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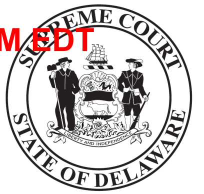

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSE TERREROS,	)	
	)	
Defendant—Below,	)	
Appellant	)	
	)	
v.	)	No. 435, 2022
	)	
	)	
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff—Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S *CORRECTED* REPLY BRIEF

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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.

a. *The superior court's denial of Terreros' motion relied on the State's misrepresentations about material facts.*

Terreros Opening Brief pointed out that the denial of his suppression motion explicitly relied on the following misrepresentations about the process and scope of the search. Op. Br. at 11—14.

- The extraction was conducted by a neutral third-party cell phone company. A196.
- The extraction was limited to the date range identified in the affidavit. A163, par. 29; A196; A208.
- The extraction did not include contacts, emails, Facebook, or Instagram. A192; A193.

Although the State had provided two extraction reports *before* the hearing (A14) which were consistent with the above representations, it was not until two weeks *after* the motion was decided (and 1.5 years after the extraction) that they provided (what appears to be) the full extraction (A211), which made the following clear:

- The extraction was conducted by Detective Steven L. Burse of the New Castle County Police Department, not a third-party cell phone company. A212 A288, A290.
- The 75 pages provided in advance of the hearing (A16—101) were *less than one fifth of one percent* of the 41,527 pages of extraction material (A217) the State possessed.

- The extraction is almost entirely made up of data outside from outside the time period mentioned in the affidavit.
- The extraction included huge amounts of contact, email, Facebook, and Instagram data. A213—14.

Because the trial court's ruling rests on "clearly wrong" findings, it must be reversed.[1] The misrepresentations were significant to the ruling because the categories at issue –messages, contacts, emails, Facebook, Instagram, and data from outside the temporal scope referenced in the affidavit– had no conceivable probable cause, and thus clearly subject to the type of exploratory rummaging which defines general warrants. Nonetheless, the State did not correct its misrepresentations with the trial court, and on appeal, despite being confronted with record evidence, (Op. Br. at 11—14) it has not acknowledged its misrepresentation about contacts, emails, Facebook, and Instagram data (*compare* A192—93 *with* A213—14) and inexplicably denied that they searched outside of the temporal scope mentioned in the affidavit. *Compare* Answer at 11 ("the temporal limitations were employed when data from the phone was searched") *with* A211—42. The Answer acknowledges that Cellebrite is not a neutral third party, but then minimizes the prosecution's blameworthiness by equating its misrepresentations with the judge and trial counsel's reliance on those misrepresentations.[2]

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[1] *Jones v. State*, 81 A.3d 1248, 1251 (Del. 2013) (holding this Court will overturn factual findings which are "clearly wrong" when "justice requires.")
[2] Answer at 13 ("The State concedes Cellebrite is not a phone company . . . the prosecutor, trial counsel, and the court mistakenly conflated the terms 'extraction'

b. ***The time period in the affidavit was not incorporated into the warrant.***

The State's Answer assumes that the affidavit's reference to a time period necessarily limits the warrant's authorization to that period. That's not the rule. In *Wheeler* this Court explained that even when "supporting documentation adequately describes the things to be searched for and seized, such description does not necessarily save a warrant from its facial invalidity."[3] A warrant only incorporates supporting documentation if (1) the warrant (not the affidavit) uses "clear" language of incorporation, and (2) the supporting document accompanies the warrant when the search is conducted.[4] In this case, neither requirement was satisfied.

The State has not even claimed that the affidavit accompanied the warrant, which is dispositive on its own. Separately, the warrant lacks clear language of incorporation. Simply referencing an underlying affidavit is inadequate,[5] and this warrant's "references" to the affidavit not only fail to suggest that a temporal limit was incorporated, they "demonstrate[] that where the [warrant] was intended to

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and 'search.'"). The State's misrepresentations may very well have been mistakes but conflating the terms "search" and "extraction" cannot possibly explain why the court was told a third-party neutral conducted either.

[3] *Wheeler v. State*, 135 A.3d 282, 307 n. 124 (Del. 2016).

[4] *See, e.g., United States v. Perez,* 629 Fed.Appx. 699, 702–03 (6th Cir.2015); *United States v. Tracey*, 597 F.3d 140, 146—48 (3d Cir. 2010) (holding affidavit can determine warrant's scope if "warrant is accompanied by an affidavit []incorporated by reference"); *United States v. Waker,* 534 F.3d 168, 172–73 (2d Cir.2008) (holding warrant must contain "deliberate and unequivocal language of incorporation.")

[5] *Tracey*, 597 F.3d at 146; *Id.* at 149 ("referencing the attached affidavit somewhere in the warrant without expressly incorporating it does not suffice.")

incorporate the affidavit, it said so explicitly."[6] Finally, rather than containing an "ambiguity [about temporal scope] . . . that can be clarified by inspecting the affidavit,"[7] the clause at issue in this warrant–"*all* search history"— is unambiguous, and completely incongruent with the supposed temporal limitation. A119.

c. *The Superior Court erred by employing partial suppression.*

Terreros' opening brief argued that the superior court's granting of partial suppression was impermissible. The Answer does not argue that partial suppression was a permissible remedy and has thus waived any such argument. Instead, it claims:

> *the Superior Court did not grant partial suppression of the data from Terreros's phone . . . and did not limit the State's introduction of evidence discovered pursuant to the search warrant*. Answer at 15.

The State "reads" the record incorrectly. The Judge explicitly suppressed the portions of the search outside the temporal scope. A208—09.

d. *The error below was not harmless beyond a reasonable doubt.*

When, as here, an error violates a constitutional right, it is only harmless if the State proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[8] The State's Answer suggests that admitting the

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[6] *Doe v. Groody*, 361 F.3d 232, 240 (3d Cir. 2004) (describing references in warrant to affidavit as "actually unhelpful" to government's incorporation argument).
[7] *Id.* at 239—40 (holding warrant's identification of specific occupant prevented incorporation of affidavit's reference to "all occupants").
[8] *Taylor v. State*, 260 A.3d 602, 618 (Del. 2021).

google history was harmless because the State's case was overwhelming, and the google history was duplicative to Casillas-Ceja's testimony. The State is wrong.

i. This was an extremely close case.

The evidence in this case was far from overwhelming. There was no DNA match, and no eyewitnesses other than the complainant, a small child whose credibility was effectively impeached. Further, this Court's harmless error analysis recognizes that "the time [a] jury spen[ds] deliberating," and "the moderating nature of a split verdict" speak to the closeness of a case.[9] In this case, the allegations were relatively simple and limited to a discrete time period, yet the jury deliberated for well over a full day, sent out two notes, and were still only able to reach an inconsistent verdict. A392; A396. Below, even the State conceded that the jury must have "grappled over" at least one element. A437.

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[9] *Floudiotis v. State*, 726 A.2d 1196, 1207 (Del. 1999) ("any error need not have been glaring to have had an adverse impact on the defendants' trial."); *see Pierce Mfg. Inc. v. E-One, Inc.*, 2022 WL 479808, at *3 (M.D. Fla. Feb. 16, 2022) ("this was a close case that resulted in a split verdict."); *United States v. Scheur*, 626 F. Supp. 2d 611, 617 (E.D. La. 2009) (holding closeness of case reflected by facts that "jurors deliberated for several days, sent a number of written notes to the Court . . . and then ultimately delivered a split verdict"); *State v. Yang*, 712 N.W.2d 400, 406 (Wis. Ct. App. 2006) ("this was a close case, as evidenced [in part] by the split verdict.")

ii. The search history was not duplicative; it was the State's most important piece of evidence.

As reflected by D.R.E. 1002, the "best evidence rule," original documentary evidence is "the most reliable information as to the contents of [the] documents"[10] because it mitigates the risk of fraud,[11] and "inaccuracy stemming from the fallibility of human memory."[12] It is well established that "even honest eyewitnesses can make mistakes because of mental processes beyond their understanding and control."[13] Memories are "subject to 'decay' (the disintegration of memory traces) and re-constructive processes that modify the initial perception."[14] These concerns were clearly present in Casillas-Ceja's testimony which was based on her recollection of reading the information a single time nearly two years prior.[15] But for the admission of the actual searches, Casillas-Ceja's surely would have been subject to powerful cross examination about bias in supporting her daughter's allegations, and her memory of the searches, just as was conducted earlier with other witnesses. A255—

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[10] *Robertson v. M/S Sanyo Maru*, 374 F.2d 463, 465 (5th Cir. 1967); *United States v. United States Gypsum Co*., 333 U.S. 364, 396 (1948) ("[w]here [] testimony is in conflict with contemporaneous documents we can give it little weight.").
[11] *United States v. Yamin*, 868 F.2d 130, 134 (5th Cir. 1989).
[12] C. Ford, *What the Best Evidence Rule Is-and Isn't*, MONT. LAW. 22 (Nov. 2014).
[13] M. Mendez, *Memory, That Strange Deceiver*, 32 STAN. L. REV. 445, 445 (1980).
[14] *Id.* at 448.
[15] Casillas-Cejas saw the search history on November 23, 2019. A276. She testified about her recollection of that search history on July 27, 2021. A234.

65. It is also possible that her testimony about the searches would have been excluded.[16]

It is not just in the abstract that documentary evidence is more reliable than testimony; a review of this record shows the prosecution recognized its added value in this particular case. The fact that the State introduced the report, which required an additional expert witness (A286-A290) and a court interpreter (A292—A294), demonstrates it had value beyond that of Casillas-Cejas's testimony. Their repeated references to the report during argument furthers this point. A372—74. The prosecution's decision to conclude their closing remarks with a reference to the search history is a clear recognition that it was the center piece of their case. A378.

[16] Casillas-Cejas' testimony is secondary evidence of the content of the searches and therefore generally inadmissible under D.R.E. 1002. If the searches were suppressed, the State would be responsible for their unavailability, and arguably unable to use the D.R.E. 1004 exceptions to D.R.E. 1002. *See State v. Stufflebean*, 548 S.W.3d 334, 350 (Mo. App. E.D. 2018) (holding best evidence rule prohibited testimony regarding content of writing which had been suppressed as a result of a discovery violation).

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

The bulk of the State's Answer to this claim reviews the trial court's rejection of the portion of Terreros' motion for judgement of acquittal made pursuant to the federal constitution. A406—15. This claim, however, is solely focused on the Delaware (not federal) Constitution. The Answer's limited treatment of the Delaware Constitution misdescribes the record below and misapprehends the controlling legal principles. According to the State:

> *In the penultimate paragraph of his Motion for Judgment of Acquittal Terreros argued: "Delaware citizens are guaranteed the enjoyment of all trial rights as they existed at English common law, notwithstanding subsequent modification of the federal right to a jury trial." Terreros did not further develop this single-sentence claim. The State did not address Terreros's undeveloped claim in its response and the Superior Court likewise did not address the English common law claim when it denied Terreros's Motion for Judgment of Acquittal. In any event, an analysis of the English common law was not necessary to decide the issues Terreros fully presented to the Superior Court. Rather than present his developed claims on appeal, Terreros simply seeks to develop his English common law claim in this Court while simultaneously contending that the State should be prevented from addressing his newly developed claim on appeal.* Answer at 21—22.

The State's assertion that the development of the claim is limited to "a single sentence" in "the penultimate paragraph of his motion," is blatantly wrong. Terreros'

State Constitutional claim was developed below in a clearly demarcated section which begins two pages before the single sentence spotted by the State. A415—17.

On top of misconstruing the record, the Answer's assertion that "an analysis of the English common law was not necessary" reflects a fundamental misunderstanding of the constitutional right at issue. The jurisprudence reviewed in the Answer does not even mention the Delaware Constitution; which – as clearly shown in the motion below (A415—17), and the Opening Brief (at 21—22), as well as the scholarly literature[17] and binding precedents[18] cited therein– incorporates the right to a jury trial as it existed at English Common law (unlike the federal analog), such that if inconsistent verdicts were prohibited at English Common Law, they are prohibited by the Delaware Constitution. Thus, not only was "an analysis of the English common law [] necessary" it was arguably the only necessary analysis. The State's description (Answer at 22—23) of Terreros' Opening Brief as an "attempt[] to ground his state constitutional claim in the English common law tenet that prohibited inconsistent verdicts," effectively concedes the claim by recognizing that "English common law . . . [which is more or less dispositive, in fact] prohibited inconsistent verdicts."

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[17] Honorable Randy J. Holland, *State Jury Trials and Federalism: Constitutionalizing Common Law Concepts*, 38 VAL. U.L. REV. 373 (2004).
[18] *McCoy v. State*, 112 A.3d 239, 256 (Del. 2015); *Claudio v. State*, 585 A.2d 1278, 1305 (Del. 1991).

CONCLUSION

Because Defendant could not have been convicted without the disputed evidence, because the verdict issued violates our state constitution, Defendant's aforesaid convictions should be vacated.

Respectfully submitted,

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