cellular telephone, because of the "unprecedented volume of private information stored on [such] devices."[82] Further, under Section 2307(a) of Title 11, "[t]he warrant shall designate the house, place, conveyance or person to be searched, and shall describe the things or persons sought *as particularly as possible*."[83]

Cellular telephones differ from other types of property, like a wallet or purse, because they have the capacity to hold "vast quantities of personal information literally in the hands of individuals," and, therefore, implicate greater

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[80] *Id*.

[81] *Buckham v. State*, 185 A.3d 1, 16 (Del. 2018) (quoting *Sisson v. State*, 903 A.2d 288, 296 (Del. 2006)) (emphasis added).

[82] *Wheeler v. State*, 135 A.3d 282, 299 (Del. 2016) (citing *Riley v. California*, 134 S.Ct. 2473, 2494-95 (2014)).

[83] 11 *Del. C.* § 2370(a) (emphasis added).

privacy concerns.[84] Because cellular devices are essentially "minicomputers" that serve multiple functions[85], officers must obtain a warrant prior to searching a cell phone, including those that are obtained incident to arrest or via a lawful search warrant.[86] "Allowing police to scrutinize . . . [cell phone] records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case."[87] Therefore, courts must bring to bear a "heightened vigilance" to protect against invasive and "unjustified" searches of electronic devices.[88]

In *State v. Ada*, the Superior Court invalidated a search that was supported by an officer's assertion, based on training and experience, that drug dealers often keep separate supplies of drugs.[89] In *Ada*, the affidavit of probable cause: (1) contained a report from a "concerned citizen" and informants that the defendant was selling drugs; (2) identified the defendant as coming and going from a home with a key to the front door; and (3) alleged that another drug dealer may have been living on the same block as the defendant.[90] The Superior Court held that

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[84] *Riley*, 134 S.Ct. at 2485-89.

[85] *Id*. at 2488-89.

[86] *See id.*

[87] *Id*. at 2490.

[88] *Wheeler*, 135 A.3d at 307.

[89] *State v. Ada*, 2001 WL 660227 at *1 (Del. Super. Ct. June 8, 2001).

[90] *Id*. at *5.

there was an insufficient nexus between the residence and the alleged crime of drug dealing "given that police observed no illegal or suspicious activity occurring at the residence."[91] Because all of the facts correlated to the defendant himself or other individuals or locations, the Superior Court concluded that the search warrant lacked probable cause to search the home.[92]

In *State v. Cannon*, the Superior Court invalidated a search for want of a sufficient nexus because police lacked adequate information that criminal activity had occurred at the specific location to be searched.[93] There, a confidential informant told police that the defendant was involved in the distribution of drugs.[94] While conducting surveillance, police observed the defendant conduct multiple suspicious stops in his vehicle.[95] The police subsequently executed a traffic stop of an individual suspected to have purchased drugs from the defendant during one of said stops.[96] The police found cocaine on the individual's person.[97] The

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[91] *Id*.

[92] *Id*.

[93] *State v. Cannon*, 2007 WL 1849022 at *4 (Del. Super. Ct. June 27, 2007).

[94] *Id*. at *1.

[95] *Id*. at *1-2.

[96] *Id.*

[97] *Id*.

individual then admitted to police that he had obtained the substance from the defendant.[98]

As a result of their observations and investigation of the buyer, police obtained a search warrant for the defendant's residence.[99] Because neither the informant's tip nor the investigatory work done by the police related to the defendant's home, the Superior Court held that the search warrant lacked a sufficient nexus of illegal activity to support a search of the home.[100] The trial court granted the defendant's motion and all evidence seized as a result of the warrant was suppressed.[101]

In *State v. Westcott*, a search of multiple cellular phones was invalidated because the affidavit in support of the search warrant failed to establish probable cause because it did not meet the constitutional requirement for particularity.[102] There, the defendant was arrested for Attempted Murder in the First Degree, Robbery in the First Degree, and various other charges arising out of a shooting.[103]

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[98] *Id*.

[99] *Id*.

[100] *Id*. at *5.

[101] *Id*. at *7.

[102] *State v. Westcott*, 2017 WL 283390 at *1 (Del. Super. Ct. Jan. 23, 2017).

[103] *Id*.

The police obtained a search warrant to search "data and cellular logs" from cell phones believed to belong to the defendant.[104] "The affidavit alleged that a shooting had occurred and [the defendant] had committed it."[105]

More specifically, police found drugs and three cell phones during a consent search of the apartment where the *Westcott* defendant was residing.[106] During that search, the defendant was not present and the ownership of the cell phones was in question.[107] "[T]he detective sought to search 'the three phones to look for physical evidence or confession of the shooting or the illegal distribution of heroin contained thereon.'"[108] The officer "did not expressly state any nexus between [the defendant's] ownership of the [cellular] phone and the existence of evidence of the crimes [to be found] on that [cellular] phone."[109] Thus, the Superior Court found that the affidavit lacked probable cause to search the devices, reasoning that the

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[104] *Id*.

[105] *Id*.

[106] *Id*.

[107] *Id*. (the affidavit alleged the need to search the data and cellular logs to ascertain to whom the devices belonged).

[108] *Id*.

[109] *Id*. at *2.

mere fact a suspect owns a cellular phone is insufficient "to warrant an inference that evidence of any crime he or she commits may be found" on the device.[110]

In 2018, this Court issued its decision in *Buckham v. State*, holding that it was plain and reversible error to admit evidence seized from a cell phone pursuant to a search warrant that did not establish a nexus between the cell phone and the crime alleged.[111] The police in *Buckham* had probable cause to arrest the defendant for attempted murder.[112] When the defendant was arrested six weeks later, he had a cell phone in his possession which the police searched pursuant to a search warrant.[113] This Court held that the warrant did not recite specific facts to create a nexus between the crime alleged in the warrant—attempted murder—and the place to be searched—the defendant's cell phone.[114] The warrant alleged that the defendant had been missing, cell phones can be used to pinpoint GPS locations, criminals communicate through cell phones, and that the defendant was posting on

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[110] *Id*.

[111] *Buckham*, 185 A.3d at 19-20. The *Buckham* Court also found the search warrant failed to particularly state the exact places within the cell phone that the police wished to search when they knew about those particular locations within the phone. *Id*. at 18. The particularity component of the search warrant at issue here will be discussed in Claim II, *infra*.

[112] *Id*. at 5.

[113] *Id*. at 5-6.

[114] *Id*. at 17.

social media about getting arrested.[115] This Court found that "these sorts of generalized suspicions do not provide a substantial basis to support a probable cause finding."[116]

Here, the police lacked any information that evidence related to any crime would be found on either of the devices found on Mr. Taylor's person incident to his arrest. Instead, the authorities asserted that in the affiant's "training, knowledge, and experience," there was sufficient probable cause because, essentially, people use cell phones to communicate.[117]

The cell phones at issue here are akin to the residences in *Cannon* and *Ada*, and the facts within the search warrant compare to those in *Westcott* and *Buckham*. Police suspected Mr. Taylor was a member of a gang and that he had committed a shooting.[118] Those suspicions, however, fail to give rise to any particularized information or implication that evidence of any criminal offense would be located on the electronic devices found on his person. The officer's assertions based on

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[115] *Id*.

[116] *Id*.

[117] *See* A0258-59. The *Buckham* Court found the statement within the challenged search warrant that "criminals often communicate through cellular phones" to be "[p]articularly unpersuasive," remarking "who doesn't in this day and age?" *Buckham*, 185 A.3d at 17.

[118] A0256-58.

her training and experience alone amounted to a hunch, which was insufficient to establish probable cause.[119]

The affidavit contained no information that suggested that Appellant had previously communicated via either of the devices found on his person. Neither was there information that the devices had been used as an instrumentality of the alleged homicide purportedly committed by Mr. Taylor. The affidavit is devoid of any information which would suggest the suspect who was alleged to have committed either shooting was seen with a cellular device before, during, or after the shootings. Rather, like the *Westcott* and *Buckham* defendants, Mr. Taylor merely possessed the two devices at the time the arrest warrant was executed. Mere possession of the devices was the basis for the search warrant, which is insufficient as a matter of law to establish probable cause to search.

Moreover, throughout the entirety of the affidavit, the affiant failed to offer any nexus between the alleged crimes and Appellant's electronic devices. Within the affidavit, the officer explained why evidence related to "the gang feud, the Lombard Street shooting, the murder located on Clifford Brown Walk and general retaliation" was likely to be found on the phone belonging to Latasha Pierce—*not*

[119] *See State v. Ranken*, 25 A.3d 845, 863-64 (Del. Super. 2010) ("While an officer's training and experience may be considered in determining probable cause, it cannot substitute for lack of evidentiary nexus.") (internal citations omitted).

either device found on the person of Diamonte Taylor.[120] The affidavit's author asserts that "[d]ue to Latasha Pierce['s] close interaction with the residence of 508 Sherman St.[,] this investigator believes communication will exist via *her* cell phone."[121] Whether Detective Kirlin felt that evidence related to an investigation was likely to be found on Ms. Pierce's cellular phone is immaterial as to whether such information was likely to be found on Mr. Taylor's devices.

During the hearing on Mr. Taylor's suppression motion, the State asserted—without any sort of sworn testimony from the officer—that Detective Kirlin made a "typo" when drafting the search warrant and contended the references to Latasha Pierce's phone were mere scrivener's errors.[122] The Superior Court accepted that assertion.[123] Even accepting the State's argument that the officer made a scrivener's error when drafting the affidavit, however, the warrant still fails to establish a nexus between the alleged crime and Mr. Taylor's cell phone.

[120] Mr. Taylor does not concede that the affidavit would give rise to probable cause to search the devices belonging to Ms. Pierce.

[121] Exhibit A at ¶ 23 (emphasis added).

[122] A0297.

[123] A0297-98.

The affidavit attached to the search warrants does not mention any cell phone or electronic device until paragraph 20.[124] Therein, Detective Kirlin states that Mr. Taylor was arrested by United States Marshals on June 1, 2016 and, at the time of his arrest, two cell phones were located on his person.[125] The next paragraph describes the execution of a search warrant on a black GMC Envoy, wherein two additional devices were found: (1) a black-in-color ZTE cell phone and a white Samsung cell phone with a pink cover.[126]

Paragraph 22 states that Detective Kirlin spoke to Latasha Pierce, who informed the officer that the white Samsung cell phone with a pink cover belonged to her.[127] Ms. Pierce advised that she was in a relationship with Kevon Harris-Dickerson—identified by police as a member of the "'STK' group"—and that he stayed at 508 Sherman Street with Ms. Pierce and her mother, sister, and children.[128] Ms. Pierce told Detective Kirlin that, on numerous occasions, Mr. Harris-Dickerson had kept and used her cell phone during the day.[129] The only

[124] *See* A0256-258.

[125] A0258.

[126] A0258.

[127] A0258.

[128] A0258.

[129] A0258.

information Ms. Pierce provided to the officer regarding Mr. Taylor was that she was familiar with him and that he had previously been to her residence.[130] Simply put, the entirety of Paragraph 22 focuses on Ms. Pierce.

The subsequent paragraph—contended by the State to include a scrivener's error—sets out to explain why a search of Mr. Taylor's is necessary, and reads as follows:

> Your affiant can truly state that based on the above listed facts this investigator feels a search of Diamonte Taylor's White Samsung and white Motorola, [*sic*] cell phone is needed for the listed reasons. Since Diamonte Taylor exited the residence of 508 Sherman Street and was located with Corliss Pierce who is known to reside at 508 Sherman Street along with Latasha Pierce, who's phone was located in the Black Envoy gives increasing likelihood that communication with either party about gang feud, the Lombard Street shooting the murder located on Clifford Brown Walk and general retaliation will be via her cell phone. This investigator feels that talk regarding the homicide will lead to possible witnesses and or possible suspect(s) information/participant(s) involvement. Based on the social media and the numerous postings referencing the related crimes listed above, along with numerous posts referencing the ongoing gang feud, on social media, will lead to communication between all party's [*sic*] (i.e. friends, family, social media)[.] Due to Latasha Pierce [*sic*] close interaction with the residence of 508 Sherman St.[,] this investigator believes communication will exist via her cell phone.[131]

Paragraph 23 references Diamonte Taylor only twice: (1) in the first sentence stating the detective felt a search of his cell phones was necessary, and (2) in the

[130] A0258.

[131] A0258-59.

second sentence stating that he exited the residence with Ms. Pierce's sister.[132] The State contends that the use of the pronoun "her" in the final sentence of Paragraph 23 was a scrivener's error, and that the sentence should read: "Due to Latasha Pierce['s] close interaction with the residence of 508 Sherman St.[,] this investigator believes communication will exist via [Diamonte Taylor's] cell phone."[133] Even accepting the State's contention that this portion of the affidavit contains scrivener's errors, Paragraph 23—and thus, the affidavit *in toto*—fails to establish a nexus between Mr. Taylor's phone and the alleged crime as the narrative of the paragraph is not narratively logical.

Reading Paragraph 23 as the State contended it should be read, it alleges that Diamonte Taylor was seen exiting Pierce's residence with Pierce's sister, Corliss. The affiant then makes an illogical conclusion that because Pierce's phone was in the Black Envoy, there is an increased likelihood that evidence of criminality will be on Mr. Taylor's phone. It is unclear how Mr. Taylor being present with Corliss Pierce in a vehicle containing Pierce's phone gives rise to any logical inference that evidence of a crime would be found on Mr. Taylor's device.

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[132] A0258.

[133] A0259; A0297 ("I will note, because Mr. Gifford pointed it out, the reference in Paragraph 23 is a typo. And I think the Court has to look at that because I know that there was a search warrant done for Latasha Pierce's phone as well -- and I think that Detective Kirlin was using the pronouns of 'him' and 'her' interchangeably as she was doing the different warrants for Latasha Pierce versus Diamonte Taylor.").

Additionally, the references to social media in Paragraph 23 are wholly devoid of context and could not give rise to a finding of probable cause. The first and only time social media is mentioned at all within the affidavit is in Paragraph 23.[134] The affidavit does not provide any context for the reference to social media; instead, it is unclear whether "the numerous postings referencing the recent crimes" were made by suspected members of an alleged gang, residents of the city of Wilmington, or even mainstream media outlets.[135] At no point does the affidavit provide the magistrate with any information that Mr. Taylor utilized social media to post about the crimes, his alleged involvement with STK, or any gang feud. Moreover, even if the warrant had established that Mr. Taylor had utilized social media to post about such topics, the warrant fails to provide any evidence that Appellant used his cell phone to do so, as opposed to a computer or some other device.

Finally, reading Paragraph 23 as the State suggests, the affiant states that due to Pierce's close interaction with her own residence, Detective Kirlin believed communication would exist via Mr. Taylor's cell phone. This is a wholly conclusory statement devoid of any logical reasoning or internal consistency. The

[134] *See generally* A0256-59.

[135] Indeed, DelawareOnline—the web version of The News Journal—posted at least two articles to its Facebook page about the shooting on Clifford Brown Walk in May 2016, prior to the application for the instant warrant. *See* A0262-63.

entirety of Paragraph 23 consists of conclusory, unsupported statements that amount to nothing more than a hunch.

The Court erred in accepting the State's explanation that Detective Kirlin made scrivener's errors when drafting Paragraph 23. Appellant suggests that the more likely explanation for the focus on Ms. Pierce within Paragraph 23—and indeed, throughout the preceding paragraph as well—is that Detective Kirlin recycled language from a search warrant for Ms. Pierce's phone into the search warrant for Mr. Taylor's devices, and failed to change the substance of that portion of the affidavit to even attempt to mete out an explanation as to why evidence of any crime was likely to be found on Mr. Taylor's device.

The warrant failed to give rise to probable cause to believe that any evidence of a crime would be located on the devices found on Appellant's person at the time of his arrest. Like in *Buckham*, the "allegations in the warrant application are too vague and too general to connect his cell phone" to any crime.[136] The Superior Court erred in holding otherwise and such error warrants reversal.

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

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

A. Question Presented

Whether the trial court erred in ratifying a search of a cell phone that was based on a general warrant which lacked particularity and failed to establish a temporal limitation. This issue was preserved via the filing of a suppression motion challenging the search warrant.[137]

B. Standard and Scope of Review

When reviewing the denial of a motion to suppress, this Court reviews legal conclusions made by the trial court *de novo*.[138]

C. Merits of Argument

The Fourth Amendment of the United States Constitution protects people from unreasonable searches and seizures and the issuance of general warrants.[139] The Delaware Constitution provides citizens of this State even broader protection than the Fourth Amendment from unreasonable searches and seizures and includes a particularity requirement be met before issuance of a search warrant.[140]

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[137] A0011; A0230-65; A0293-303.

[138] *Bradley v. State*, 51 A.3d 423, 433 (Del. 2012).

[139] U.S. Const. Amend. IV.

[140] Del. Const. Art. I, § 6.

Moreover, Section 2307 of Title 11 mandates that a "warrant shall designate the house, place, conveyance or person to be searched, and shall describe the things or persons sought as particularly as possible."[141]

"Our nation's constitutional history and jurisprudence reflects a long-standing hostility towards general warrants."[142] The Supreme Court of the United States has described a general warrant as a "specific evil . . . abhorred by the colonists," for which "the problem is not that of intrusion, per se, but of a general, exploratory rummaging in a person's belongings."[143] The passage of the Fourth Amendment "was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity."[144]

This Court "has cautioned against the 'substantial' risk that 'warrants for digital and electronic devices [may] take on the character of 'general warrants.'"[145]

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[141] 11 *Del. C.* § 2307(a).

[142] *Wheeler v. State*, 135 A.3d 282, 297 (Del. 2016).

[143] *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971).

[144] *Riley v. California*, 134 S.Ct. 2473, 2494 (2014).

[145] *Westcott*, 2017 WL 283390 at *3 (citing *Wheeler*, 135 A.3d at 307).

"This reality necessitates heightened vigilance, at the outset, on the part of judicial officers to guard against unjustified invasions of privacy."[146]

In *Wheeler v. State*, this Court stated that "warrants, in order to satisfy the particularity requirement, must describe what investigating officers believe will be found on electronic devices with as much specificity as possible under the circumstances."[147] "[G]eneric classifications in a warrant are acceptable only when a more precise description is not possible."[148] If investigators have available to them a more precise description of the alleged criminal activity that is the subject of the warrant, they should use that description, and the search should also be narrowed by the relevant time frame, if known, in order to reduce the likelihood of constitutional violations.[149] "A warrant's description meets the particularity requirement if it 'limit[s] the officer's search of the cell phones to certain types of data, media, and files that [are] '*pertinent to th[e] investigation*.'"[150] "Such a

[146] *Id*.

[147] *Wheeler*, 135 A.3d at 304.

[148] *Id*. (citing *United States v. Bright*, 630 F.2d 804, 812 (5th Cir. 1980).

[149] *Id*. (citing *Bright*, 630 F.2d at 812).

[150] *Westcott*, 2017 WL 283390 at *3 (citing *Starkey v. State*, 2013 WL 4858988 at *4 (Del. Supr. Sep. 10, 2013)).

description 'effectively limit[s] the scope of the warrants, and prevent[s] a boundless search of the cell phone."[151]

In *Wheeler v. State*, the State executed a search pursuant to two warrants related to witness tampering.[152] The warrants had generalized language covering the defendant's "entire digital universe and essentially had no limits."[153] Specifically, the warrants authorized the authorities to extract the digital devices seized for, in relevant part, the following information:

> 5. *Any* cellular telephone, to include the registry entries, call logs, pictures, video recordings[,] text messages, user names, buddy lists, screen names, telephone numbers, writings or other digital material as it relates to this investigation.
>
> 6. *Any* digital camera, digital video camera, optical camera, optical video camera, cell phone, or other device capable of capturing and storing to any media, photographs or images and the associated media from there [*sic*].
>
> 7. *Any and all* data, and the forensic examination thereof, *stored by whatever means*, on any items seized pursuant to paragraphs 4, 5, and 6, as described above to include but not limited to: registry entries, pictures, images, temporary internet files, internet history files, chat logs, writings, passwords, user names, buddy names, screen names, email, connection logs, or other evidence.
>
> 8. *Any* file, writing, log, artifact, paper, document, billing record or other instrument, stored electronically or in printed form, which relates

[151] *Id*.

[152] *Wheeler*, 135 A.3d at 284.

[153] *Id*.

> to or references the owner of items seized pursuant to paragraphs . . . 5, 6, 7 and 8, as described above.[154]

During the search, the State found no evidence of witness tampering, but did uncover files containing child pornography.[155] This Court found that such evidence should have been suppressed, reasoning that the warrants were not particular and, thus, unconstitutional because they failed to limit the search to the relevant time frame and failed "to describe the items to be searched for and seized with as much particularity as the circumstances reasonably allow."[156]

In *Buckham*—in addition to finding that the search warrant in question failed to establish a sufficient nexus between the crimes alleged and the search warrant—this Court also found that the warrant failed to state with particularity the exact places within the cell phone that the police wished to search when they knew about those particular locations within the phone.[157] The warrant authorized police "to search the phone for '[a]ny and all store[d] data contained within the internal memory of the cellular phones [*sic*], including but not limited to,

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[154] *Id*. (emphasis in original).

[155] *Id*.

[156] *Id*. at 284-85, 304-05.

[157] *Buckham*, 185 A.3d at 17-20.

incoming/outgoing calls, missed calls, contact history, images, photographs and SMS (text) messages' for evidence of 'Attempted Murder 1st Degree.'"[158]

This Court found the warrant to authorize an unconstitutional "top-to-bottom search" that allowed "the government access to far more than the most exhaustive search of a house."[159] The *Buckham* Court went on to state that the "warrant was both vague about the information sought—despite the fact that a far more particularized description could have been provided—and expressly authorized the search of materials there was no probable cause to search, like the contents of all the Facebook messages Buckham sent."[160] This Court ultimately found that to allow evidence seized from the cell phone as a result of the overly broad warrant was plain error as the warrant did not "pass muster."[161]

The warrant issued here does not contain the level of particularity required as a matter of law. The language used in the warrant to search Appellant's devices authorized a search of the following:

> [A]ny/all data stored by whatever means, or through normal course of business of wireless services, and/or through the forensic examination of said cellular telephone, to include but not limited to registry entries, pictures, photographs, images, audio/visual recordings, multi-media

[158] *Id*. at 15.

[159] *Id*. at 18 (quoting *Wheeler*, 135 A.3d at 299) (internal quotations omitted).

[160] *Id*. at 19.

[161] *Id*. at 18.

> messages, web browsing activities, electronic documents, location information, text messaging, writings, user names, subscriber identifiers, buddy names, screen names, calendar information, call logs, electronic mail, telephone numbers, any similar information/data indicia of communication, and any other information/data pertinent to this investigation within said scope.[162]

Such language is—at minimum—as broad in scope as that used in *Buckham*, as it permitted a "top-to-bottom" search by authorizing rummaging through "[a]ny/all data stored by whatever means" within the device. The warrant is arguably even broader than that struck down in *Buckham*, as not only does it authorize the search of incoming, outgoing, and missed calls; contact history; images; photographs; and text messages; but also "registry entries, audio/visual recordings, multi-media messages, web-browsing activities, electronic documents, location information . . . , writings, user names, subscriber identifiers, buddy names, screen names, calendar information . . . , electronic mail, telephone numbers, [and] any similar information/data indicia of communication."[163]

In the trial court, the State relied upon *Starkey v. State* to argue that a warrant which authorized the search for "[a]ny and all data stored" on a cell phone

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[162] A0254-55.

[163] A0254-55. While the illustrative list in the case *sub judice* appears to be broader than that utilized in *Buckham*, given that both warrants expressly authorized the search of any and all information stored within the device, Appellant recognizes that this may be a distinction without a difference.

was sufficiently particular.[164] The State's reliance on *Starkey* was untenable. First, the affidavit in *Starkey* established that the defendant was arrested in possession of a stolen phone and that he used the phone to call a witness, thus establishing a nexus between the phone and the crime.[165] Moreover, *Starkey* predated *Wheeler* by three years, and consequently did not consider the heightened standard for search warrants for cell phones established by the *Wheeler* Court. Although the *Starkey* Court found that language within the warrant limiting the scope of the warrant to information "pertinent to [the] investigation" prevented a "boundless" search of the device[166], the *Wheeler* Court acknowledged that it was "consider[ing] directly, for the first time, a challenge to warrants seeking to seize and search computer-based and digital items on the grounds that they are in the nature of a general warrant, unconstitutionally overbroad, and lack sufficient particularity."[167] Simply put, the nature of the claim raised by the *Starkey* defendant differed in kind from the issue addressed in *Wheeler*. Mr. Taylor's challenge to the search warrant

[164] *See* A0268; A0298 ("With regards to the scope, I think the Court has keyed in on *Starkey* and there doesn't seem to be any reason to believe that *Starkey* is not good case law.") (citing *Starkey v. State*, 2013 WL 4858988 (Del. Supr. Sep. 10, 2013).

[165] *Starkey*, 2013 WL 4858988 at *3.

[166] *Id*. at *4.

[167] *Wheeler*, 135 A.3d at 302.

was rooted in *Wheeler*, and thus should not have been decided based on this Court's decision in *Starkey*.

The State also contended—and the trial court so ruled—that the warrant established a temporal limitation on the search because the affidavit discussed incidents that occurred on particular dates, even though the warrant itself failed to include any such timeframe.[168] The Supreme Court of the United States noted in *Groh v. Ramirez* that the "Fourth Amendment by its terms requires particularity *in the warrant*, not in the supporting documents" such as an affidavit of probable cause.[169] The Court went on to state that the Fourth Amendment does not forbid "a warrant from cross-referencing other documents" and that the majority of Circuits "have held that a court may construe a warrant with reference to a supporting application or affidavit *if the warrant uses appropriate words of incorporation*, and if the supporting document accompanies the warrant."[170] No such words of incorporation were used here. This Court specifically referenced the *Groh* Court's comments in *Wheeler*, noting it was not clear from the warrants whether they were necessarily limited by the supporting affidavits.[171] Neither the State nor the

[168] A0270 ("The dates of the incriminating content . . . fell squarely within the scope of criminal behavior defined in the warrant – namely May 16, 2016 through June 1, 2016.").

[169] *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (*emphasis added*).

[170] *Id*. at 557-58 (emphasis added).

[171] *Wheeler*, 135 A.3d at 306 n.124.

Superior Court reconciled the absence of a temporal limit in the warrant itself with the warning of the *Groh* Court.

The most telling evidence that the search warrant at issue was a general warrant lacking any temporal limitation comes from the fruit of the search itself. Despite the State's claim that the search warrant properly established a temporal limitation upon the police, the search of Mr. Taylor's device returned data created beginning in January 2005 through June 2016.[172] The extraction report generated by the police upon searching Appellant's cell phone consisted of 4,645 pages of material.[173] In no way was the search of Mr. Taylor's phone a narrowly-tailored one. Instead, the search of Appellant's device was an "exploratory rummaging in [Mr. Taylor's] belongings."[174]

The Superior Court denied Mr. Taylor's suppression motion two months before this Court issued its decision in *Buckham*. Nevertheless, this Court judges whether the trial court erred "from the vantage point of the appellate court in reviewing the trial record, not whether it was apparent to the trial court in light of then-existing law."[175] Subsequent to *Buckham*, however, the trial court itself has

[172] A0296.

[173] A0295.

[174] *Buckham*, 185 A.3d 18 (citing *Wheeler*, 135 A.3d at 299).

[175] *Capano v. State*, 781 A.2d 556, 663 (Del. 2001).

acknowledged that the decision *sub judice* cannot be relied upon based on that decision.

One year after the Superior Court issued its decision as to Mr. Taylor's suppression motion, it was called upon to determine the validity of another search warrant in *State v. Reese*.[176] which authorized the following contents of a cell phone:

> [A]ny/all data stored by whatever means, or through normal course of business of an unknown wireless service, and/or through the forensic examination of said cellular telephone, to include but not limited to registry entries, pictures, photographs, images, audio/visual recordings, multi-media messages, web browsing activities, electronic documents, location information, text messaging, writings, user names, subscriber identifiers, buddy names, screen names, calendar information, call logs, electronic mail, telephone numbers, any similar information/data indicia of communication, and any other information/data pertinent to this investigation within said scope.[177]

Other than insertion of the word "unknown" in the second line of the above-quoted text, the scope of the warrant examined in *Reese* is identical to the instant warrant.[178] Accordingly, the State relied upon the trial court's decision to deny Mr. Taylor's suppression motion to defend the language of the warrant at question in *Reese*.[179] The Superior Court found the argument unavailing, quoting the

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[176] 2019 WL 1277390 (Del. Super. Ct. Mar. 18, 2019).

[177] *Id*. at *1.

[178] *Compare id.* with A0254-55.

[179] *Reese*, 2019 WL 1277390 at *5-6.

identical language within the search warrant for Mr. Taylor's devices before observing that its February 2018 decision in this case "pre-dates the Supreme Court's decision in *Buckham*."[180] In so holding, the Superior Court also recognized that the holding of *Starkey* was no longer cognizable in the wake of *Wheeler* and *Buckham*.[181]

Cases preceding *Buckham* support the same result. For example, in *State v. Westcott*, the challenged search warrant allowed cellular devices to be searched for "all data and cellular logs."[182] The warrant contained no time limit on the data to be searched, despite that the officers knew the alleged crime took place on a certain date.[183] The *Westcott* Court held the description did not limit the scope of the search and the officers should have sought a more limited search to *recent* data.[184] The *Westcott* warrant did not contain the level of particularity required under the United States Constitution, the Delaware Constitution, nor the Delaware statute authorizing search warrants.[185]

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[180] *Id*. at *7.

[181] *Id*. at *5 n.35.

[182] 2017 WL 283390 at *3.

[183] *Id*.

[184] *Id*.

[185] *Id*. at *4.

As in *Wheeler* and *Buckham*, the warrant failed to establish on its face any temporal limit to restrict the search conducted by the authorities. The warrant impermissibly allowed the police to search for "any and all data stored" on the device. Those constitutional infirmities resulted in an invasive, top-to-bottom search of Mr. Taylor's cell phone that rummaged through the entirety of his digital universe. The warrant failed to satisfy the particularity requirement mandated by federal and State law, and the Superior Court erred in holding otherwise. Such error mandates that Appellant's conviction be reversed.

<u>CLAIM III</u>. 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.

A. Question Presented

Whether the trial court erred in failing to grant a mistrial after the State: (1) violated the dictates of *Brady* by failing to disclose that Nadana Sullivan provided a statement one day prior to her testimony that was inconsistent with the statement she had given two years earlier which had been previously turned over; (2) elicited testimony from Sullivan that Mr. Taylor was the individual Sullivan saw running down the street with a firearm on the day of the homicide, despite that the prosecution knew her statement was not based on personal knowledge but rather inadmissible hearsay; and (3) after Sullivan falsely testified that she had identified Mr. Taylor in a police lineup two years earlier when she had never even been shown a lineup, the prosecution failed to correct the record immediately, only doing so upon order of the trial court after the weekend recess. This issue was preserved via Mr. Taylor's request for a mistrial.[186]

[186] A0935-41; A1004-09.

B. Standard and Scope of Review

"This Court reviews for abuse of discretion the Superior Court's decision to deny a motion for a mistrial."[187]

C. Merits of Argument

The State called six witnesses who were in the area when Brandon Wingo was shot and killed. Four of the witnesses offered no testimony as to the identity of the shooter beyond a description of what the individual was wearing at the time: Taniyah Moses[188], Naja Miles[189], Brandy Robertson[190], and Ariana Maldonado.[191]

The testimony of Treasure Evans as to the identification of the shooter was muddied. She testified that prior to the shooting, she saw Mr. Taylor in the passenger seat of a vehicle as it drove by her when she was on the sidewalk getting into her mother's car.[192] Ms. Evans stated that as the car with Mr. Taylor passed her, she could see that he was wearing a black hoodie.[193] The witness testified that

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[187] *Ashley v. State*, 798 A.2d 1019, 1022 (Del. 2002).

[188] A0784-85.

[189] A0793-95.

[190] A0800-03.

[191] A0805-07.

[192] A0812.

[193] A0813.

sometime after the shooting, she was interviewed by Detective Kirlin and was shown pictures of various individuals.[194] Ms. Evans confirmed she was shown a picture of Mr. Taylor by the detective and identified him because she had "seen him in the area that day."[195]

Next, the State played a statement Ms. Evans provided to the police shortly after the incident pursuant to Section 3507 of Title 11.[196] During that interview, Ms. Evans informed Detective Kirlin she saw Mr. Taylor seated in the passenger seat of a vehicle driving by, just as she had testified to at trial.[197] She also stated that Appellant was wearing a hoodie.[198] When she began to describe what she saw during the actual shooting, Ms. Evans stated "I couldn't see his face. And then after he got done shooting, I ran in the house, and he ran past."[199] Eventually, after pressing from the detective, Ms. Evans stated that "it was Diamonte . . . [b]ecause that's who I seen in the car, and it's the same person who shot Brandon."[200]

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[194] A0813.

[195] A0814.

[196] A0817.

[197] A0875.

[198] A0879.

[199] A0895.

[200] A0898.

However, immediately thereafter, she clarified she assumed the shooter was Mr. Taylor: "I'm telling you what I seen [*sic*]. If I actually seen [*sic*] his face, I'm like, oh, yeah, that was actually him, but I didn't see his face. And so I can't say that that was actually him, but I assumed that was him."[201] Thereafter, Ms. Evans says that she recognized the shooter as Mr. Taylor.[202] Once again, however, the witness clarifies the only reason she believed she saw Mr. Taylor was because she saw the shooter was wearing a black hoodie like she had seen Mr. Taylor wearing in the vehicle.[203]

After the State played Ms. Evans's interview with Ms. Kirlin, the witness returned to the witness stand for cross-examination.[204] Ms. Evans confirmed she felt like she was going to be held by the police until she answered all of the questions to the officer's satisfaction.[205] The witness confirmed she saw Mr. Taylor in the vehicle and that she never saw the face of the shooter, but she felt

[201] A0899.

[202] A0904; A0908.

[203] A0911; A0913.

[204] A0819.

[205] A0819.

pressured by Detective Kirlin to say that Mr. Taylor was the person who shot Mr. Wingo.[206]

Nadana Sullivan was the final witness to testify who was in the area at the time Mr. Wingo was shot and killed.[207] The four girls had not been able to identify the shooter prior to Sullivan's testimony. Although Ms. Evans's testimony was muddled, she made clear that while she may have assumed Appellant was the shooter because she had seen him wearing a hoodie in a car a few minutes earlier, she had not actually seen the shooter's face.

Sullivan testified on direct examination that she was in the area of the shooting on May 19, 2016.[208] She stated that she heard gunshots while sitting in her car speaking to her daughter, Ms. Evans.[209] Sullivan testified that after she got out her vehicle, she saw a tall brown-skinned individual wearing a hood running toward her.[210] The witness also stated that the individual was carrying a black gun.[211] The prosecutor ended his direct examination as follows:

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[206] A0819-20.

[207] A0820.

[208] A0821.

[209] A0821.

[210] A0821.

[211] A0821.

Q: Ms. Sullivan, I forgot to ask you. The person who was running down Clifford Brown Walk in the middle of the street with the gun, had you seen that person before?

A: No.

Q: No.

A: No.[212]

The State concluded its direct examination, and the defense opted not to cross-examine Sullivan.[213] The Court asked the parties whether Sullivan could be excused, and the prosecutor said no.[214] Sullivan was told by the judge she could not leave and to wait in the hallway, and the State then recalled Detective Kirlin.[215] The officer was only able to testify that she had spoken with Sullivan the day prior before Mr. Taylor objected.[216]

At sidebar, the defense asked for a proffer as to what Detective Kirlin was going to testify to in regard to her conversation the day prior with Sullivan.[217] The State informed the defense for the first time that Sullivan had told the detective the

[212] A0823.

[213] A0823.

[214] A0823.

[215] A0823.

[216] A0823.

[217] A0823.

day before that she had seen Appellant on at least two occasions prior to May 19, 2016, and that Detective Kirlin was being called to impeach Sullivan's testimony that she had never seen the shooter before he was running toward her in the street.[218] Specifically, the prosecutor stated:

> Ms. Sullivan came to the Attorney General's office yesterday, as we meet with witnesses typically to go over their testimony. And indicated that she had seen the individual running towards her previously. And she could identify him. And she had seen him within three days of this incident holding a gun on the corner of Clifford Brown Walk and Sherman Street.[219]

The defense contended that under *Jencks v. United States*, the State should have provided any notes of that interview upon conclusion of her direct examination.[220] The prosecutor responded: "I feel comfortable saying that Detective Kirlin did not take notes from the sit-down that we had with Nadana Sullivan with her yesterday. You're free to ask her about that."[221]

The Court stated that Sullivan would have to return to the witness stand if the State wished to elicit testimony regarding her conversation with the prosecution team the prior afternoon.[222] As the defense was just learning of this new statement

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[218] A0824.

[219] A0824.

[220] A0824 (citing *Jencks v. United States*, 353 U.S. 657 (1957)).

[221] A0824.

[222] A0824.

for the first time, it requested a recess prior to Sullivan being called back to the stand.[223] The trial court denied that request.[224]

Upon conclusion of the sidebar, the prosecutor stated he had no more questions for Detective Kirlin and the judge excused the officer from the stand.[225] Sullivan was recalled by the State and the following questioning occurred:

> Q: I want to ask you about yesterday afternoon. Did you come and visit and talk with Detective Kirlin?
>
> A: Yesterday? Yes.
>
> Q: Did you talk about taking the witness stand today and what you remember from that date?
>
> A: Yes.
>
> Q: Did you tell Detective Kirlin that you actually saw the person running down the street with the gun?
>
> A: Yes.
>
> Q: Do you remember saying that you knew who that person was?
>
> A: Yes.
>
> Q: Who was it?
>
> A: Diamonte.
>
> Q: Did you tell Detective Kirlin how you knew that?

[223] A0825.

[224] A0825.

[225] A0825.

A: Yes.

Q: How did you know that?

A: From the children.

Q: Did you see that person before?

A: See what, the name that the children -- the person the children told me?

Q: No. Did you see Diamonte Taylor before May 19th --

A: Oh, no. No.

Q: Do you remember telling Detective Kirlin that you saw him on the corner?

A: Oh, yeah. I'm sorry.

Q: Okay.

A: It was three days prior. I saw Diamonte and another guy. They were fiddling around with a gun.

A: Where was that?

Q: On the corner of Shearman [*sic*] and Clifford Brown Walk.[226]

Armed only with the information the State had supplied at the sidebar minutes earlier about its meeting with Sullivan the day before, the defense cross-examined Sullivan.[227] Sullivan stated that "some other people [told her] that [Mr. Taylor]

[226] A0825-26.

[227] A0826.

was the person who was responsible that day."[228] She confirmed that she was "given a name" by unidentified children after talking to them about the incident.[229] Sullivan stated that the children had shown her photos of Mr. Taylor.[230] The witness confirmed that she first met with Detective Kirlin on June 1, 2016.[231] When the defense tried to cross-examine the witness with her statement from two years before that she could not look at a lineup because she would not recognize anyone, the witness denied it.[232] Finally, the following exchange occurred:

> Q: So is it your testimony today that Detective Kirlin showed you a six-pack photographic lineup in that interview, June 1, 2016? Is that what you're saying?
>
> A: Yes.
>
> Q: Okay. And what happened when you looked at that lineup?
>
> A: What do you mean?
>
> Q: Well, did you pick anybody out?
>
> A: Yes.
>
> Q: You did?

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[228] A0826.

[229] A0826.

[230] A0826.

[231] A0827.

[232] A0827.

A: Uh-huh.

Q: Who was that?

A: It was Diamonte.

Q: Oh, okay. All right. Well, during this interview with Detective Kirlin, do you recall telling Detective Kirlin, "I'm really like telling, you know, saying to her, like"—referring to Treasure—"I don't, I didn't see his face, do you know? And that's when she went on and told me what she knew." So didn't you tell Detective Kirlin that day that you didn't see the shooter's face?

A: Yes. I told her he had a hood on.

Q: Okay. But you told her that you didn't see the shooter's face, right?

A: I don't remember that.

Q: You don't remember it?

A: No.[233]

After showing Sullivan her statement and confirming that she previously said she could not see the shooter's face, the defense concluded its cross-examination.[234]

Sullivan was never shown a photographic lineup by Detective Kirlin, nor did she ever identify Mr. Taylor as the shooter on June 1, 2016.[235] Nevertheless, the State failed to correct her false testimony on redirect examination.[236] Instead, the

[233] A0827.

[234] A0828.

[235] A0946.

[236] *See* A0828.

State asked Sullivan no other questions, the witness was excused, and the prosecution called its final witness for the day, Shawn Garrett.[237] Garrett's testimony dealt with a different incident that occurred on May 30, 2016.[238]

When the parties returned after the weekend break, Mr. Taylor requested that the Court declare a mistrial based on Sullivan's testimony.[239] The defense contended: (1) the State committed a *Brady* violation by failing to disclose Sullivan's newly-provided inconsistent statement prior to her testimony[240]; (2) the State introduced an identification of Mr. Taylor from Sullivan that was based on hearsay, and not her personal knowledge[241]; and (3) the State failed to correct Sullivan's false testimony that she had been shown a lineup by Detective Kirlin and identified Mr. Taylor on June 1, 2016.[242] The Superior Court stated that it wanted to see a transcript of Sullivan's testimony before it ruled on the motion, but that nevertheless, the State needed to recall Detective Kirlin to correct the record

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[237] A0828.

[238] A0828.

[239] A0935-41.

[240] A0938.

[241] A0936.

[242] A0937.

that Sullivan had never viewed a lineup.[243] The State did so, and the officer testified that she never showed Sullivan a photo lineup.[244]

The State Failed to Discharge Its Obligation Under Brady

The State's obligation pursuant to *Brady* is fundamental to the constitutional integrity of a trial because, in order to find a violation, the court must find the suppressed evidence was material to the outcome.[245] It is well-settled that "the suppression by the prosecution of evidence favorable to the defense violates due process where the evidence is material either to guilt or to punishment."[246] As this Court has acknowledged, the State's obligation under *Brady* is premised on the notion that "[s]ociety wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any of the accused is treated unfairly."[247]

Keeping with that notion, the assessment of a *Brady* violation is measured as follows:

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[243] A0941.

[244] A0946.

[245] *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 454 (1995); *United States v. Bagley*, 473 U.S. 667, 678 (1985) ("[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.").

[246] *Brady*, 373 U.S. at 87.

[247] *Wright v. State*, 91 A.3d 972 (Del. 2014) (quoting *Brady*, 373 U.S. at 87).

> Under *Brady* and its progeny, the State's failure to disclose exculpatory and impeachment evidence that is material to the case violates a defendant's due process rights. The reviewing court may also consider any adverse effect from the nondisclosure on the preparation or presentation of the defendant's case. There are three components of a *Brady* violation: (1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the State; and (3) its suppression prejudices the defendant. In order for the State to discharge its responsibility under *Brady*, the prosecutor must disclose all relevant information obtained by police or others in the Attorney General's Office to the defense. That entails a duty on the part of the prosecutor to learn of any favorable evidence known to the others acting on the government's behalf, including the police.[248]

When considering whether a *Brady* violation has occurred, courts' focus generally turn on "the third component—materiality."[249] A showing of materiality does not demand that suppressed evidence would result in acquittal.[250] Instead, the requirement is that a defendant merely receive a "fair trial, 'understood as a trial resulting in a verdict worthy of confidence.'"[251] Thus, to establish materiality, a defendant need only show "that the suppressed evidence 'undermines [the] confidence in the outcome of the trial."[252]

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[248] *Wright*, 91 A.3d at 988 (internal quotations and citations omitted).

[249] *Atkinson v. State*, 778 A.2d 1058, 1061 (Del. 2001).

[250] *Id*.

[251] *Id*. at 1063 (citing *Kyles*, 514 U.S. at 434).

[252] *Id*.

In determining the effect of delayed disclosure of *Brady* material, the relevant inquiry is whether the State's delay deprived the defendant of the opportunity to use the information effectively.[253] 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 truth of his testimony are tested.'"[254] As the jury is "the sole trier of fact, responsible for determining witness credibility and resolving conflicts in testimony," it is imperative that jurors have "every opportunity to hear impeachment evidence that may undermine a witness' credibility."[255]

In *State v. Braden*, the Superior Court dismissed an indictment due to the State's commission of a "*Brady* violation [that occurred] when it failed to provide the defense, in a timely manner, with [a witness] statement"[256], thereby prejudicing the defense. The *Braden* witness told police, five days after a shooting for which the defendant was accused of committing, that individuals other than the defendant were the shooters.[257] Although the Department of Justice disclosed the witness's

[253] *Atkinson*, 778 A.2d at 1062.

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

[255] *Jackson*, 770 A.2d at 515 (internal quotations omitted).

[256] 2009 WL 10244069 at *2–3 (Del. Super. Ct. May 19, 2009).

[257] *Id*. at *1.

statement to the defense prior to trial, it did so more than a year after the *Braden* defendant requested discovery.[258] By the time the State provided the statement, the witness could not be located by either party.[259] In dismissing the indictment, the Superior Court noted that the witness's inability to testify at trial was important in its analysis, but was "not the most influential factor in the Court's decision."[260] Instead, the trial court discussed the evidence against the defendant, noting that:

> [T]he State had made no attempt to convince the Court that ample evidence exists against Braden to render this *Brady* violation harmless. It appears that the evidence in this case is derived mostly from witness statements, and not from forensic or circumstantial evidence. There is no "smoking gun" in this case that implicates Braden. Therefore, where the State has had since September 2007 to investigate this case using the statements taken from witnesses in this case, the defense has not had the same opportunity. In a case like this, where it is essentially a "battle of the witnesses," the failure to disclose what is perhaps the most important witness statement to the defense is crippling.[261]

The *Braden* Court ultimately found "there [was] a reasonable probability that the timely disclosure of [the witness's] statement to the defense would have had a material effect on the outcome of the case."[262]

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[258] *Id*.

[259] *Id*.

[260] *Id*. at *3.

[261] *Id*.

[262] *Id*. at *2.

In *Atkinson v. State*, this Court determined a *Brady* violation required reversal of the defendant's conviction for, *inter alia*, Attempted Unlawful Sexual Intercourse in the Second Degree.[263] In *Atkinson*, the State suppressed notes taken by the Deputy Attorney General initially assigned to prosecute the case.[264] The notes revealed inconsistent statements made by the alleged victim to witnesses regarding the incident.[265] The defense only became aware of the notes during trial, whereupon the trial court ordered the State to turn over the materials to the *Atkinson* defendant.[266] Nevertheless, the *Atkinson* Court determined the notes would have affected the jury's assessment of at least one key witness and that the delayed disclosure prevented the defense from using the impeachment material effectively.

It is worth noting that the existence of a *Brady* violation does not depend in any way upon the "good or bad faith of the prosecution."[267] Defense counsel is entitled to rely on the presumption that prosecutors will fairly "discharge[ ] their

[263] 778 A.2d at 1062.

[264] *Id*. at 1061-62.

[265] *Id*.

[266] *Id*. at 1063.

[267] *Brady*, 373 U.S. at 87.

official duties,"[268], and that the prosecutor shall act as the "representative not of an ordinary party to a controversy, but of a sovereignty … whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."[269] Moreover, the State's duty of disclosure under *Brady* is not limited to information actually known to the prosecutor or in the prosecutor's actual possession but includes all information in the possession of the prosecutor's office, the police and others acting on behalf of the prosecutor.[270] Additionally, in terms of inconsistent statements of a government witness, the Supreme Court of the United States "has never drawn a distinction between recorded and unrecorded statements, and instead distinguishes between evidence that is material and evidence that is not."[271]

Here, the statement Sullivan provided to the Department of Justice the day before her testimony was inconsistent with her statement to Detective Kirlin on June 1, 2016. The State did not advise that Sullivan had provided a conflicting

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[268] *United States v. Messanatto*, 513 U.S. 196, 210 (1995) (citing *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("[I]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties.")).

[269] *Berger v. United States*, 295 U.S. 78, 88 (1935).

[270] *See Kyles*, 514 U.S. at 437, 482; *Giglio v. United States*, 405 U.S. 150, 154 (1972); *accord Banks v. Dretke*, 540 U.S. 668, 675-76 (2004) ("When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight."); *United States v. Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991) (noting that prosecutor is charged with knowledge of information known by other members of the prosecution team)).

[271] *Woods v. Smith*, 660 Fed.Appx. 414, 435 (6th Cir. 2016).

statement until after she had testified. Moreover, after Sullivan testified about her conversation with Detective Kirlin the day prior, the defense was still unaware of exactly what was said during that interaction and thus was limited in how effectively it could cross-examine the witness.

The State suppressed Sullivan's interview when it failed to disclose that such conversation occurred prior to her testimony. Had the defense not objected when Detective Kirlin was called to the stand to testify about Sullivan's statements one day prior, the State would have elicited testimony about an inconsistent statement while Mr. Taylor heard such evidence for the first time.

Also telling is the prosecutor's comment that he was "comfortable saying that Detective Kirlin did not take notes from the sit-down that we had with Nadana Sullivan with her yesterday" and that the defense was "free to ask her about that."[272] Such response suggests that the authorities did not take notes during their meeting with Sullivan so as to avoid having to disclose the substance of the statement under *Brady*.

The State's failure to disclose Sullivan's inconsistent statement to the defense prejudiced Appellant as it obviated his ability to effectively cross-examine the witness. The defense was caught by surprise by Sullivan's sudden identification of Appellant as the armed individual she saw on May 19, 2016. The

[272] A0824.

Superior Court would not grant a recess prior to Sullivan's testimony. Defense counsel was unaware of the exact substance of the statement. This resulted in Sullivan making an identification based on hearsay and offering false testimony that she had previously been shown a lineup by the police, whereupon she identified Mr. Taylor in June 2016. Had the defense known of the substance of her contradictory statements, Mr. Taylor would have sought to exclude her improper identification prior to the State seeking to admit it. Moreover, the defense would have had more time to prepare for a meaningful cross-examination, and likely would have avoided the circumstances that led to Sullivan offering false testimony to the jury.

Sullivan was the only witness who positively and definitively identified Mr. Taylor as the individual who shot Mr. Wingo on May 19, 2016. Moreover, she affirmatively stated that she had identified Appellant to the police just weeks after the incident. The State's suppression of her inconsistent statement deprived Mr. Taylor the ability to effectively confront such testimony, thereby prejudicing Mr. Taylor.

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

Delaware Uniform Rule of Evidence 602 states that a "witness may testify to a matter only if evidence is introduced sufficient to support a finding that the

witness has personal knowledge of the matter."[273] Here, Sullivan lacked personal knowledge that the individual she saw running with a firearm was Mr. Taylor, but rather was informed that was who she saw by unidentified children. Such testimony was inadmissible hearsay.[274]

During her second direct examination, the prosecutor asked Sullivan whether she had told Detective Kirlin that she saw the person running down the street with a firearm and that she knew who that person was.[275] Sullivan said that she did.[276] Next, the State specifically asked Sullivan whether she told Detective Kirlin how she knew who the individual was and how she knew.[277] Sullivan replied: "From the children."[278] Sullivan confirmed on cross-examination that "some other people [told her] that [Mr. Taylor] was the person who was responsible [for the shooting] that day."[279]

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[273] D.R.E. 602.

[274] *See* D.R.E. 801(c).

[275] A0825.

[276] A0825.

[277] A0825.

[278] A0825.

[279] A0826.

It is apparent from the leading questions posed on direct examination that the State was aware Sullivan's identification of Mr. Taylor was based on hearsay. When explaining what Sullivan had stated during her interview the day prior at sidebar with the Court prior to her second direct examination, the prosecutor omitted that Sullivan informed Detective Kirlin that she knew the armed individual she saw running down the street was Mr. Taylor because "the children" told her that was who it was. Nevertheless, the State specifically elicited that testimony for the jury.

Sullivan's testimony was unreliable at best. It was in stark conflict with the statement she gave less than two weeks after the incident. Despite that the State was aware of the inconsistencies between the two statements and that her identification of the defendant was based on what other people had told her about who had shot Mr. Wingo, the prosecution still called Sullivan to the stand to offer inadmissible hearsay.

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

The Supreme Court of the United States held in *Napue v. Illinois* that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go

uncorrected *when it appears*."[280] This Court has recognized the timing requirement established by the *Napue* Court, stating that when false evidence is offered by a witness, "the prosecutor had the duty *then and there* to correct that which he knew to be false."[281] The State failed to correct Sullivan's false testimony that she had identified Mr. Taylor in a photo lineup in June 2016 when it appeared, instead waiting until after the weekend recess.

The rationale that the admission of false evidence must be corrected immediately is consistent with this Court's rulings that *immediate* curative instructions from a trial judge after an error during trial generally cures any unfair prejudice to a defendant.[282] Instead of curing any prejudice resulting from Sullivan's testimony by correcting it then and there, however, the State asked Sullivan no follow-up questions on redirect and stated that she could be released by the trial court as she would not need to be recalled.[283] Nor did the State call

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[280] 360 U.S. 264, 269 (1959) (emphasis added).

[281] *O'Neal v. State*, 247 A.2d 207, 210 (Del. 1968) (emphasis added).

[282] *See, e.g., Saavedra v. State*, 225 A.3d 364, 382 (Del. 2020) (holding that curative instruction in the "immediate wake of . . . two instances of misconduct . . . were meaningful and practical steps taken in response to [the defendant's] concerns and mitigated any prejudicial effect" that improper testimony may have caused); *Asbury v. State*, 2015 WL 5968404 at *2 (Del. Supr. Oct. 13, 2015) ("The trial judge gave an immediate curative instruction to cure any unfair prejudice to the defendant."); *Dixon v. State*, 2014 WL 4952360 at *2 (Del. Supr. Oct. 1, 2014) (noting that a trial court's "immediate curative efforts" to strike offensive testimony in conjunction with the jury's presumption to have followed instruction reduced the risk of any prejudice to defendant).

[283] A0828.

Detective Kirlin to clarify that Sullivan had not been shown a lineup and had not identified Mr. Taylor during her June 2016 interview.[284] Instead, the State called an unrelated witness and moved on, allowing the court to recess for the weekend.

The final testimony related to Mr. Wingo's murder that the jury heard before a two-day break was that Sullivan identified Mr. Taylor two weeks after the homicide. This left the jury to reflect over the weekend upon Sullivan's false, uncorrected claim. The likelihood that Sullivan's testimony resonated with the jury is nearly a guarantee. The taint of such testimony was unlikely to be cured by a brief correction days later.

The State's handling of Sullivan's testimony was problematic from multiple perspectives. The prosecution opted not to disclose to the defense prior to her testimony that she had provided a statement one day earlier wholly in conflict with her initial statement two years earlier. Then, when explaining at sidebar what Sullivan had stated the day before, the prosecutor omitted that Sullivan "knew" she had seen Mr. Taylor fleeing with a firearm because the "children" told her. Instead, the State elicited the identification in front of the jury, then established the basis of that identification—thus sending the message to the jury that individuals in the community knew that Mr. Taylor had shot and killed Mr. Wingo. Finally,

[284] *See* A0828-32.

despite that Sullivan explicitly testified that she was shown a "six-pack photographic lineup" by Detective Kirlin on June 1, 2016 and had identified Mr. Taylor as the armed individual she observed, the State failed to correct that testimony until after the weekend recess, and only upon the trial court's directive to do so after the defense had already moved for a mistrial. Throughout the entirety of the trial, Sullivan was the only witness who placed Mr. Taylor at the scene of Mr. Wingo's homicide with a firearm in his hand. Given the problems with her testimony and the State's handling of the witness, the Superior Court erred in failing to grant a mistrial and Mr. Taylor's conviction should accordingly be reversed.

CONCLUSION

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

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Dated: September 8, 2020