EFiled: Apr 28 2023 08:41AM EDT
Filing ID 69914297
Case Number 435,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| JOSE TERREROS,<br><br>Defendant—Below,<br>Appellant<br><br>v.<br><br>STATE OF DELAWARE<br><br>Plaintiff—Below,<br>Appellee. | ) | No. 435, 2022 |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

# APPELLANT'S OPENING BRIEF

Elliot Margules, Esquire [#6056]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5141

Attorney for Appellant

DATE: April 28, 2023

# TABLE OF CONTENTS

## TABLE OF CITATIONS

**Cases**

**Court Rules, Constitutional Rules, and Statutes**



**Other Authority**

## NATURE AND STAGE OF PROCEEDINGS

On February 17, 2020, Jose Terreros was indicted on Rape First Degree, Sexual Abuse of a Child by a Person in a Position of Trust, and Dangerous Crime Against a Child. A11—13. The charges stem from allegations of a single incident, alleged to have occurred on November 19, 2019. A11—13.

On March 3, 2020, the State provided Terreros with portions of a cell phone extraction they had conducted, pursuant to a search warrant. A14—16. On March 15, 2021, Terreros filed a motion to suppress all evidence seized from the phone. A102. The State responded on June 1, 2021. A153. On June 30, 2021, the trial court heard and denied the motion. A170.

On July 26, 2021, a jury trial began. A219. On July 30, the jury returned its verdict: not guilty of Rape in the First Degree, but guilty of both Sexual Abuse of a Child by a Person in a Position of Trust, and Dangerous Crime Against a Child. A396. On August 6, 2021, Terreros filed a motion for judgement of acquittal which argued that the inconsistent verdict in his case did not comply with the federal or state constitutions. A400. The State filed its response on August 13, 2021. A432. On November 29, 2021, the trial court denied the motion. Exhibit A.

On October 28, 2022, Terreros was sentenced to the minimum mandatory sixty years of incarceration. Exhibit B.

This is his opening brief to his timely field notice of appeal.

## SUMMARY OF ARGUMENT

**1.** Terreros' motion to suppress argued that the cell-phone search warrant was an unconstitutional general warrant. The only evidence the supporting affidavit suggested was on the phone were certain specified internet searches from a clearly defined few day period following the allegation. Nonetheless, the warrant authorized a search, without any temporal limitation, of nearly the entire phone.

The judge denied the motion in reliance on *claims* that (i) the extraction was conducted by a neutral third-party, (ii) the State only accessed information within a limited temporal scope, and (iii) did not access emails, Facebook, or Instagram. These representations were not unsupported by the record and demonstrably untrue.

The judge also erred in finding that the absence of a temporal limitation in the warrant could be remedied by "partial suppression." This Court has never authorized partial suppression and should certainly not do so here. Partial suppression is generally inconsistent with the Delaware Constitution, and, in this case, is inconsistent with how the remedy is applies to federal constitutional claims.

**2.** The trial court correctly found that the verdict was inconsistent. Below, Terreros argued that, regardless of federal law, inconsistent verdicts were not permitted at English Common Law, which was incorporated in the Delaware Constitution's right to a jury trial. The State did not respond to this argument and the judge did not address it.

## STATEMENT OF FACTS

Jose Terreros lived with his girlfriend, Ms. Andrea Casillas-Ceja, their two children, and three of Ms. Casillas' children from another relationship. A249; A269; A350. On November 19, 2019, Casillas and Terreros took the kids to see farm animals in Pennsylvania. A282; A352. After returning home, Casillas went to a 7-Eleven for a few minutes, and when she returned, J.S.,[1] Casillas' four-year-old daughter, claimed that Terreros had licked her vagina. A272-73. Casillas yelled at Terreros and told him to leave the house. A356. Terreros denied the allegations but left the home as requested. A273; A356. He testified that Casillas was gone for five to ten minutes, during which time he played with his daughter, not J.S. A354.

Casillas called the police and took J.S. to a hospital where she was seen by a forensic nurse and provided a recorded statement at the children's advocacy center (CAC). A273. The forensic nurse, Bernadette Clagg, testified that there was no evidence of an injury, but given the allegations, she would not expect an injury. A312. According to Casillas, after the allegation, J.S., who was potty trained, began to have accidents. A278, 282. Nurse Clagg testified that such behaviors can be caused by trauma, like sexual assault, or non-criminal circumstances. A326.

[1] The complaining witness, a minor, is assigned a pseudonym. Supr. Ct. R. 7 (d).

Nurse Clagg collected DNA swabs from J.S.'s inner and outer genital areas and her clothing. A315; A326. The DNA samples were analyzed by Lauren Rothwell, a Senior Analyst at the Division of Forensic Science. A328. Rothwell determined that all samples were negative for the presence of seaman. A333. No male DNA was present on the vaginal swabs (A335), but the sample from J.S.'s jeans did contain male DNA. A341. Rothwell explained that "DNA transfer," which explained the presence of male DNA, can occur without direct contact, such that the unidentified male contributor might not have ever touched J.S.'s jeans. A343.

Amy Kendall of the CAC interviewed J.S. and Kendall acknowledged that young children (like J.S.) can lose track of the sources of information which form their memories, and that some of those sources can be imagined. A257. Kendall confirmed that a child's ability to accurately relay a memory is tied to their verbal ability, and that preschool age children have limited verbal skills, and not fully developed brains. A257. She also conceded that even when a child is confused, they might not display the typical of confusion. A259.

After police interviewed Terreros, Terreros called Casillas and asked her to call his boss from his phone, which was at the home. A275-76. Casillas did so, and also looked through Terreros' internet search history. A276. Casillas informed police that she found "pornography, a search of how to detect if a little girl has been raped, how long saliva stays on a body, and a search of how long fingerprints stay on

clothes/sheets/blankets." A122, A278. Officer Jay Davidson obtained a warrant for Terreros' cell phone which authorized the search of – in addition to internet search history – *every single* text/email/application message, photograph, and video in his phone, without any temporal limitation or probable cause. A119.

On December 5, 2019, Detective Steven Burse of the New Castle County Police Department used Cellebrite technology to execute the warrant on Terreros' phone. A212, A286—88. The resulting download was enormous – 29 gigabytes, or 41,527 pages – and included (in part) 3,491 videos, 64,384 pictures, and 8,584 audio files. A215—17. Sections of the extraction which include the suspicious web searches were submitted into evidence. A16—19, A288, State's Exhibits 4—7, A443—47. Terreros admitted to making the internet searches but explained that he did so to better understand how to defend himself against the allegations. A356.

## I. All evidence seized pursuant to a cell phone warrant, which authorized a search of nearly the entire phone without any temporal limitation, should be suppressed, when the supporting affidavit only provided probable cause to search a five-day portion of internet search history.

### *Question Presented*

Whether all evidence seized pursuant to a cell phone warrant, which authorized a search of nearly the entire phone without any temporal limitation, should be suppressed, when the supporting affidavit only provided probable cause to search a five-day portion of internet search history? A103—12.

### *Scope of Review*

Alleged constitutional violations and legal conclusions regarding the denial of a motion to suppress are reviewed *de novo*.[2] Factual findings on a motion to suppress are reviewed to determine whether there is sufficient evidence to support the findings and whether those findings were clearly erroneous."[3]

### *Merits of Argument*

After being told the about suspicious internet searches seen on Terreros' phone, former Newport Police Officer Jay Davidson applied for a warrant. The first five and half paragraphs of the eight-paragraph affidavit allege Terreros had oral sex

[2] *Taylor v. State*, 260 A.3d 602, 612 (Del. 2021).
[3] *Id.*

with J.S., fled the residence before Davidson arrived, and then voluntarily turned himself in to police, consensually provided a DNA sample, and spoke to officers about the allegations. A121. The information about the phone is limited to the final two and half paragraphs:

> 6. . . . [Terreros] *asked* [Casillas] *to contact his boss using his cellphone to attempt to get bail money.*
>
> 7. *Your affiant was advised by RP that she . . . located Terreros' cellular phone . . . proceeded to check the search history and found pornography, a search of how to detect if a little girl has been raped, how long saliva stays on a body, and a search of how long fingerprints stay on clothes/sheets/blankets.*
>
> 8. *Your affiant requests a search warrant for the dates: 11/19/19 – 11/23/19 in order to obtain additional evidence pertaining to this investigation.* A122.

The affidavit does not state, or allow for an inference, that there would be any relevant evidence on the phone other than the suspicious searches which occurred after November 19, 2023. Nonetheless, the warrant granted the State unrestricted access to rummage through every single text/email/application message Terreros had ever sent, and every single photograph or video he had ever taken or been sent, without any temporal limitation or probable cause. A119

The resulting download was enormous – 29 gigabytes, or 41,527 pages – and made up of, in part, 3,491 videos, 64,384 pictures, and 8,584 audio files. A215—17.

For context, the illegal extraction in *Taylor* was barely one tenth the size of this one.[4] The fact that the State only used a small portion of the extraction (A16—19, A288, State's Exhibits 4—7) does not mitigate the constitutional defect, it highlights the lack of probable cause, particularity, and ultimately, the extent of the rummaging.

**a.** ***Probable Cause and Particularity in Cell Phone Warrants.***

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and specifically prohibits the issuance of general warrants.[5] Article I, Section 6 of the Delaware Constitution provides even broader protection than the Fourth Amendment from unreasonable searches and seizures and includes a particularity requirement to be met before issuance of a search warrant.[6] Moreover, 11 *Del.C.* 2307 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*."[7] Delaware Courts use 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

[4] *Taylor*, 260 A.3d at 609 (4,645 pages).
[5] U.S. Const. amend. IV.
[6] Del. Const. art. I, § 6.
[7] 11 *Del. C.* § 2307(a) (emphasis added).

particular place.[8] "An affidavit establishes probable cause to search only where it contains a nexus between the items sought and the place to be searched."[9]

"Our nation's constitutional history and jurisprudence reflects a long-standing hostility towards general warrants."[10] 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."[11] The Fourth Amendment "was the founding generation's response."[12]

In *Wheeler v. State* this Court recognized that "[t]he manifest purpose of this particularity requirement [i]s to prevent general searches," which the Court described as "wide-ranging exploratory searches."[13] To satisfy the particularity requirement, a warrant application "must describe what investigating officers believe will be found on [the device] with as much specificity as possible under the circumstances," and narrowly tailor the search to a relevant time frame.[14] Cell phone extraction warrants pose a "substantial risk . . . [of] tak[ing] on the character of

[8] *Illinois v. Gates*, 462 U.S. 213, 238 (1983).
[9] *State v. Adams*, 13 A.3d 1162, 1173 (Del. Super. 2008)
[10] *Wheeler v. State*, 135 A.3d 282, 297 (Del. 2016).
[11] *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971).
[12] *Riley v. California*, 573 U.S. 373, 402–03 (2014).
[13] *Wheeler*, 135 A.3d at 299.
[14] *Id.* at 304.

general warrants . . . [which] necessitates heightened vigilance, at the outset, on the part of judicial officers."[15] "[G]eneric classifications in a warrant are acceptable only when a more precise description is not possible."[16] "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.'"[17] "Such a description 'effectively limit[s] the scope of the warrants, and prevent[s] a boundless search of the cell phone."[18]

**b. *All evidence from this general warrant should have been suppressed.***

Materials obtained *via* general warrants require complete suppression.[19] The challenged warrant was a general warrant. Rather than enforcing the particularity requirement to prevent a general search of Terreros' phone, it did the opposite. This warrant abandoned the temporal limitation proposed in the application (*compare* A119 to A120), and in doing so encouraged a search with less particularity than what was sought. Given that law enforcement did not even seek to search for evidence outside of that time frame, their examination of that unrequested data is well described as "exploratory rummaging."

---

[15] *Taylor v. State*, 260 A.3d 602, 613–14 (Del. 2021) (internal citations omitted)
[16] *Id.*
[17] *State v. Westcott*, 2017 WL 283390 at *3 (Del. Super. Ct. Jan. 23, 2017).
[18] *Id.*
[19] *Taylor*, 260 A.3d at 617 ("There is no room [] for limited suppression of evidence seized under a general warrant.")

Even if the warrant had included the proposed temporal limitation, it would still have enabled law enforcement to rummage through vastly expansive categories of data despite the absence of any conceivable probable cause, or any direction as to what police would be looking for. In the aggregate, the "categories" listed in the warrant make up almost the entire phone, and contain information, which is far more private, and "far more than the most exhaustive search of a house."[20] But the warrant not only failed the particularity requirement as to the places to be searched, it also failed to describe what evidence was being sought within those places.[21]

### 1. The findings upon which the judge denied the motion are not just unsupported by the record; they are demonstrably wrong.

The trial court's ruling explicitly rests on a finding that "the extraction was temporally limited by" a "neutral third party" who "only gave the State the information which was within that temporal limitation." A208. This finding was an error, and not based in evidence, but unsupported *representations about* evidence. For example, when the judge asked: "[s]o the extraction was made by the cell phone company. Is that correct?" The State responded on the record, "Yes. Cellebrite."

---

[20] A191; *Riley,* 573 U.S. 373, 396 (2014); *see People v. Coke*, 461 P.3d 508 (Col. 2020) (given "cell phones' immense storage capacities," search warrant that permitted "search [of] all texts, videos, pictures, content lists, phone records, and any dates that showed ownership or possession violates the particularity demanded by the Fourth Amendment").

[21] 11 *Del.C.* § 2307(a) (recognizing particularity requirement applies to, both, locations to be searched and the evidence sought within those locations).

A196. But, as this Court has observed while reviewing other cell phone searches, Cellebrite is not a cell phone company. It is the creator of a "Digital Evidence Investigation Platform"[22] which Delaware law enforcement – the opposite of a neutral third party– uses to conduct phone extractions.[23] And, that is exactly what occurred here, Detective Steven Burse of the New Castle County Police Department– not a cell phone company – conducted the extraction. A288, A290.

The trial court also erred in its findings about the temporal limitation.[24] A200—01. The trial court was openly troubled by the absence of a temporal limitation in the actual warrant (A206—07) and asked the State to confirm a representation it had made in its papers (A163, par. 29), that "the extraction was pursuant to the temporal limitation contained on the [application, but not in the warrant itself]?" A196. The State answered in the affirmative, and the judge denied

[22] *About*, CELLEBRITE, https://www.cellebrite.com/en/about/.
[23] *Taylor*, 260 A.3d at 609–10 (citing to *About*, CELLEBRITE and noting it is the police that use Cellebrite).
[24] Trial Counsel correctly argued that, although the warrant mentions the affidavit, the affidavit was not incorporated. A200—01; *see United States v. Strand*, 761 F.2d 449, 453 (8th Cir. 1985) (finding warrant which states "[a]ffidavit(s) [have] been made" and "grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s)" "does not in any way incorporate the affidavit's listing of particular items"); *United States v. George*, 975 F.2d 72 (2d Cir. 1992) (finding affidavit and application not incorporated into warrant which did not direct executing officers to affidavit to limit scope of search). And even if the application were incorporated, it only places a temporal limit on the incoming and outgoing call portion of the search, not any of the other categories (including the search history). A120.

the motion in reliance on that representation. But that representation too was inaccurate. The extraction, conducted nearly a year and a half before the hearing,[25] is almost entirely made up of data outside of the temporal limitation (November 19—23, 2019), including some from as early as 2009.[26] A217.

The ruling also relied on an erroneous finding that this warrant did not authorize the search of "contacts, e-mails, Facebook, Instagram, or any financial information."[27] A207. This finding too rests solely on the State's representations. A192 ("The officer did not seek to search contacts, e-mails, Facebook"); A193 ("They didn't use Facebook. They didn't ask to search Instagram"). But, as argued by Trial Counsel, these claims are incompatible with the four corners in which the officer sought and obtained approval to search "any and all messages" and "any and all messaging apps." A199. There is no question: emails are messages,[28] and

[25] The extraction was completed on December 5, 2019. A212. Although the record is not entirely clear, it appears the State provided individual sections of the extraction ("reports") on Mach 3, 2020 (A14), but did not provide the full extraction until July 14, 2021 (A211), two weeks after the suppression hearing.

[26] The State acknowledged that "Cellebrite is unable at this time to limit [the temporal] scope"). A195. This concession would be of limited significance if one were to erroneously credit the State's representation that Cellebrite is a neutral third-party cellphone company which completes the extraction and then sends the State a limited portion restricted to the temporal scope of the application.

[27] *See Burns v. United States*, 235 A.3d 758, 775 (D.C. Ct. App. 2020) ("given the heightened privacy interests attendant to modern smart phones under *Riley*, it is thus constitutionally intolerable for search warrants simply to list generic categories of data typically found on such devices as items subject to seizure.").

[28] Facebook and Instagram are messaging apps. https://about.instagram.com/features/direct (describing Instagram Messenger); https://www.facebook.com/messenger/

Instagram and Facebook are messaging apps.[29] And despite the State's representation to the contrary, the extraction in fact included (2,886) contacts, and extensive email, Facebook, and Instagram data. A213—14.

### 2. The absence of any conceivable probable cause to search huge categories of digital information, makes this warrant, a general warrant.

This was not a complex prosecution, or a complex affidavit.[30] The "probable cause" to search Terreros' phone is exclusively tied to web searches during the discrete period of November 19—23, 2019. Nothing in the affidavit justifies an inference that evidence would be located within Terreros' messages, messaging apps, photos, videos, GPS coordinates, incoming or outgoing calls, or web history from days preceding the allegations. By including entire categories devoid of any probable cause, the warrant left law enforcement to rummage through Terreros' most

---

(Facebook Messenger). Such a reading is also consistent with Delaware courts' use of the word. *Buckham v. State*, 185 A.3d 1, 4 (Del. 2018); (discussing Facebook "*messages*"); *State v. Boddy*, 2021 WL 2454426, at *1 (Del. Super. Ct. June 16, 2021) (Instagram "*message*").

[29] An e-mail is a message, and this Court refers to them as such. *Sisson v. State*, 903 A.2d 288, 302 (Del. 2006).

[30] *United States v. Christine*, 687 F.2d 749, 760 (3d Cir. 1982) ("flexibility is especially appropriate in cases involving complex schemes."); *United States v. Gardiner*, 463 F.3d 445, 471 (6th Cir. 2006) (degree of particularity required "depends on the crime involved and the types of items sought"); *see Andresen v. Maryland*, 427 U.S. 463 (1976) (granting leeway for broadly phrased description where "under investigation was a complex real estate scheme whose existence could be proved only by piecing together many bits of evidence," and stating that "the complexity of an illegal scheme may not be used as a shield to avoid detection.").

sensitive data without limitation or guidance. Like the general warrant in *Buckham*, this warrant "expressly authorized the search of materials there was no probable cause to search."[31] Or, as in *Wheeler*, this warrant could have, but did not, include a temporal limitation.[32]

Terreros recognizes that in some digital investigations, "the commingling of relevant and irrelevant information and the complexities of segregating responsive files *ex ante*" may necessitate expansive searches,[33] but that is not what occurred here. For example, had the affidavit provided probable cause to believe there were some relevant messages on the phone, but the warrant granted exceedingly broad access to all messages on the phone, ostensibly to ensure no relevant ones were missed, then Terreros' claim might have been limited to overbreadth.[34] But this

[31] *Buckham*, 185 A.3d at 19 ("warrant was [] vague about the information sought—despite the fact that a far more particularized description could have been provided").
[32] *Wheeler v. State*, 135 A.3d 282, 304 (Del. 2016) (citing cases and stating "Federal Courts of Appeal have concluded that warrants lacking temporal constraints, where relevant dates are available to the police, are insufficiently particular").
[33] *Id.* at 299–301.
[34] *See In re Search of Google Email Accounts identified in Attachment A*, 92 F. Supp. 3d 944, 952–53 (D. Alaska 2015) ("This is not a case where the government has established that evidence [of] a crime lurks *somewhere* on a computer or third-party network, and law enforcement has a legitimate need 'to scoop up large quantities of data, sift through it, carefully for concealed or disguised pieces of evidence . . . Rather, this is an electronic-data case where the government has established probable cause that a *specific* date range of email communications may contain evidence of a crime. There has been absolutely no showing that the remaining balance of the email accounts would have any bearing on the investigation.'")

affidavit provides no reason to believe there would be a single relevant message, picture, video, phone call, or search before December 19, 2019. Just as in *Wheeler*, the inclusion of entire "categories of items," without even a suggestion that they were in any way linked to the alleged crime (Rape 2nd),[35] made this warrant not just overly broad, but a general warrant which authorized law enforcement to rummage through these categories with direction.

**c. *This warrant was not suitable for partial suppression via redaction.***

The second basis for the trial court's decision was its reliance on the Superior Court's decision in *State v. Anderson*, which it described as holding "that even if there were an overly broad search in terms of time that one of the proper remedies . . . would be to suppress evidence from the time periods which were not overly broad." A208—09. However, as another Superior Court decision noted shortly after *Anderson*, the Delaware Supreme Court has never authorized "the limited remedy of quasi-suppression."[36] For numerous reasons, the Court should not do so here.

**First**, the absence of a temporal limitation, especially in conjunction with the other particularity/breadth violations, makes this a general warrant for which partial suppression is inapplicable.[37] The *Anderson* Court held its warrant was not "general"

[35] *Wheeler*, 135 A.3d at 306–07.
[36] *State v. Reese*, 2019 WL 1277390, at *7 (J. Jurden, Del. Super. Ct. Mar. 18, 2019).
[37] *Taylor v. State*, 260 A.3d 602, 617 (Del. 2021).

despite lacking a temporal limitation, but, as this Court noted when the State cited to *Anderson* to support its "limited-suppression" argument in *Taylor v. State*, *Anderson* relies on the trial court decision in *Taylor*, which this Court reversed.[38]

**Second**, partial suppression "is only applicable where the valid portions . . . make up the greater part of the warrant."[39] The "greater part" determination "focuses on the warrant itself rather than . . . the items actually seized" and requires reviewing courts to "employ a holistic test that examines the qualitative as well as the quantitative aspects."[40] In this case, both the qualitative and quantitative aspects of the permissible portion – the search history from November 19 to November 23, 2019 – are far outweighed by the invalid portions – "any and all messages, any and all messaging apps . . . all photographs, videos, GPS coordinates, incoming and outgoing calls," and the search history preceding November 19, 2019. A119.

**Third**, partial suppression is a remedy that hinges on a technical "redaction" process.[41] Focusing on the dynamics of that process highlights why redaction cannot

---

[38] *Id*. n.149.

[39] *.S. v. Naugle*, 997 F.2d 819, 822 (10th Cir. 1993); *State v. Douglass*, 2018 WL 830306 (Mo. 2018) (courts must "determine whether the valid portions make up the greater part of the warrant"); *United States v. Freeman*, 685 F.2d 942, 952 (5th Cir. 1982) (doctrine does not apply when "warrant is generally invalid but as to some tangential item meets the requirements of probable cause").

[40] *United States v. Sells*, 463 F.3d 1148, 1158–60 (10th Cir. 2006).

[41] *State v. Anderson* focuses on the remedy, which it labels "selective suppression." 2018 WL 6177176 (Del. Super. Ct. Nov. 5, 2018). However, the cases upon which the *Anderson* Court relies, each focus on the process, referred to as "redaction"

remedy the temporal breadth of this warrant: the legal theory is not that, even if a warrant is flawed, seized evidence for which the affidavit provided probable cause need not be suppressed. Rather, partial suppression is enabled by the theory that a reviewing court can "strik[e] from a warrant those severable phrases and clauses that are invalid for lack of probable cause or generality and preserv[e] those severable phrases and clauses that satisfy the Fourth Amendment."[42] In other words, redaction depends on the language in the warrant, not the probable cause in the affidavit. Redaction does not sanitize evidence tainted by an illegal seizure, it retroactively divides a severable warrant into permissible and impermissible searches, such that evidence obtained through the former is wholly untainted and evidence obtained through the latter is entirely irredeemable.

As to this search, the affidavit provides probable cause to believe incriminating web searches during a distinct time period would be found on the phone; but, there is no way to redact this warrant to add in the requisite temporal limitation. Whereas the *inclusion* of unjustified categories (like messages and messaging apps) can theoretically be redacted from the warrant; there is no clause which can be redacted to cure the lack of particularity stemming from *excluding* a

(rather than the remedy achieved by the process). *See United States v. Christine*, 687 F.2d 749 (3d Cir. 1982); *United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars & Fifty-Seven Cents*, 307 F.3d 137 (3d Cir. 2002); *United States v. Santiago-Rivera*, 2017 WL 4551039 (M.D. Pa. Oct. 12, 2017).

[42] *Christine*, 687 F.2d at 754.

temporal limitation. The language of the warrant – "all search history" (A119) – is such that the search history can be redacted in its entirety, but there is no way to *redact* a temporal limitation *into* the warrant.

**Fourth**, *Anderson*'s "selective suppression" remedy is not suitable for violations of the Delaware Constitution. This is clear from the sources *Anderson* relies on to authorize that remedy: *United States v. Santiago-Rivera* of the United States District Court for the Middle District of Pennsylvania, which in turn relies on *United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars & Fifty-Seven Cents* ($92,422.57) of the Third Circuit.[43] *$92,422.57* makes clear that redaction is contingent on the good faith exception to the exclusionary rule. And of course, regardless of whether the good faith exception applies to Terreros' Federal claim, this Court has rejected its applicability to the Delaware Constitution.[44]

The general goals of the State Constitution exclusionary rule are also inconsistent with redaction. The *Dorsey* Court rejected the good faith exception because of its inconsistence with the principle that "there must be a remedy for the violation of any vested right."[45] It characterized the "remedy of a civil action" "as a

[43] *Ninety-Two Thousand Four Hundred Twenty-Two Dollars & Fifty-Seven Cents*, 307 F.3d at 149.
[44] *Dorsey v. State*, 761 A.2d 807, 815—17, 820 (Del. 2000) (holding good-faith exception inapplicable to Delaware Constitution).
[45] *Id.*

practical matter [as] no remedy at all."[46] The same is true for partial suppression: "as a practical matter" it has the same impact as "no remedy at all." A187—88.

Finally, the *Dorsey* Court reaffirmed this Court's commitment "to use every means at [its] disposal to preserve" the search and seizure guarantees of the Delaware Constitution.[47] Remedying unconstitutional warrants through redaction does not just reflect a failure to use every means to preserve Delawareans' rights, it does the opposite by encouraging overinclusive warrants that shoot for the moon despite those rights. Finally, redaction is inconsistent with the language of the State Constitution and governing statutes, which reflect that Delaware judges and magistrates are not authorized to issue warrants which permit the search of materials without probable cause or adequate particularity, even if such warrant also permits the search of materials based on adequate probable cause and sufficient particularity.[48] Because such warrants are not authorized, all materials obtained through their execution– including those for which permission *could have* been legally granted (in this case, the search history) – must be suppressed as fruits of a warrantless search.

---

[46] *Rickards v. State*, 77 A.2d 199, 205 (Del. 1950).
[47] *Dorsey*, 761 A.2d at 818 (citing *Rickards*, 77 A.2d at 205).
[48] Del Const. § 6 ("*no warrant* to search any place, or to seize any person or thing, *shall issue* without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation.") (emphasis added); 11 *Del.C.* § 2307(a) ("Issuance of search warrants — *If* the judge . . . finds . . . probable cause for the search, that person may direct a warrant . . .") (emphasis added).

## II. Inconsistent verdicts are inconsistent with the English Common Law Right to a jury trial enshrined in the Delaware Constitution.

### *Question Presented*

Whether the English Common Law right to a jury trial permitted inconsistent verdicts. A415—17.

### *Scope of Review*

This Court reviews alleged constitutional violations *de novo.*[49]

### ***The State has waived its counterargument to this claim.***

Below, Terreros argued that the Delaware Constitution does not allow inconsistent verdicts like that of this case. A415—17. The State did not respond, and therefore waived this argument.[50] A432—441. The trial court did not address the State's waiver or the merits of Terreros' argument.

### *Merits of Argument*

Article I, Section 4 of the Delaware Constitution states "[t]rial by jury shall be as heretofore," which this Court has interpreted to afford substantively different rights than its federal counterpart. Specifically, in *Claudio v. State*, this Court held that art. I, § 4 preserves the right to a jury trial as it existed at English common law,[51]

[49] *Wheeler v. State*, 135 A.3d 282, 295 (Del. 2016).
[50] *Lopez-Vazquez v. State*, 956 A.2d 1280, 1289 (Del. 2008) (finding State waived argument that defendant engaged in consensual encounter with police).
[51] *Claudio v. State*, 585 A.2d 1278, 1305 (Del. 1991); Honorable Randy J. Holland, *State Jury Trials and Federalism: Constitutionalizing Common Law Concepts*, 38

and has since reaffirmed this interpretation.[52] Thus, if inconsistent verdicts were invalid at common law, they remain so under the Delaware Constitution.

**a.** ***Inconsistent verdicts were not permitted at English Common Law.***

No Delaware court has ruled on this issue; however, ample authority supports the proposition that "[a]t common law, inconsistent verdicts were invalid and set aside."[53] The English Common Law "rule of consistency" was most famously applied to multi-defendant conspiracy verdicts in which all but one alleged conspirators were acquitted.[54] But it also applied to inconsistencies within verdicts

---

VAL. U.L. REV. 373 (2004) ("the English common law right to a trial by jury is preserved *in its entirety* in the Delaware Constitution") (emphasis added)

[52] *McCoy v. State*, 112 A.3d 239, 256 (Del. 2015) ("all of the fundamental features of the jury system, as they existed at common law, have been preserved for Delaware's citizens.") (internal citation omitted).

[53] *State v. Halstead*, 791 N.W.2d 805, 807 (Iowa 2010); *Travis v. State*, 98 A.3d 281, 300 (Md. App. 2014) ("[g]enerally recognized common law principle that inconsistent verdicts would not be permitted"); *People v. Cummings*, 362 N.W.2d 252, 256 (Mich. App. 1984) ("common-law rule [] to prevent the enforcement of inconsistent verdicts"); *Getsy v. Mitchell*, 456 F.3d 575, 587 (6th Cir. 2006) ("The principle against inconsistent verdicts was well established at common law); *see Inconsistent Verdicts in A Federal Criminal Trial*, 60 COLUM. L. REV. 999, 1008 (1960) ("[C]onsistency has been required in jury verdicts in criminal cases throughout the history of the English law"). Blackstone's Commentaries, upon which this Court relied to identify the applicable common law jury rules in *Claudio*, recognize the rule of consistency. William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Vol. 2, Book IV, ch. 10, § 146 (Oxford: Clarendon Press, 1765, facsimile version Legal Classics Library, 1983) (hereinafter BLACKSTONE'S COMMENTARIES ("requiring *conviction* of two to constitute a criminal agreement") (emphasis added).

[54] *Gov't of Virgin Islands v. Hoheb*, 777 F.2d 138, 143 (3d Cir. 1985).

of muti-count indictments against individual defendants, like Terreros.[55]

In fact, in *Dunn v. United States*, one of the foundational cases relied on by the trial court, the United States Supreme Court recognized that the federal rule "undercut the common law 'rule of consistency."[56] The rule announced by Justice Holmes in *Dunn*[57] relies heavily on *Steckler v. United States*, a circuit-court opinion by Judge Learned Hand, which sheds light on the common law rule: "[n]o doubt it has generally been assumed that, if the verdict was rationally inconsistent, the conviction ought not to stand, and probably that was the common law, though it is hard to find a case squarely so holding."[58]

---

[55] *People v. Dercole*, 424 N.Y.S.2d 459 (App. Div. 1980) ("[e]arly cases dealing with inconsistent verdicts both in this country and in England reviewed situations in which the jury returned guilty verdicts on separate counts in a single indictment charging the defendant in the alternative with having stolen certain goods and having received the goods knowing they were stolen. The legal uncertainty and inconsistency inherent in such a verdict was held to mandate reversal and a new trial") (citing cases); *Inconsistent Verdicts in A Federal Criminal Trial*, 60 Colum. L. Rev. 999, 1001 (1960) (noting "common law [rule that] inconsistent verdicts were invalid and no judgment of conviction could be entered thereon . . . developed in cases involving either single verdicts or multiple defendants").

[56] *Hoheb*, 777 F.2d at 143; *United States v. Vogt*, 910 F.2d 1184, 1203 (4th Cir. 1990) ("decisions, have effectively undercut the old common law rule which protected criminal defendants against conviction on an 'inconsistent' verdict"); *Dunn v. United States*, 284 U.S. 390, 405–06 (Butler, J., dissenting) (1932) ("No doubt it has generally been assumed that, if the verdict was rationally inconsistent, the conviction ought not to stand, and probably that was the common law").

[57] *Id.* at 403 (holding inconsistent verdicts should be upheld if "the evidence was sufficient to warrant the conviction.")

[58] *Steckler v. United States*, 7 F.2d 59, 60 (2d Cir. 1925).

**b. *Common Law Juries were not permitted to apply or consider lenity.***

The possibility that a verdict's inconsistency is a function of lenity, a primary rational for upholding inconsistent verdicts, would not have been a basis to uphold such verdicts at common law. Lenity's role at common law was as a statutory interpretation tool, not as a consideration in jury deliberations.[59] At common law, when determining guilt, the jury had no business considering the sentence an accused might face.[60] As this Court has recognized, at common law, "any consideration of punishment by the jury was improper . . . [A]bsent express statutory authorization, the jury should not [] consider the sentencing consequences which flow from a guilty verdict."[61]

---

[59] In his concurrence in *Johnson v. United States*, Justice Thomas described the rule of lenity as it emerged in 16th-century England as a "rule of [statutory] construction. 576 U.S. 591, 613–14 (2015) (Thomas, J., concurring); *see Taylor v. United States*, 495 U.S. 575, 596 (1990) ("rule of lenity is a common law doctrine that directs courts to construe ambiguous criminal statutes in favor of criminal defendants."); *Alexis v. State*, 87 A.3d 1243, 1258 (Md. 2014) ("rule of lenity is a common law doctrine that directs courts to construe ambiguous criminal statutes in favor of criminal defendants"); *State v. McGee*, 864 P.2d 912, 914 (Wash. 1993) ("Under the rule of lenity, the court must adopt the interpretation most favorable to the criminal defendant"). Blackwood does not mention juror lenity, and his only mention of "the lenity of punishment" reflects that, at common law, the need for criminal trials to function as a "public example" outweighed any benefit from a verdict impacted by concerns about the defendant's punishment. BLACKSTONE'S COMMENTARIES, Book IV, ch. 27, §412 (addressing why a victim's voluntary forgiveness of the accused should not "intercept" a criminal trial).

[60] Rather than apply lenity, a jury's role was to "indifferently" determine "the truth of every accusation." BLACKSTONE'S COMMENTARIES, Book IV, ch. 27, § 395.

[61] *State v. Cohen*, 604 A.2d 846, 852 (Del. 1992).

## CONCLUSION

Because Defendant could not have been convicted without the disputed evidence, and for the reasons and upon the authorities cited herein, Defendant's aforesaid convictions should be vacated.

Respectfully submitted,

/s/ Elliot Margules
Elliot Margules [#6056]
Office of Public Defender
Carvel State Building
820 North French Street
Wilmington, DE 19801

DATED: April 28, 2023