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IN THE

Supreme Court of the State of Delaware

SHAHEED MATTHEWS, Defendant Below, Appellant, v. STATE OF DELAWARE, Appellee.	**No. 24, 2023** COURT BELOW: SUPERIOR COURT OF THE STATE OF DELAWARE, Cr. ID No. 1806004163 (N)

AMICUS CURIAE'S OPENING BRIEF

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NATURE OF PROCEEDINGS AND STATEMENT OF INTEREST

In 2019, Shaheed Matthews was tried in the Superior Court on murder and firearm-possession charges. The State described its case as entirely circumstantial. The jury found Mr. Matthews guilty. On direct appeal, this Court affirmed.

Mr. Matthews filed a *pro se* motion in Superior Court for postconviction relief, asserting claims of ineffective assistance of counsel. His appeal focuses on a claim that trial counsel provided ineffective assistance by failing to seek suppression of evidence obtained from Mr. Matthews' cellphone. Applying *Wheeler v. State*, 135 A.3d 282 (Del. 2016), the Superior Court agreed that the warrant was an improper general warrant and invalid. But the Superior Court denied the motion, finding that Mr. Matthews (1) "consented to the search" and (2) "suffered no actual prejudice" because "even if the consent was defective, the cell phone evidence had no bearing on the outcome of the case."

On appeal, Mr. Matthews argues that, under *Bumper v. North Carolina*, 391 U.S. 543 (1968), the Superior Court erred in determining that he consented. Mr. Matthews further argues that he suffered prejudice.

On August 3, 2023, this Court *sua sponte* appointed Garrett B. Moritz as *amicus curiae* for the purpose of filing briefing in support of the arguments that Mr. Matthews has raised on appeal. Neither Mr. Moritz nor his law firm have any personal interest in this appeal.

SUMMARY OF ARGUMENT

I. Trial counsel's failure to move to suppress evidence seized from Mr. Matthews' cellphone under an unconstitutional general warrant constituted ineffective assistance of counsel. The State's briefing below and on appeal does not dispute that the warrant was unconstitutional. Because Mr. Matthews at most provided consent to search his cellphone after a law enforcement officer announced that he had a warrant, there was no valid consent under *Bumper v. North Carolina*. The claim that Mr. Matthews "suffered no actual prejudice" is not supported by the record, as (a) the State's case relied heavily on the cellphone evidence and (b) both the State and the trial court acknowledged during trial that the cellphone evidence was "material", "probative" and "prejudicial."

STATEMENT OF FACTS[1]

A. Antoine Terry's Shooting

Antoine Terry was a friend of Mr. Matthews. On December 27, 2017, Mr. Terry spent the evening watching basketball and eating dinner with Mr. Matthews and his girlfriend at the girlfriend's residence on Parma Avenue in New Castle. That night, Mr. Terry was fatally shot nearby.

The State's witnesses acknowledged that it was a "high crime area" with "a lot of shootings." AA12; AA72; AA195. No eyewitness identified the shooter. No murder weapon was recovered.

B. The Cellphone

On December 28, 2017, detectives interviewed Mr. Matthews. When asked for a good number "to get a hold of you," Mr. Matthews initially told detectives he did not have a cellphone. AA338. When the detectives pressed later in the interview, Mr. Matthews told them "I didn't want to give the number out." AA345.

A few pages later, the State's transcription of the interview includes the following exchange:

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[1] Citations to "AA__" refer to the *Amicus Curiae*'s Appendix, filed herewith.

DT1: … Well, listen, here's one thing I want to go over with you, okay? **So everybody that we've talked to, okay, uh, I know you're kind of like funny about your cellphone, and you don't want to give me the cellphone number.**

SM: **You can, you can have it (UI)**

DT1: **Well, here's the thing; we have a search warrant for it.**

SM: **Okay.**

DT1: **Okay? So, uh, we're going to take it anyway.**

SM: **Yeah, you can (UI)**

DT1: Um, and I don't want you to think there's any ill will behind it.

SM: Mm-hmm.

DT1: But what happens is if, if we know somebody had contact with him, we take their cellphone. And it's not saying that we think you did anything wrong.

SM: Uh, I don't have it on me, but you can, you can definitely have the number.

DT1: Okay. Where is, where is the physical cellphone at?

SM: In town, uh, at my brother's house.

DT1: Okay. Um, we're going to need to get a hold of that.

SM: I got to buy a whole new phone?

DT1: No, no, no, so here's what happens, um, we get the phone. We do what's called a forensic examination.

SM: Yeah, that's –

DT1: Basically hook it up to a computer.

SM: Oh, okay, alright.

DT1: Um, they dump the contents of it, and then we give it right back to you.

AA349 (emphasis added).[2]

At trial, Detective Eugene Reid gave the following account:

Q. Did you seize a cell phone from the defendant in connection with this investigation?

A. Yes, yes.

Q. How did that occur?

A. We had a search warrant to collect his cell phone, and we collected that from him at his residence.

Q. Did he physically hand it to you?

A. Yes.

AA64.

C. The Trial

Trial was held April 8–15, 2019. The State's opening statement repeatedly referenced evidence from defendant's cellphone:

- "[Y]ou will hear evidence taking the form of video surveillance, *cell phone evidence*, and witnesses." AA5 (emphasis added).

[2] The transcription designates "unknown detective" as "DT1" and Mr. Matthews as "SM".

- "[Y]ou will also hear evidence pertaining to the *defendant's cell phone* …. And you will hear the contents of *the defendant's phone* as it pertains to the evening of December 27th, 2017, into the following morning on the 28th." AA5 (emphasis added).

- "[G]oing with *the defendant's phone*, ladies and gentlemen, you will hear evidence beginning with 7:36 p.m. on the evening that Antoine Terry was murdered, and you will hear evidence that defendant texted Antoine Terry." AA5-6 (emphasis added).

- "And you will hear *additional cell phone evidence taken from the defendant's cell phone* where we expect you will hear that the defendant called his girlfriend, Devon Johnson, at 10:45 p.m. They have a 29-second conversation." AA6 (emphasis added).

- "Going back to *the defendant's cell phone again*, you will hear much evidence from that where you will hear evidence that the defendant calls a gentleman named Kevin Scott." AA7 (emphasis added).

- "You will also see from the records that are discussed that the evidence will show the defendant made *zero calls or zero text messages* to Antoine Terry after they parted ways the evening of December 27." AA7 (emphasis added).

- "[I]t's the State's burden to prove to you beyond a reasonable doubt … that the defendant was the one who murdered Antoine Terry … through the totality of the evidence *of the defendant's cell phone*, the statements from the witnesses, [etc.] …." AA9 (emphasis added)

During trial, the State's medical examiner testified that Mr. Terry's cause of death was shooting. AA136-41. The medical examiner acknowledged "We don't know the time of death." AA140.

Law enforcement never "recover[ed] the murder weapon." AA156. The State did call a firearms identification specialist who testified that bullet fragments were ".38 caliber class." AA146. But the State's ballistics report was inconclusive

as to the specific type of firearm used, and the witness acknowledged that ".38 caliber class includes several cartridge designations … that can include all of your 9 millimeters, .380's, your .38's, and .357 magnum. … [T]here are many." AA146.

The State admitted that "[o]ur case is entirely circumstantial." AA174. The State presented the following principal categories of evidence:

Witness testimony. The State called Mr. Matthews' girlfriend. AA80-107. She testified that Mr. Matthews and Mr. Terry had been "friends for about six years." AA100. She further testified that, on the evening of December 27, 2017, she, Mr. Matthews, and Mr. Terry watched a basketball game on television at her house and ate Chinese food. AA84, AA98-99. She testified that during the basketball game, "everybody's having a good time" and no one was "fighting, or yelling, or doing anything … to antagonize anyone else during the game." AA99. She did not see "bad blood" between Mr. Matthews and Mr. Terry during the game. AA99, AA100.

The State questioned Mr. Matthews' girlfriend about "cell phone records from [Mr. Matthews'] phone showing who he called and who called him on certain dates and times." AA93-94. The State asked about Mr. Matthews calling to ask her to drive to pick him up later that evening. AA86. And the State also questioned her about text messages with Mr. Matthews the morning of December

28, 2017, stating "I love you so much, and I can't lose you"; "You won't babe. Come to me as soon as you get off"; and "Changes have to be made now, okay." AA94.

The State called Mr. Terry's girlfriend. Her recollection was limited. AA76-78.

The State called a nearby resident who looked out his window after hearing shots. He testified: "I seen a dark figure. And the figure had a hoodie on. … And he was big." AA37. That witness testified "I'm not sure whether, you know, he was pointing. I didn't see a weapon. It was too dark." AA37. The witness noted: "[T]he pole light was not on, and that's one of the bad parts about that, too. If it was on, I might have more something I could really say about this situation." AA37.

Video cameras. The State presented security camera video from the area, and testimony regarding how the video was collected. *E.g.*, AA41-43; AA44-47; AA59-63. The nighttime video quality was often poor.

Notably, in what was referred to as the "19 Briarcliff video", the detective who testified regarding that video acknowledged he could not "see with any certainty who those people were." AA69. In response to the question "there

doesn't appear to be any physical altercation, correct?," the detective responded "[a]ll I can testify to is that they're just seen walking." AA69.[3]

Gunshot residue. A witness from a materials characterization lab testified "[t]hat there was a population of gunshot residue present" on Mr. Matthews' jacket. AA134. The witness acknowledged that gunshot residue "can sometimes get trapped within the weave of the fabric" and can "actually stay … on fabric, for a long period of time." AA134-35. The witness also acknowledged that "I can't say how [gunshot residue] got there, when it got there. Just that it's there." AA134-35. And the witness acknowledged that "it's possible it could have gotten there a month ago, a year ago, multiple years ago." AA135.

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[3] The State subsequently elicited the detective's "opinion" as to "what is going on" in the 19 Briarcliff video, and the detective offered that "[a]t some point in time those two figures"—who the detective acknowledged were "granted, very small"—"appear to be kind of going back and forth, which I took as a physical altercation. And then they go off screen." AA202. Discussing the video during closing argument, the State told the jury that the detective's "*opinion* was that there was a *possible altercation*." AA217 (emphasis added).

On direct appeal, the State's answering appellate brief asserted that "Video surveillance from a number of sources in the neighborhood showed that two people exited 227 Parma Avenue, where Matthew and Terry had watched the basketball game, walked toward 245 Parma Avenue, stopped, [and] engaged in a physical altercation." No. 296, 2019, Dkt. 16 at 6. This Court's Order affirming on direct appeal appears to have adopted this characterization, stating "Video cameras from the neighborhood showed two people leave 227 Parma Avenue at about 10:38 p.m., walk towards 245 Parma Avenue, stop, and fight." *Matthews v. State*, 241 A.3d 220, 2020 WL 6557577, at *1 (Del. Nov. 9, 2020) (Table). That characterization of the 19 Briarcliff video is not consistent with the State's own more qualified characterization at trial. *See also* AA395.

Cellphone evidence. The State presented cellphone data taken from Mr. Matthews' cellphone and testimony regarding its extraction. *See, e.g.*, AA64-66 (discussing "seiz[ure]" of defendant's cellphone and technical extraction process); AA66 (text message conversations "taken from the defendant's phone that stood out to [the detective] as important"); AA69; AA93-94 (questioning Mr. Matthews' girlfriend about "cell phone records from [Mr. Matthews'] phone showing who he called and who called him on certain dates and times"); AA94 (questioning Mr. Matthews' girlfriend about a text message with him the next morning stating "I love you so much, and I can't lose you"; "You won't babe. Come to me as soon as you get off"; and "Changes have to be made now, okay"); AA183 (questioning detective regarding "text message conversations taken from the defendant's cell phone" and that Mr. Matthews did not "sen[d] a text message or place[] a call to Antoine Terry after 10:40 p.m.").

One area the State focused on was text messages about potentially purchasing a gun and gun-related internet search history recovered from Mr. Matthews' cellphone. Defense counsel objected to this evidence under Delaware Rule of Evidence 404(b). AA148-50, AA161; AA168-76. The State responded that this evidence on Mr. Matthews' cellphone was "extremely probative" and went to "a material issue":

MR. GRUBB: … The firearm has not been recovered. No casings were recovered from the scene. We do not know the caliber of the firearm that killed Antoine Terry. So it is, in fact, *a material issue* that the defendant is trying to get a gun days before the homicide ….

The fact that the defendant was searching for a gun two days prior to the homicide, and then deleted that history, and that he was attempting to purchase a firearm one week prior to the homicide, is extremely probative that the defendant is, in fact, guilty ….

[W]e need it. No gun was recovered here. There are no eyewitnesses saying the defendant murdered Antoine Terry. *Our case is entirely circumstantial* ….

[W]e concede and acknowledge *certainly this evidence is prejudicial*, as is everything that we would put on in our case.

AA173-74 (emphasis added).

The trial court agreed. In overruling the Rule 404(b) objection and admitting this cellphone evidence, the court held that such evidence of "other acts" "must be material to an issue or ultimate fact in dispute in the case" to be admitted. AA173-74. The court concluded that "I think *it is material*," and that "[b]oth the text message[s] and the Internet search *are material* to the ultimate fact in dispute in this case as to whether or not the defendant intentionally killed the victim, Antoine Terry, with a gun." AA175 (emphasis added).

The trial court further stated: "*I think it's got prejudice*, and the State's acknowledged that." AA176 (emphasis added). But the court agreed with the State's "need for the evidence," noting "[t]his is a circumstantial evidence case." AA175-76. Conducting "the overall balancing test under 403," the trial court held that the prejudice was outweighed by the evidence's "significant probative value." AA176.

The 404(b) objection overruled, the State then presented Mr. Matthews' cellphone search history showing that on December 25 and 26, 2017, he "searched through Google" for the terms "Ruger 45" and "Ruger P97." AA184. On cross-examination, the State's witness acknowledged that this was "just a general search" and "[t]here's no indication a purchase was made, or any attempt to purchase." AA191. The State also introduced text messages from Mr. Matthews' cellphone from December 20, 2017, in which he texted someone about the cost of a "Taurus Millenium" and then, after receiving an answer, responds "[t]hat's too much." AA184-85.

* * *

The State's closing argument repeatedly referenced evidence from Mr. Matthews' cellphone. For example:

- "Now, mentioned *the defendant's cellphone. Cellphone is important.* … You got three calls, incoming missed from Devon Johnson at 10:49. You got a call to Kevin Scott right afterwards at 11:09." AA220 (emphasis added).

- "You heard Detective Reid testify *he went through the defendant's cellphone*, there's *no texts* from anybody indicating that there had been shots fired from Parma and there were *no other calls* in between those missed calls from Devon Johnson and when the defendant called Kevin Scott to see if everything was all right." AA220 (emphasis added).

- "But then *we go through the defendant's cellphone some more*, 7:34 in the morning: I love you so much and I can't lose you. Just seven minutes later. … [H]ow are those text messages in relation if she did not know already?" AA221 (emphasis added).

- "There's *more from the defendant's cellphone* …. December 25th and 26th, the defendant has three searches for a firearm *on his cellphone*. You heard Detective Reid testify that these searches were subsequently deleted before he handed *that cellphone* over to New Castle County Police." AA221 (emphasis added).

- "December 20th, *got text messages* from an unidentified person *on defendant's phone* saying: These folks just hit him. They have a Taurus Millenium – the detective testified to is a gun. He asks how much? It's 450. There's a picture of the gun. The defendant says that's too much." AA221 (emphasis added).

- "[A]t some point in time [Mr. Matthews] learns that his good buddy has been murdered blocks from his house — we don't see a single *text message*. Not to Antoine Terry asking him if he's okay or to anyone else talking about how his good friend has now passed. We don't see a single *phone call* to Antoine Terry after the shots fired. … [M]aybe he didn't call Antoine Terry because he knew he was dead because he's the one that killed him." AA229 (emphasis added).

The jury returned a verdict of guilty on both charges.

On July 1, 2019, the Superior Court sentenced Mr. Matthews to life plus three years in prison. AA334.

D. Direct Appeal

On direct appeal, Mr. Matthews "raise[d] one narrow ground—whether the Superior Court abused its discretion by admitting evidence at trial about Matthews' internet search history and text messages related to the possible purchase of a gun." *Matthews*, 2020 WL 6557577, at *1. Mr. Matthews' direct appeal "limited his challenge to relevance." *Id.* at *2. This Court affirmed.

E. Mr. Matthews' *Pro Se* Motion for Postconviction Relief and the Opinion Below.

Mr. Matthews filed a *pro se* motion for postconviction relief, asserting six claims of ineffective assistance of counsel. AA240. One claim was that "trial counsel's failure to file a motion to suppress challenging the illegal search and seizure of Mr. Matthews' phone … result[ed] in constitutional prejudice to Mr. Matthews." AA261. Mr. Matthews wrote that "the search of his cellular phone was through the use of a general warrant in violation of his Fourth Amendment right under the U.S. Constitution, Del. Const. Article I, Section 6 and the particularity requirement under Delaware statutory law[.]" AA264.

The Superior Court[4] ordered Mr. Matthews' trial counsel to respond. In an affidavit dated May 23, 2022, Mr. Matthews' trial counsel attested that: "As for challenging the introduction of Mr. Matthew's cell phone evidence defense counsel

[4] The judge who presided at trial had retired, and the motion for postconviction relief was heard by a different judge.

did not see a basis for objecting to the exclusion of all the cell phone information as a whole." AA283.

On January 3, 2023, the Superior Court issued an Opinion and Order denying Mr. Matthews' motion. Citing *Wheeler v. State*, 135 A.3d 282 (Del. 2016), the Superior Court "agree[d] with Mr. Matthews that the warrant application itself is void of the temporal constraints prescribed by *Wheeler*" and that "[t]he State has failed to argue, much less argue convincingly, [that] the cell phone warrant satisfied [*Wheeler's*] particularity requirement." AA373. The Superior Court thus found the cellphone warrant "to be a general warrant" invalid under *Wheeler*. AA373.

But the Superior Court ruled that, "[t]he validity of the search warrant notwithstanding, Mr. Matthews provided police with an independent basis to search his phone" because he "consented to the search." AA373-74. In reaching this conclusion, the Superior Court stated that "Mr. Matthews … offered to provide his phone to police" and "[i]t bears mention that Mr. Matthews made the offer *before* officers notified him they had already obtained a warrant for the phone." AA374-75 (emphasis in original).

In addition, the Superior Court ruled that "even if the consent was defective, the cell phone evidence had no bearing on the outcome of the case." AA376. The Superior Court stated that "the surveillance video showing the suspect chasing

down and shooting Mr. Terry from behind more than adequately proved that element of the crime." AA376. Reasoning that "[t]he State's case was strong … even without the cell phone evidence," the Superior Court found that "Mr. Matthews suffered no actual prejudice from the admission of the phone activity." AA378.

Mr. Matthews' *pro se* appeal followed.

ARGUMENT

I. TRIAL COUNSEL'S FAILURE TO MOVE TO SUPPRESS THE CELLPHONE EVIDENCE WAS INEFFECTIVE ASSISTANCE.

A. Question Presented

Where the State seized evidence from Mr. Matthews' cellphone under an unconstitutional general warrant, did failure to move to suppress the cellphone evidence on constitutional grounds constitute ineffective assistance of counsel? Mr. Matthews presented this argument below. AA261, AA264.

B. Standard of Review

This Court reviews "legal or constitutional questions, including ineffective-assistance-of-counsel claims, *de novo*." *Purnell v. State*, 254 A.3d 1053, 1093-94 (Del. 2021) (citation omitted); *Reed v. State*, 258 A.3d 801, 821 (Del. 2021) (both cited at State's Ans. Br. 5 & n.5); *see also Starling v. State*, 130 A.3d 316, 325 (Del. 2015) ("We review ineffective assistance of counsel claims … *de novo*.").

C. Merits of the Argument

Ineffective assistance of counsel claims are subject to a two-pronged test: (1) "the defendant must show that counsel's performance was deficient" and (2) "the defendant must show that the deficient performance prejudiced the defense." *Starling*, 130 A.3d at 325 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Both prongs are met here.

1. Trial counsel's failure to move to suppress the cellphone evidence was deficient.

a. The warrant to search Mr. Matthews' cellphone was an unconstitutional general warrant. In ruling on the postconviction motion, the court below cited *Wheeler* and found "the cell phone warrant to be a general warrant — that scourge of executive overreach 'abhorred by the colonists' that permitted 'a general, exploratory rummaging in a person's belongings' for vaguely-defined categories of contraband." AA373 (citation omitted).

The State did not argue otherwise below. AA306-12. Nor did the State's answering brief on appeal. State's Ans. Br. 8-9. Any argument that the warrant was constitutional has been waived. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999).

b. Instead, the State argued that "[r]egardless of the search warrant's validity, there was an independent basis to search the contents of the phone: Matthews' consent." AA309. The Superior Court agreed. AA374. But Mr. Matthews did not provide valid consent.

i. "When the State relies upon consent to demonstrate the lawfulness of a search, the State has the burden of proving that the consent was voluntarily given." *Blackwood v. State of Del.*, 2023 WL 6629581, at *6 (Del. Oct. 11, 2023) (Order). The State cannot meet its burden "by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49

(1968). The U.S. Supreme Court has held that where the official conducting the search has first asserted that they possess a warrant, "there can be no consent." *Id*. at 548.

ii. Here, Mr. Matthews at most provided consent to search his cellphone after law enforcement personnel announced they had a warrant. Before that, Mr. Matthews responded regarding his "cellphone number." The State's own interview transcript documents this:

> DT1: … Well, listen, here's one thing I want to go over with you, okay? So everybody that we've talked to, okay, uh, I know you're kind of like funny about your cellphone, and you don't want to give me **the cellphone number**.
>
> SM: You can, you can have it (UI)
>
> DT1: Well, here's the thing; **we have a search warrant for it**.
>
> SM: Okay.
>
> DT1: Okay? So, uh, we're going to take it anyway.
>
> SM: Yeah, you can (UI)

AA349 (emphasis added).

And even if this Court were to find the consent ambiguous—and it should not—ambiguity should be resolved against finding consent. *See State v. Harris*, 642 A.2d 1242, 1246 (Del. Super. Ct. 1993) (finding "ambiguous and equivocal" purported "consent" insufficient); *United States v. Taverna*, 348 F.3d 873, 878

(10th Cir. 2003) (government must "proffer clear and positive testimony that consent was unequivocal and specific").

iii. This case is like *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968). In *Bumper*, law enforcement officers went to petitioner's grandmother's house and announced that they had a warrant. *Id.* at 547. Petitioner's grandmother responded, "Go ahead," and opened the door. *Id*. at 546. The grandmother later testified that "He just told me he had a search warrant, but he didn't read it to me .... He said he was the law and had a search warrant to search the house, why I thought he could go ahead …. I took him at his word." *Id.* at 547-48. The officers entered the home, searched, and found a rifle, which was later introduced into evidence at the petitioner's trial. *Id*. The lower court denied a motion to suppress based on the prosecutor's position that he was relying upon the consent of the grandmother and not upon the warrant to justify search of the house. *Id*. at 546.

The U.S. Supreme Court granted certiorari and reversed, holding that "it was constitutional error to admit the rifle in evidence against the petitioner." *Bumper*, 391 U.S. at 550. The Court reasoned that "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search." *Id*. "The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Id*. *Bumper* is on point here.

c. *Blackwood v. State*, 2023 WL 6629581 (Del. Oct. 11, 2023), which found consent to a cellphone search, is distinguishable. In *Blackwood*, consent was not obtained upon announcement of a warrant. Instead, the appellant in *Blackwood* "told Detective Reid how to access the phone, accessed the phone for Detective Reid while the detective observed, and then again showed Detective Reid how to enter the passcode, without expressing any limitations on what content Detective Reid could access." *Id*. at *7. The appellant in *Blackwood* also encouraged the detective to access information in the cellphone to verify the appellant's alibi. *Id*. at *7-8.

d. Trial counsel's failure to move to suppress was "so far out of the realm of reasonable trial strategy that [it] qualif[ies] as ineffective assistance." *Starling*, 130 A.3d at 330. Indeed, trial counsel unsuccessfully attempted to keep cellphone evidence out through other means. *See* AA148-50, AA161; AA168-76 (unsuccessfully objecting to internet search history on Mr. Matthews' cellphone under Rule 404(b)).

But trial counsel missed the constitutional basis to suppress the cellphone evidence under *Wheeler* and *Bumper*. In responding to the allegations of ineffective assistance, trial counsel submitted an affidavit attesting that: "As for challenging the introduction of Mr. Matthews' cell phone evidence defense counsel

did not see a basis for objecting to the exclusion of all the cell phone information as a whole." AA283.

"[R]ather than being a tactical decision, [the decision to object under Rule 404(b)] is better described as damage control after failing" to file the motion to suppress. *Starling*, 130 A.3d at 328. That is ineffective assistance, not trial strategy.

2. Mr. Matthews' defense was prejudiced.

"To demonstrate prejudice caused by counsel's ineffectiveness, a defendant 'must show that that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Starling*, 130 A.3d at 325. A "reasonable probability" means "a 'probability sufficient to undermine confidence in the outcome,' a standard lower than 'more likely than not.'" *Id.* The deficiency here meets that test.

a. The cellphone evidence was a major part of the State's case. The State described its case as "entirely circumstantial." AA174. During trial, the State presented extensive evidence from Mr. Matthews' cellphone. *See* pp. 10-12, above. And the State referred to cellphone evidence repeatedly during opening and closing arguments. *See* AA5-7, AA9 (opening argument); AA220-21, AA229 (closing argument).

Indeed, in connection with a relevance dispute over just a portion of the cellphone evidence, the State argued that certain of Mr. Matthews' text messages and internet search history were "extremely probative" and went to "a material issue." AA173-74. The State "concede[d] and acknowledge[d] certainly this evidence is prejudicial." AA174. In overruling the objection and admitting the internet search history, the trial court agreed: "*I think it's got prejudice*, and the State's acknowledged that." AA176 (emphasis added). But the court agreed with the State's "need for the evidence," noting "[t]his is a circumstantial evidence case" and "I think [the internet search history's] got some significant probative value." AA175-76. The court concluded that "[b]oth the text message[s] and the Internet search *are material* to the ultimate fact in dispute in this case as to whether or not the defendant intentionally killed the victim, Antoine Terry, with a gun." AA175 (emphasis added).

Under these circumstances, there is "reasonable probability" — i.e., a "probability sufficient to undermine confidence in the outcome" — that, had trial counsel not missed the constitutional argument for excluding Mr. Matthews' cellphone evidence, the outcome of the trial would have been different.

b. In denying Mr. Matthews' motion, the trial court wrote that "[t]he State's case was strong … even without the cell phone evidence" and therefore "Mr. Matthews suffered no actual prejudice from the admission of the phone

activity." AA378. The Superior Court may have been impacted by the State's apparent overstatement on direct appeal of the video evidence's strength. *See* note 3, above. The trial record is to the contrary.

In fact, throughout the trial, the State's case relied heavily on the cellphone evidence. The State itself described its case as "entirely circumstantial." AA174. The State and the trial court both acknowledged during trial that just a portion of the cellphone evidence was "material", "probative" and "prejudicial." Under these circumstances, it cannot be said that the cellphone evidence caused Mr. Matthews no prejudice.

CONCLUSION

For the foregoing reasons, Mr. Matthews' conviction should be reversed and the case remanded for a new trial.

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