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Case Number 158,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TERRELL S. MOBLEY,	)	
	)	
Defendant Below-Appellant,	)	No. 158, 2023
	)	
	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE
	)	ID No. 1906003128A/B
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

REPLY BRIEF

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Dated: April 30, 2024

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Terrell Mobley, through the undersigned counsel, replies to the State's Answering Brief as follows:

ARGUMENT

I. THE TRIAL JUDGE ERRED IN DENYING THE DEFENSE MOTION TO COMPEL *BRADY* MATERIAL, LEAVING THE DEFENSE UNABLE TO EFFECTIVELY IMPEACH THE CHIEF INVESTIGATING OFFICER ABOUT HIS FALSE AFFIDAVIT AND TESTIMONY IN A PRIOR CASE.

In the Daryus Whittle case, Corporal Moses averred in an arrest warrant that he saw Whittle take a gun from his waistband and put it under a stairwell.[1] That did not really happen. An officer monitoring Downtown Visions saw the incident and sent Moses to the scene.[2] Moses maintained the ruse during his testimony at the preliminary hearing,[3] even though he had authored a police report containing the true facts. By the time of trial, Moses admitted he had never seen the incident happen, as he had sworn in an affidavit and in testimony.[4] He said that he "messed up" his prior testimony.[5]

After granting a motion for judgment of acquittal in the Whittle case, the judge told the prosecutor:

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[1] A893.
[2] A920.
[3] A899-902.
[4] A920-921.
[5] A923.

> Because of the rather odd circumstances of this, which began with the playing of just the tape with nobody describing what was occurring within that tape or who was involved, the court was unaware, and because of the circumstances of the Court of Common Pleas testimony, which, by the way, Mr. [Prosecutor], I hope as an officer of this Court you will bring to the attention of that officer's superiors.[6]

The prosecutor responded, "Yes, Your Honor."[7]

The State never disclosed any of this to the defense; the defense obtained it from another source after the first trial. The application in the defense motion to compel was for those communications between the DOJ and Wilmington police. Some communication almost certainly occurred given the exchange between the prosecutor and the judge at the conclusion of the Whittle trial.

The State's argument, like the Superior Court's holding, asserts that because the defense had access to the certain transcripts and documents from the Whittle case, there was no *Brady* violation.[8] But Mr. Mobley had the right to effective cross-examination of Moses – an essential component of a fair trial.[9] The jury "should be afforded every opportunity to hear impeachment evidence that may undermine a witness' credibility."[10]

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[6] *Id.*
[7] *Id.*
[8] Ans. Br. At 17-19.
[9] *Jackson v. State*, 770 A.2d 506, 515 (Del. 2001).
[10] *Atkinson v. State*, 778 A.2d 1058, 1062 (Del. 2001).

Given the pretrial motion practice, Corporal Moses was ready with prepared answers about his conduct in the Whittle case. He claimed, for the first time, that his conduct was an effort to keep things generic to preserve the safety of Downtown Visions employees.[11] Then he shifted gears, testifying that he was a young officer at the time and probably could have done a better job of testifying.[12] He analogized to building a house with bad bricks[13] and baking a cake with the steps out of order.[14]

Without the communications from the DOJ to the Wilmington PD, and without any internal DOJ communications about Corporal Moses, the defense was stuck. It could not effectively cross-examine Moses, who had benign answers prepared. It strains credulity to consider that a trial judge ordered the Whittle prosecutor to communicate with the Wilmington PD about Moses' conduct and that no communication ever occurred. Notably, the prosecutor in Mr. Mobley's case never told the trial judge that no such communication existed. The prosecutor only told the trial judge that Mr. Mobley's personnel file contained no *Brady* information.[15]

[11] A1066-1067.
[12] A1073.
[13] A1070.
[14] A1073.
[15] A941.

Due to the Court's ruling on the motion to compel, Corporal Moses was able to devise answers to cross-examination questions portraying himself as a young officer with good intentions who simply messed up. Without the *Brady* material to which the defense was entitled, the jury was not afforded every opportunity to hear evidence that could undermine a witness' credibility.

The State did not address the argument that the Superior Court impermissibly shifted the burden to the defense to identify what *Brady* material it sought. The Court held that the defense "made no effort to *justify* his *specific* requests and cited to no authority for productions of the items sought *in particular*."[16] This holding was transplanted from a different legal issue: defense subpoenas for police officer files.[17] Mr. Mobley's request, however, was governed by *Brady* and its progeny – the State had an affirmative obligation to furnish impeachment material regarding Corporal Moses. The defense explained that in a Motion for Partial Reargument.[18]

By imposing a requirement that the defense justify its request for *Brady* material with enough particularity to satisfy the Court, the Superior Court erred and should be reversed.

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[16] *State v. Mobley*, 2023 WL 107387, at *2 (Del. Super. Jan. 3, 2023)(italics in original).
[17] *Snowden v. State*, 672 A.2d 1017 (Del. 1996).
[18] A942-954.

II. THE TRIAL JUDGE'S *SUA SPONTE* DECISION TO TELL THE JURY THAT THE CASE WOULD BE TRIED IN TWO PARTS VIOLATED MR. MOBLEY'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

The parties disagree about the applicable scope of review. Mr. Mobley asserts that the Superior Court's *sua sponte* comment to the jury that this was a criminal trial that would be tried in two parts violated his right to be tried by an impartial jury on only the evidence presented at trial. As a constitutional claim, this triggers *de novo* review.[19]

The State views this claim as pertaining to jury instructions. Such claims trigger *de novo* review when the defense objects. The form of a jury instructions is reversible only when it is so deficient that it undermined the jury's ability to intelligently perform its duty.[20]

This was not a jury instruction. It was a comment the judge decided to give to the jury before the start of the trial. The question before this Court is whether that comment infringed upon Mr. Mobley's right to an impartial jury; the review is *de novo*.

The State is correct that the judge's comment did not refer to specific additional charges faced by Mr. Mobley.[21] But the State is wrong in its assertion

[19] Op. Br. At 37-38.
[20] Ans. Br. at 20-21.
[21] Ans. Br. at 23.

that nothing in the judge's comment confirmed to the jury that Mr. Mobley faced additional criminal charges.[22] The comment did exactly that. The Court said the trial was a criminal trial that would be tried in two parts. There is no other possible interpretation.

The judge's comment was more than a mere "procedural roadmap," as the State asserts.[23] The problem is that the unspecified roadmap let the jury know more charges were coming in the trial. For all the jury knew, that could have meant a different set of criminal charges. The judge's comment permitted the jury to infer a general criminal disposition to Mr. Mobley. It led to speculation about what the charges in this unidentified Part Two of the trial would be. The comment was extra-evidentiary, violating Mr. Mobley's right to have the jury decide his case upon only the evidence admitted at trial and the reasonable inferences from that evidence.

[22] *Id.*
[23] Ans. Br. at 24.

CONCLUSION

For the foregoing reasons, and those stated in the Opening Brief, Appellant Terrell Mobley respectfully requests that this Court reverse the judgments of the Superior Court. This case was plagued by errors of constitutional dimension; a remand for a new trial is the appropriate remedy.

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