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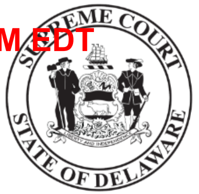

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEVIN COLEMAN,	)	
	)	No. 83, 2022
Defendant Below-	)	
Appellant,	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE
	)	ID No. 2010012644A/B
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF

DELAWARE IN AND FOR KENT COUNTY

OPENING BRIEF

COLLINS & PRICE

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Dated: July 7, 2022

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NATURE OF THE PROCEEDINGS

Indictment and pretrial matters

On November 2, 2020, a grand jury approved an indictment of 29 defendants, including Devin L. Coleman, with drug and weapons offenses.[1] This case arose out of a wiretap investigation by Dover Police. The President Judge assigned the case to the Honorable Jeffrey J. Clark.[2]

At arraignment on November 24, 2020, the Court advised Mr. Coleman that counsel would be appointed for him.[3] By the time of the initial office conference proceeding on January 25, 2021,[4] John S. Malik, Esquire had been appointed as Mr. Coleman's attorney.[5]

The undersigned attorney was appointed as defense coordinating counsel for this case but did not represent Mr. Coleman or any client.[6]

Also arising out of the wiretap investigation were separate charges for Mr. Coleman. In Case ID No. 2007010434, Mr. Coleman faced two charges of Possession of a Firearm by a Person Prohibited (PFBPP) and one charge of Possession of Ammunition by a Person Prohibited (PABPP). The State filed a *nolle*

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[1] A31-97.
[2] A103.
[3] A101.
[4] A109-144.
[5] A106.
[6] *See*, A123-127.

prosequi on that case[7] and re-charged these offenses in the reindictment of the instant case.

Also arising out of Mr. Coleman's arrest was a violation of probation and conditional release. Mr. Coleman proceeded *pro se* on that matter after a colloquy with the Court.[8] He filed a motion to suppress evidence.[9] After a multi-day hearing, the Superior Court found Mr. Coleman in violation of his probation and conditional release.[10] He appealed and is currently *pro se* in this Court on appeal.[11] This Court has removed Mr. Coleman's *pro se* VOP appeal from cases to be decided until this appeal is submitted for decision.[12]

On April 5, 2021, a grand jury approved a reindictment.[13] The number of defendants increased to 37. The reindictment charged Mr. Coleman with:

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[7] ID No. 2007010434; D.I. 31.
[8] A157-168.
[9] *See*, A107-108.
[10] *State v. Coleman*, 2021 WL 2181428 (Del. Super. May 27, 2021).
[11] *Coleman v. State*, 192, 2021D.
[12] *Coleman v. State*, 192, 2021D; D.I. 46.
[13] A194-261.

Count 1: Racketeering
Count 13: Drug Dealing (methamphetamine)
Count 14: Criminal Solicitation of Drug Dealing
Count 16: Drug Dealing (heroin)
Count 17: Aggravated Possession (heroin)
Count 18: Conspiracy Second Degree (Drug Dealing)
Count 49: Conspiracy Second Degree (Drug Dealing)
Count 50: Drug Dealing (cocaine)
Count 57: Drug Dealing (fentanyl)
Count 58: PFBPP
Count 59: PFBPP
Count 60: PABPP

On April 12, 2021, the State provided a large volume of discovery to coordinating counsel,[14] including the wiretap application, affidavit and order as to Mr. Coleman's phone number.[15] These items were distributed to all counsel, including Mr. Coleman's attorney.[16]

At Mr. Coleman's arraignment on May 27, 2021, Mr. Coleman expressed an interest in going *pro se*.[17] The Court deferred a colloquy until case review and encouraged Mr. Coleman to discuss the matter further with his attorney.[18] That same day, the Superior Court denied Mr. Coleman's motion to suppress in the VOP case and found Mr. Coleman in violation of his probation and conditional release.[19]

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[14] A262-267.
[15] A268-319.
[16] A341-342.
[17] A365.
[18] A365-366.
[19] *State v. Coleman*, 2021 WL 2181428 (Del. Super. May 27, 2021); A368-382.

On July 7, 2021, the Superior Court held a case review on Mr. Coleman's case.[20] The prosecutor agreed to enter *nolle prosequis* as to the original set of charges and reallocate Mr. Coleman's bail to the charges in the reindictment.[21] Mr. Coleman was not on this Zoom call due to difficulties with the connection to the prison.[22] Later that day, the case review resumed with Mr. Coleman on the call.[23] Mr. Coleman stated he wanted to go *pro se* because his attorney was not heeding his wish to have the indictment read in open court and that he wanted to review discovery.[24] Trial counsel stated that he would be providing all the discovery to Mr. Coleman.[25] The judge ordered trial counsel to provide any case law for reading the indictment and gave the State an opportunity to respond.[26] Mr. Coleman withdrew his application to proceed *pro se*.[27]

On September 3, 2021, after an office conference,[28] the Court issued an Interim Scheduling Order.[29] An amended order issued on September 21, 2021 set

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[20] A412-433.
[21] A414-415.
[22] A419-420.
[23] A422-423.
[24] A424.
[25] A426.
[26] A427-428.
[27] A430.
[28] A434-461.
[29] A462-463.

forth a deadline to join Defendant Marquis Mack's motion to suppress. It also established a trial date for Mr. Coleman on October 25, 2021.[30]

On September 24, 2021, trial counsel filed a motion[31] to join Mack's motion *in limine* to exclude references to gang affiliation.[32] That same day, trial counsel moved[33] to join Mack's motion to suppress.[34] On October 1, 2021, the Court approved the parties' stipulation to sever Mr. Coleman's charges for PFBPP and PABPP (Counts 58, 59, and 60) to a bifurcated trial.[35]

On October 1, 2021, the Court heard argument on the motion to suppress and motion *in limine*.[36] On October 18, 2021, the Court issued an Opinion and Order denying the motion to suppress.[37] The Court denied the motion to suppress the wiretap evidence.[38] As to Mr. Coleman, the Court noted that Mr. Coleman had moved to "raise and preserve for appeal" all arguments raised in the VOP suppression hearing. After the close of the evidence, Mr. Coleman had alleged technical violations of the wiretap statute's notice requirements. The Court found that Mr. Coleman was collaterally estopped from raising these issues in the

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[30] A464-466.
[31] A467-471.
[32] A472-475.
[33] A476-480.
[34] A481-487.
[35] A488-490.
[36] A491-551.
[37] *State v. Mack*, 2021 WL 4848230 (Del. Super. Oct. 18, 2021); A552-574.
[38] *Id.* at *9.

suppression matter, noting that he had not moved to stay the present matter while awaiting a decision from this Court on his appeal in the VOP case.[39]

At Mr. Coleman's final case review on October 20, 2021,[40] trial counsel sought to file an out of time motion to suppress the wiretap evidence pursuant to 11 *Del. C.* § 2407(g)(4).[41] This subsection requires the issuing judge to serve an inventory notice to a person whose communications have been intercepted.[42] The Court indicated it would consider a motion to file out of time.[43] The State offered Mr. Coleman a plea to one count of PFBPP and one count of Drug Dealing, with a sentence range of 10-25 years and the State would not file an habitual offender motion.[44] Mr. Coleman rejected the plea offer after a colloquy.[45]

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[39] *Id.* at *9, fn. 67.
[40] A575-603.
[41] A578-579.
[42] Within a reasonable time but not later than 90 days after the termination of the period of an order or extensions thereof, the issuing judge shall cause to be served, on the persons named in the order and the other parties to intercepted communications as the judge may determine in that judge's discretion that is in the interest of justice, an inventory that shall include notice of:
a. The fact of the entry of the order;
b. The date of the entry of the order and the period of authorized interception; and,
c. The fact that during the period, wire, oral or electronic communications were or were not intercepted. 11 *Del. C.* § 2407(g)(4).
[43] A581.
[44] A588.
[45] A592-594.

On October 25, 2021, trial counsel filed a Motion to File Suppression Motion Out of Time[46] and a Motion to Suppress.[47] The Court denied the Motion to File Out of Time.[48] The judge put the reasoning on the record at the office conference on October 25, 2021.[49]

Trial

The trial began with an office conference on October 25, 2021.[50] The State indicated it was only going forward on the Drug Dealing Fentanyl charge in the "A" case, and the two PFBPP and one PABPP charges in the severed "B" case.[51] The State entered *nolle prosequis* as to Mr. Coleman's eight other pending charges.[52]

At the end of jury selection, trial counsel notified the judge that Mr. Coleman stated he wanted to go *pro se*.[53] Mr. Coleman explained he was unaware of the charges because they were not read at arraignment and thought he would get more information if he represented himself.[54] The Court advised Mr. Coleman to

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[46] A635-639.
[47] 640-644.
[48] A645.
[49] A605-607.
[50] A604-634.
[51] A611-612.
[52] A612.
[53] A647-648.
[54] A683.

confer with counsel.[55] After a break, Mr. Coleman withdrew his request to proceed *pro* se.[56] Trial counsel stated that he had advised Mr. Coleman of the charges, and that throughout the VOP proceedings and the other proceedings in the instant case, Mr. Coleman was aware of the charges.[57] The Court did not conduct a further colloquy as Mr. Coleman had withdrawn his request to proceed *pro se*.[58]

The Drug Dealing trial ("A" case) occurred October 25-29, 2021. The jury found Mr. Coleman not guilty of Drug Dealing but guilty of the lesser-included offense of Possession of Fentanyl.[59] The firearm trial ("B" case) occurred on October 29 and November 1, 2021. The jury found Mr. Coleman guilty of one count of PFBPP, but not guilty of the second PFBPP count and not guilty of PABPP.[60]

Sentencing

On November 16, 2021, the State filed a Motion to Declare Habitual Offender.[61] The Court granted that motion at the sentencing hearing on February 14, 2022.[62] The Court sentenced Mr. Coleman to 29 years of unsuspended Level V

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[55] A686.
[56] A689.
[57] A690-691.
[58] A690, 692.
[59] A19; D.I. 74.
[60] A27-28; D.I. 14.
[61] A1567-1562.
[62] A1578.

time for the PFBPP conviction, and a fine for the drug possession misdemeanor.[63] The Court made a technical correction to the sentence order on February 28, 2022.[64]

Appeal

Mr. Coleman, through counsel, filed a timely notice of appeal on March 11, 2022.[65] The undersigned attorney was appointed as appellate counsel. This is Mr. Coleman's Opening Brief.

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[63] A1587-1588.

[64] Exhibit A.

[65] A22; D.I. 94; A29; D.I. 27.

SUMMARY OF ARGUMENT

I. THE SUPERIOR COURT ERRED BY DENYING DEFENSE COUNSEL'S REQUEST FOR A MISSING EVIDENCE INSTRUCTION, RESULTING IN A DEPRIVATION OF MR. COLEMAN'S DUE PROCESS RIGHTS.

During a probation search arising out of a wiretap investigation, a probation officer found five items in a backpack Mr. Coleman carried into a hotel room. They were a 9mm handgun, a loaded magazine inside that handgun, a .40 caliber handgun, an unloaded magazine found inside that handgun, and a loose empty additional .40 caliber magazine. The collecting officer removed the .40 caliber magazine from the gun. His negligent handling of the evidence commingled the two .40 caliber magazines, so it was impossible to tell the loose magazine from the magazine that was found inside the gun.

This negligent collection and preservation of evidence would become important at trial, because only one of the magazines had Mr. Coleman's fingerprint on it. It was not possible to tell which one, since the probation officer failed to mark the evidence properly. An evidence detection officer testified he would have first photographed the evidence *in situ* and then marked the magazines in a manner to make clear which magazine came from the .40 caliber firearm.

Because of the importance of the fingerprint evidence to the question of whether Mr. Coleman possessed the firearm, defense counsel sought a *Deberry/ Lolly* missing evidence instruction. The Superior Court denied the request.

The jury found Mr. Coleman guilty of only one count of PFBPP and not guilty of the other PFBPP count and not guilty of PABPP. The verdict makes clear the importance of the missing fingerprint evidence, meaning missing as to which magazine from which it came. Moreover, the verdict underscores that there was insufficient evidence otherwise to sustain a conviction.

The Superior Court's error in denying the request for the instruction caused prejudice to Mr. Coleman and deprived him of due process. The Superior Court should be reversed.

STATEMENT OF FACTS

Evidence in the "A" trial and "B" trial was presented as follows:

The "A" trial: drug dealing

Detective Robert Cunningham headed up the wiretap investigation for the Dover Police, in a joint investigation with the State Police.[66] Through Detective Cunningham, the State played several intercepted phone calls. In the first call, Mr. Coleman talks to an unknown person on July 21, 2020 at 1:01 PM.[67] On the call, the unknown person tells Mr. Coleman about handguns for sale. In the second call, at 1:59 PM, Mr. Coleman talks with eventual codefendant Marquis Mack.[68] The gist of the call is that Mr. Coleman was going to go look at the guns for sale. On the third call a minute later,[69] Mr. Coleman tells an unknown male he is going to the place where the guns are for sale. The fourth call, at 2:29 PM, was between Mr. Coleman and Mack.[70] They discuss the pricing for the guns – $700 – and that the seller is coming down from "up top," meaning Wilmington.[71]

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[66] A727.
[67] State's Exhibit 1; A736. Transcripts of the calls were provided to the jurors to facilitate their listening and collected after the calls were played. The judge instructed the jury that the audio calls were evidence, and the transcripts were not. A766.
[68] State's Exhibit 2; A738-739.
[69] State's Exhibit 3; A743.
[70] State's Exhibit 4; A745.
[71] A745.

Detective Joshua DiGiacomo surveilled Mr. Coleman on July 22, 2020.[72] At 8:38 AM, he observed Mr. Coleman get out of a car at the Capital Inn in Dover. Mr. Coleman was carrying a blue backpack.[73] Detective Daniel Eby, also conducting surveillance, was in a different position and able to see Mr. Coleman enter Room 117 at the Capital Inn.[74] When Mr. Coleman stepped out of Room 117 to make a phone call, he did not have the backpack with him.[75]

Detective Cunningham retook the stand to play intercepted calls from the morning of July 22, 2020. On a call at 8:24 AM, Mr. Coleman talks to an unidentified person about having "at least a deuce" but trying to get the rest of it.[76] Mr. Coleman also says he is "trying to get some whirls up;" Cunningham testified that whirls is a common term for drug deals.[77] The State introduced texts from Mr. Coleman's phone regarding gathering money.[78] At 8:53 AM, Mr. Coleman talked to an unknown female about going to the laundromat and "dope."[79] In a phone call at 9:05 AM, Mr. Coleman spoke to associate Antoine Campbell; Campbell is asking Mr. Coleman to "give me a 7."[80] Cunningham testified that a "7" was slang

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[72] A792.
[73] A794.
[74] A804-805.
[75] A811.
[76] State's Exhibit 5; A835.
[77] A837.
[78] A840-841.
[79] State's Exhibit 6; A843-845.
[80] State's Exhibit 7; A847-848.

for seven grams or a quarter ounce of drugs.[81] When cross-examined, Cunningham admitted that a 7 would normally refer to cocaine or marijuana, not prepackaged heroin.[82]

The State next called Ricky Porter. Porter is a probation officer, but by agreement of the parties was introduced as a law enforcement officer to avoid prejudice to Mr. Coleman.[83] Porter, along with Officers Buffalini and Stagg, reported to Room 117 to conduct a search. Mr. Coleman then came to the window but took 45 seconds to a minute to open the door for Officer Porter.[84] Upon entry, Porter noted an odor of marijuana. He also noted two females and a male in the room along with Mr. Coleman.[85] Officers handcuffed Mr. Coleman.[86]

Porter saw in the room two bundles of heroin/fentanyl and the blue backpack.[87] Porter found two firearms and an additional magazine in the backpack.[88] One firearm was a .40 caliber Smith and Wesson. The second was a black Ruger 9mm handgun. The 9mm had a magazine inside it containing ammunition; the Smith and Wesson had an empty magazine in the weapon. There

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[81] A848.
[82] A861.
[83] A814-815.
[84] A880-881.
[85] A881-882.
[86] A883.
[87] A882-883.
[88] A883.

was an extra magazine for the Smith and Wesson in the bag.[89] Neither of the .40 caliber magazines were loaded.[90] Porter took the evidence into custody, tagged it, and turned it over to Officer Buffalini at Dover Police Department.[91] Mail addressed to Mr. Coleman and his State ID card were also found in Room 117.[92]

On cross-examination, Porter admitted that his investigative report stated that it took "several seconds" for Mr. Coleman to open the door, not 45 seconds to a minute.[93] Porter also testified that James Ayers, the other male in the room, had heroin on his person with a stamp matching the two bundles found in the room.[94]

The State had mentioned in its opening statement that one of these two magazines had Mr. Coleman's fingerprint on it, consistent with him handling the gun.[95] Porter testified that no action had been taken when seizing the evidence to differentiate between the empty .40 caliber magazine that was found in the Smith and Wesson and the empty .40 caliber magazine that was found loose in the backpack.[96] As such, there was no way to tell which of the two .40 caliber magazines had fingerprints on it – only that one of them had fingerprints on it.[97]

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[89] A884.
[90] A891.
[91] A892-893.
[92] A905-906.
[93] A927-928.
[94] A935-936.
[95] A714.
[96] A944-945.
[97] A945-946.

Detective Nolan Matthews of Dover Police testified as a crime scene investigator regarding fingerprints.[98] On one of the .40 caliber magazines, he identified prints of value.[99] Matthews also performed swabs for DNA, but DNA testing was not completed in this case.[100] Matthews testified that no fingerprint or DNA testing was performed on any of the drug evidence.[101]

Ashleigh Haines of the State Bureau of Identification[102] examined the fingerprints. She testified that three fingerprints on one of the .40 caliber magazines could be identified. One fingerprint was Mr. Coleman's; the other two belonged to Marquis Mack and James Ayers.[103]

Detective Cunningham retook the stand to opine about whether the Fentanyl was possessed with intent to deliver.[104] The defense objected because Cunningham was the chief investigating officer in the case and insufficient foundation had been laid to establish that he was an expert.[105] The Court permitted the State to conduct *voir dire* outside the presence of the jury.[106] At the conclusion of the *voir dire*, the trial judge ruled that Cunningham was qualified to opine as an expert on the

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[98] A1002.
[99] A1007.
[100] A1011-1012.
[101] A1017.
[102] A1018.
[103] A1026.
[104] A1049-1050.
[105] A1050-1052.
[106] A1055-1056.

subject of drug sales compared to personal use of drugs.[107] Cunningham then testified that he believed the Fentanyl was packaged for sale rather than personal use.[108]

The State rested.[109] After a colloquy, Mr. Coleman elected not to testify.[110] The defense rested without presenting evidence.[111]

At the prayer conference, the State requested, and the defense opposed, an accomplice liability instruction.[112] The Court granted the State's request.[113] The defense requested and received a lesser-included offense of Possession of Fentanyl.[114]

The jury found Mr. Coleman not guilty of Drug Dealing but guilty of the lesser-included offense of Possession of Fentanyl.[115]

The "B" trial: person prohibited charges

While the jury deliberated in the "A" case, trial counsel raised an evidentiary issue with the Court. Porter took the magazine out of the .40 caliber firearm and brought the evidence to Dover Police. As such, it became impossible to tell which

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[107] A1096-1100.
[108] A1108.
[109] A1129.
[110] A1130-1131.
[111] A1134.
[112] A1144-1152.
[113] A1152-1154.
[114] A1163-1164.
[115] A1306; A1547.

magazine had Mr. Coleman's fingerprint on it – the one from inside the Smith and Wesson handgun, or the one that was loose in the bag.[116] Trial counsel argued that he was now "robbed of the ability to argue to the jury that they've not shown any connection with the magazine that was in the gun, it was another magazine and we don't know at what time the fingerprint that [sic] was placed on there."[117]

Trial counsel asserted that due to the negligent handling of the evidence by State agents, Mr. Coleman was entitled to a *Deberry/Lolly* instruction.[118] Counsel argued that without such an instruction, Mr. Coleman would be unfairly prejudiced.[119] The State countered that the defense's allegation of negligent handling was "a huge stretch," because the officer had no way of knowing there would be fingerprints found on the magazine later.[120] The State also denied that the evidence was exculpatory, and that in any event, the defense had not identified a policy or procedure that was not followed.[121]

The Court agreed to hear further argument after the evidence was received in the "B" case.[122]

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[116] 1277-1278.
[117] A1278-1279.
[118] A1279.
[119] A1280.
[120] A1282.
[121] *Id.*
[122] A1285.

The State presented a stipulation that Mr. Coleman had been previously convicted of a felony.[123] Then the State rested.[124] The Court conducted a colloquy with Mr. Coleman,[125] as well as a discussion of his admissible felonies should he testify.[126]

Detective Nolan Matthews, the evidence detection officer, testified as a defense witness. He testified that it is best practice to photograph the evidence prior to handling it.[127] He also testified that as an EDU officer, he would have designated and packaged the magazine from the .40 caliber handgun separately from the loose magazine found in the bag.[128] However, as the evidence was packaged and marked in this case by Porter, there was no way of knowing which magazine was which.[129] However, he also testified that there was no written procedure at Dover PD for marking the items separately.[130]

The attorneys argued the evidence issue further. Trial counsel noted that the EDU officer testified that it would have been proper to identify which magazine originated in the .40 caliber firearm when marking and collecting evidence.

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[123] A1338-1339.
[124] A1339.
[125] A1342-1345.
[126] A1345-1350.
[127] A1355.
[128] A1363-1364; A1374.
[129] A1365-1366.
[130] A1369.

Counsel argued it was negligent to fail to do so. The State responded that there has been no violation of procedures and, therefore, a missing evidence instruction was inappropriate.[131]

The Court denied the application for a *Deberry/Lolly* instruction, finding that "the State did not breach its duty to collect or preserve evidence."[132] Finding no breach of duty, the Court also noted that no policy or procedure had been breached. Noting that this was a probation search, the Court held, "I see no reason to conclude that [a probation search] wouldn't be subject to a different standard that [sic] an evidence collection officer that wasn't even on the scene when this happened, or an evidence tech who wasn't on the scene when it happened."[133] In conclusion, the Court ruled, "So I find no breach of the duties of the State's duty to collect or preserve evidence. And for that reason, I'm going to decline to give a missing evidence instruction."[134]

Mr. Coleman testified. He agreed that on the intercepted phone call, he was told of a 9mm handgun available for $700.[135] But he did not want a nickel-plated gun and not for $700, which he did not have.[136] But Mr. Coleman thought the

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[131] A1396-1397.
[132] A1397.
[133] A1398.
[134] *Id.*
[135] A1411.
[136] A1414.

chrome might be on the handle, which would be "cool," so he was "kind of excited" to see it.[137] Later, he was at the Capital Inn waiting for the person with the gun to arrive.[138] Mr. Coleman looked at the gun and attempted to negotiate a lower price. But negotiations failed and he did not purchase the gun.[139] Mr. Coleman explained he was interested in getting a firearm because he had been shot at the night prior the phone call about the gun.[140]

That night, Mr. Coleman stayed at his mother's house.[141] The next morning, he took his blue bookbag (the one in evidence) and put his blue Foamposits in it. He testified Foamposits are a type of sneaker.[142] Mr. Coleman identified his bookbag and the bag of laundry he had in the hotel room.[143] He also identified his blue sneakers in the room.[144] After taking out the sneakers, he went to the bathroom.[145]

Upon emerging from the bathroom, he conversed with Ayers near the sink. He noticed a "clip" (magazine) on the sink.[146] Mr. Coleman slid it across the

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[137] *Id.*
[138] A1416.
[139] A1418.
[140] A1421.
[141] A1424.
[142] A1425.
[143] A1428.
[144] A1429.
[145] *Id.*
[146] A1430.

sink[147] to Ayers and told him to get rid of it, because it was not the type of thing he wanted lying around.[148] Then he received a phone call and left the room to take the call.[149]

A gray Audi then arrived, with Mr. Coleman's friend Kendra Lewis and her sister.[150] The sister left; Mr. Coleman and Lewis re-entered Room 117.[151] Then the police arrived. Mr. Coleman turned to Ayers, who was moving things around. Mr. Coleman asked Ayers, "Yo, you good?" and opened the door.[152] Police then took Mr. Coleman and the others into custody.[153]

Mr. Coleman further testified that on the intercepted phone call in which he tells the person that he just spent $1700 on guns, he was lying to the person.[154] This was because the person, "Ham,"[155] owed him money and Mr. Coleman thought he would be more likely to pay if Ham thought Mr. Coleman had guns.[156] Mr. Coleman testified that he did not have $1,700 and did not purchase any guns on

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[147] A1432.
[148] A1430.
[149] A1433.
[150] A1434.
[151] *Id.*
[152] A1436.
[153] A1437.
[154] A1438.
[155] *Id.*
[156] A1439.

July 21, 2020.[157] He also testified that he had never seen the two guns in evidence: the 9mm Ruger and the .40 caliber Smith and Wesson.[158]

On cross-examination, Mr. Coleman generally reiterated his direct testimony. After he testified, the defense rested.[159]

During closing arguments, defense counsel criticized the State's handling of evidence, particularly the two magazines that both fit the .40 caliber handgun.[160] He argued that the police's failure to photograph the evidence initially and then tag the magazines to differentiate between them made it unknowable which of the two magazines was in the firearm.[161] The State countered that Mr. Coleman certainly touched the magazine, and there is "no evidence that the clip was ever separated from that gun."[162] The prosecutor went on to say, "it is completely logical to conclude that when the Defendant was in possession of that clip, he was also in possession of the gun, actually, as well as constructively, when it was found later in his room."[163]

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[157] *Id.*
[158] A1440.
[159] A1470.
[160] A1499-1501.
[161] A1500-1501.
[162] A1512.
[163] A1512.

The jury found Mr. Coleman guilty of one count of PFBPP, not guilty of the other count of PFBPP, and not guilty of the PABPP charge.[164]

[164] A1515; A1558.

<u>ARGUMENT</u>

I. THE SUPERIOR COURT ERRED BY DENYING DEFENSE COUNSEL'S REQUEST FOR A MISSING EVIDENCE INSTRUCTION, RESULTING IN A DEPRIVATION OF MR. COLEMAN'S DUE PROCESS RIGHTS.

A. Question Presented

Whether the Superior Court erred in refusing the defense's request for a *Deberry/Lolly* instruction when the State's negligent failure to preserve fingerprint evidence caused substantial prejudice to Mr. Coleman. This issue was preserved for appeal when defense counsel requested the instruction during trial.[165]

B. Standard of Review

This Court reviews the Superior Court's denial of a requested jury instruction *de novo*.[166]

C. Merits of Argument

Applicable legal precepts

This Court has acknowledged that the failure of the government "to take adequate steps to preserve evidence may deny a defendant due process and thereby jeopardize otherwise viable convictions."[167] The State's duty to not only disclose evidence but preserve it as well is "rooted in the due process provisions of the

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[165] A1277-1285; A1395-1398.
[166] *Lunnon v. State*, 710 A.2d 197, 199 (Del. 1998).
[167] *Deberry v. State*, 457 A.2d 744, 751 (Del. 1983)(internal citations omitted).

fourteenth amendment to the United States Constitution and the Delaware Constitution, article I, section 7."[168]

The *Deberry* Court articulated a rubric for analyzing claims that the State failed to collect or preserve evidence:

> 1. Would the requested material, if extant in the possession of the State at the time of the defense request, been subject to disclosure under Criminal Rule 16 or *Brady?*
>
> 2. If so, did the government have a duty to preserve the material?
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> 3. If there was a duty to preserve, was the duty breached, and what consequences should flow from the breach?[169]

In determining the consequences that should flow from a breach, the Court draws a balance between the nature of the State's conduct and the degree of prejudice to the accused. The Court will consider:

> 1. The degree of negligence or bad faith involved;
>
> 2. The importance of the lost evidence; and
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> 3. The sufficiency of the other evidence adduced at trial to sustain the conviction.[170]

In *Bailey v. State*, this Court noted that agencies should create rules for the gathering and preservation of evidence that are broad enough to include any

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[168] *Id.* at 751-752.
[169] *Id.* at 750.
[170] *Id.* at 752.

material that could be favorable to the defendant.[171] However, this Court has consistently declined to explicitly provide what administrative procedures are necessary for the State and its agencies to follow.[172] Nevertheless, this Court has repeatedly held that "only if evidence is carefully preserved during the early stages of the investigation will disclosure be possible later."[173]

In *Lolly v. State*,[174] the police failed to collect and preserve blood spatter evidence resulting from a break-in through an apartment window.[175] Defendant Lolly, who was found by the police bloodied and was identified by the victims, denied he committed the crime and testified he incurred the injury earlier that day.[176] The trial judge found that the evidence was important and that the State was at least negligent in its failure to preserve it. However, the instruction crafted by the judge left it up to the jury to decide whether the State was negligent and invited the jury to decide whether there was other probative evidence.[177] This Court reversed, reaffirming that a proper missing evidence instruction was required under the due process requirements of the Delaware Constitution.[178] Because "the issue

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[171] *Bailey v. State*, 521 A.2d 1069, 1090, fn. 29.
[172] *Id.*, *citing Deberry*, 457 A.2d at 752.
[173] *Johnson v. State*, 27 A.3d 541, 547 (Del. 2011), *citing Deberry*, 457 A.2d at 752.
[174] 611 A.2d 956 (Del. 1992).
[175] *Id.* at 958.
[176] *Id.*
[177] *Lolly* at 959.
[178] *Id.*

of the significance of missing evidence is a recurring problem," this Court recommended the following instruction:

> In this case the court has determined that the State failed to collect/preserve certain evidence which is material to the defense. The failure of the State to collect/preserve such evidence entitles the defendant to an inference that if such evidence were available at trial it would be exculpatory. This means that, for purposes of deciding this case, you are to assume that the missing evidence, had it been collected/preserved, would not have incriminated the defendant and would have tended to prove the defendant not guilty. The inference does not necessarily establish the defendant's innocence, however.
>
> If there is other evidence presented which establishes the fact or resolves the issue to which the missing evidence was material, you must weigh that evidence along with the inference. Nevertheless, despite the inference concerning missing evidence, if you conclude after examining all the evidence that the State has proven beyond a reasonable doubt all elements of the offenses(s) charged, you would be justified in returning a verdict of guilty.[179]

Even if the State negligently failed to preserve evidence, a *Deberry/Lolly* instruction need not be given if there was no prejudice to the defense or if there was significant other evidence available of the defendant's guilt. In *Baynum v. State*,[180] the defendant sought a missing evidence instruction because the police did not leave the recorder running during a break in the interview of the assault victim. During the break, she made a phone call which contained inconsistencies about her

[179] *Id.* at 962, fn. 6.
[180] 133 A.3d 963 (Del. 2016).

account. A detective re-entered the room and questioned her about those discrepancies. That portion of the interview was recorded.[181]

This Court affirmed the denial of the request for the instruction, finding the defendant was not prejudiced, because the State preserved the detective's questioning of the victim about her inconsistent statements.[182] Moreover, the detectives and the victim who made the statements were available at trial. Indeed, defense counsel questioned the witnesses regarding those inconsistencies.[183] This Court also found that other evidence at trial was sufficient to sustain a conviction, thereby obviating the requirement for a *Deberry/Lolly* instruction.[184]

On the other hand, upon the proper showing of prejudice to the defendant, even with a lack of bad faith by the State, this Court has reversed for failure to give the instruction. In *Johnson v. State*,[185] the defendant was charged with two counts of PFBPP, among other things. As to the first gun, Johnson was a passenger in a car owned by Andre Reeves. A subsequent search located a handgun wrapped in some clothing.[186] Later that night, a probation officer searched the home of Gary

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[181] *Id.* at 966.
[182] *Id.* at 968-969.
[183] *Id.* at 970.
[184] *Id.*
[185] 27 A.3d 541 (Del. 2011).
[186] *Id.* at 543-544.

Bryan, where Johnson stayed. The probation officer found a shotgun wrapped in a pair of sweatpants in a room purported to be Johnson's.[187]

The State entered *nolle prosequis* as to Bryan and Reeves, and proceeded to trial against Johnson.[188] The police and the probation officer failed to collect and preserve the clothing from the car and the residence, respectively.[189] This Court held that the officers breached a duty to collect and preserve evidence when they failed to collect and preserve the clothing in which the firearms were wrapped.[190]

Because there was evidence that the other defendants owned and possessed the guns, this Court held that the missing evidence was important to Johnson's defense that he did not possess the guns.[191] Moreover, this Court found that in the absence of any secondary evidence having significant probative value, due process required that the missing evidence instruction be given: "Johnson was entitled to the inference that the missing clothes from the car and the missing sweatpants from the bedroom would have been exculpatory."[192] This Court did not make any distinction between police officers and probation officers as to the duty to collect and preserve evidence.

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[187] *Id.* at 544.
[188] *Id.*
[189] *Id.* at 545.
[190] *Id.* at 547.
[191] *Id.* at 547-548.
[192] *Id.* at 548.

The Superior Court erred in finding the State did not breach its duty to collect and preserve evidence.

The first two factors in the *Deberry* rubric are easily met. The two .40 caliber magazines were in possession of the State from the time of seizure to the time of trial. That fact was provided to the defense in discovery. Also provided was fingerprint results for one of the magazines. The problem is that due to the State agent's negligent preservation of the evidence, there became no way to know which of the two magazines had Mr. Coleman's fingerprints on it. This, of course, became a crucial distinction at trial. One of the magazines was originally in a firearm, one was not. If the fingerprinted magazine was the one in the firearm, that proves Mr. Coleman possessed the firearm at least long enough to insert or remove the magazine. If the fingerprinted magazine was the one *not* in the firearm, then that is not proof that Mr. Coleman possessed the firearm.

As such, the breach of duty by Probation Officer Porter was his negligent collection and preservation of the evidence, namely the two magazines. As the prosecutor argued, "[Porter] doesn't know there are going to be fingerprints found on the magazines later."[193] That is exactly the point. Each piece of evidence should have been collected in a manner to distinguish it from other pieces of evidence. As this Court has held, "only if evidence is carefully preserved during the early stages

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[193] A1282.

of the investigation will disclosure be possible later."[194] That is what happened here. Evidence was not carefully preserved, resulting in a breach of the State's duty.

The Superior Court noted that the challenge was to the marking and cataloging of evidence and found there was no breach of duty.[195] This was despite Detective Nolan testifying that he would have photographed the evidence *in situ* first, then carefully catalogued which magazine came from the firearm and which did not. It was error to find that this failure of Porter to properly tag the evidence did not breach the duty to collect and preserve evidence.

The Court also noted that the defense had not identified any policy or procedure that had been breached.[196] None of our jurisprudence imposed a burden on defense counsel to cite a State policy or procedure having been breached in order to obtain a missing evidence instruction. The defense is typically not able to access such policies, especially in the middle of a trial. It was error to find that defense counsel's failure to cite a specific evidence collection policy militated against the granting of the request for a missing evidence instruction. Defense

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[194] *Johnson v. State*, 27 A.3d 541, 547 (Del. 2011), *citing Deberry*, 457 A.2d at 752.
[195] A1397-1398.
[196] A1398.

counsel did in fact put on a witness – Detective Nolan – to testify about how he would have gone about collecting and preserving the evidence.

Finally, the Superior Court erred in holding that the duty to collect and preserve evidence was somehow lessened because the collecting officer was a probation officer. The Court called it a "streamlined procedure" because it was a probation search and concluded that such a procedure should be held to a "different standard."[197] Again, nothing in our jurisprudence merits such a conclusion. In fact, as noted, in *Johnson*, this Court made no distinction of duty as between the police officer collecting evidence from a car stop and the probation officer collecting evidence from a residence.

For these reasons, the Superior Court's finding that the State did not breach its duty to collect and preserve evidence was error. The Court did not reach any of the other *Deberry* factors based on this erroneous finding.[198]

The Court's erroneous ruling caused prejudice to Mr. Coleman and resulted in a deprivation of his right to due process.

No bad faith was alleged by defense counsel, nor is it here. However, Porter's commingling of the evidence was clearly negligent, as Nolan's testimony confirmed. Failing to perform such a simple task as marking which empty

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[197] *Id.*
[198] A1397.

magazine came from the firearm and which did not was clearly negligent collection and preservation of evidence.

In many cases, such a misstep would not be very important. However, in Mr. Coleman's case, the distinction between the two magazines was crucial. If the magazine with his fingerprint was in the weapon, that would have been powerful evidence of his guilty. The converse is also true. If the magazine with his fingerprint was not the one in the weapon, it is not proof that he possessed the firearm. The prosecutor even argued to the jury there was "no evidence that the clip was ever separated from that gun."[199] That argument was only made possible by Porter's negligent collection and preservation of the evidence.

The importance of the missing fingerprint evidence is made obvious by the jury's verdict. The jury found Mr. Coleman not guilty of one of the PFBPP charges and the PABPP charge. There was only one firearm that had ammunition in it: the 9mm handgun. The jury found Mr. Coleman not guilty of possessing the 9mm handgun and its ammunition even though it was in the same bag as the .40 caliber handgun. The only evidentiary difference between the two guns was the fingerprints on one of the two .40 caliber magazines.

The verdict strongly implies that the jury found Mr. Coleman's testimony credible. He did want to buy a gun, despite being prohibited, because he had heard

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[199] A1512.

someone was trying to kill him. However, he lacked the funds to do so. He went to the hotel room carrying his blue backpack with his sneakers in it, which he removed upon entry. When the police knocked on the door, he advised Ayers and the others in the room before opening the door. Before opening the door to the police, he asked Ayers if he was good. The police seized the bag containing the loaded 9mm handgun, the .40 caliber handgun with the magazine in it, and the loose magazine in the bag. As such, the evidence of which magazine had Mr. Coleman's fingerprints on it was the crucial piece of missing evidence and its importance cannot be understated.

The evidence and the verdict also underscore the point that there was insufficient other evidence at trial to sustain a conviction. If the jury had believed the State's theory of the case, Mr. Coleman would have been quickly convicted of the other PFBPP charge and the PABPP charge. But the jury only found him guilty of possessing one of the items in that bookbag. That fact makes clear that there was insufficient evidence to convict Mr. Coleman without the negligently gathered fingerprint evidence.

The Court's error in denying Mr. Coleman's request for a missing evidence instruction was so prejudicial as to have deprived him of due process under the federal and Delaware constitutions.

CONCLUSION

For the foregoing reasons, Appellant Devin Coleman respectfully requests that this Court reverse the judgment of the Superior Court.

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