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Case Number 151,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIANA HAZELETT, Defendant—Below, Appellant v. STATE OF DELAWARE Plaintiff—Below, Appellee.	)	No. 151, 2024

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S *CORRECTED* OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

On November 21, 2022, Briana Hazelett was indicted on Possession of a Firearm by Person Prohibited, Possession of a Controlled Substance, Possession of Marijuana, Driving without a Valid License, and Failure to use a Turn Signal. A6—10. The charges all stem from conduct alleged to have occurred on March 2, 2022. A6—10.

Hazelett's jury trial began on May 1. During the first day of trial Hazelett sought to impeach the credibility of the State's chief investigating officer, Leonard Moses, with prior sworn inconsistent statements from another case. The State initially objected because Hazelett had not provided the impeachment material in advance. The trial judge temporarily stopped Hazelett from pursuing that line of the cross examination but did not immediately issue a ruling as to whether it might be permitted later. Eventually the trial judge permitted (what the judge characterized as) a "greatly restricted" use of the impeachment evidence.

On May 2, 2023, the case was submitted to the jury, which found Hazelett guilty of all counts. On March 15, 2024, Hazelett was sentenced to three and a half years of incarceration, suspended for probation.

This is Hazelett's Opening Brief to her timely filed notice of appeal.

SUMMARY OF ARGUMENT

1. In 2022, Briana Hazelett was pulled over for a turn signal violation, and immediately, and safely, informed police that she had a gun (which she legally owned). Officer Leonard Moses, the Chief Investigating Officer, claimed to have seen a lit blunt, and ordered all four occupants out of the car. Marijuana and methamphetamine were eventually found in the car.
2. Ms. Hazelett, a mother, and UPS billing administrator with no criminal record, denied knowledge of the drugs, and was adamant that she would not have allowed a lit blunt in her car. Ms. Hazelett sought to challenge Officer Moses' accusations by impeaching his credibility with numerous inconsistent sworn statements he had in a prior case. The most reasonable explanation for Officer Moses' inconsistent statements is that he testified dishonestly. This explanation is corroborated by Officer Moses' admission that he was deliberately misleading to protect an informant. The prior case was dismissed, and the trial judge directed the prosecutor to report Officer Moses' conduct to his superiors.
3. The State objected to Ms. Hazelett's use of the impeachment material. The prosecutor (in this case) was generally aware of the 2016 case yet made no attempt to satisfy her *Brady* obligations to learn about it and provide the impeaching materials to Hazelett. Despite *Brady*, the State argued that it was

the defendant who should have provided the impeaching material to the State. The trial court agreed. This finding was an error. Ms. Hazelton had no such obligation, and the trial prosecutor's unpreparedness was a result of her own failure to comply with *Brady*.

4. The trial court also erred in finding that no court had found Officer Moses to have testified dishonestly. The judge who dismissed the 2016 case found as much, and in any case, because Officer Moses' dishonesty was a fair inference from his inconsistent statements, Hazelton should have been permitted to develop testimony and argue that inference to the jury even without a judicial finding.
5. Relying on these errors, the trial court stated on numerous occasions that it would limit cross examination such that Hazelett's ability to use the material would be "greatly restricted." Although the exact parameters of the trial court's ruling are not perfectly clear, in conjunction with the trial court's repeated stern warnings that use of the impeachment material would be "greatly restricted," this vagueness produced a chilling effect resulting in minimal impeachment.

STATEMENT OF FACTS

Officer Leonard Moses (1 of 3)

On March 2, 2022, Officer Leonard Moses ("Officer Moses") was conducting proactive patrol at the corner of Madison and 5th Streets, in Wilmington, Delaware. A18. He observed a Black Volkswagen Passat with four occupants and began to follow. A19—20. He claims to have immediately seen "furtive movements throughout the vehicle," pulled the vehicle over after observing it turn onto 6th Street without signaling, and then smelled marijuana upon approach. A20—21.

Briana Hazelett, who was seated in the driver's seat, stuck her hands out the window, and informed the approaching officers that her gun and a removed magazine were on the dash. A21—22. Officer Moses says that there was a burning blunt in the center console. A22. The occupants were ordered to exit the vehicle. A22—23. The vehicle was searched, and officers found marijuana under the passenger seat, and in the "center area." A22. Ms. Hazelett's car was driven back to the station by Officer Akil. A26. During the inventory search of a bag found near the front passenger seat, a pill bottle with what was suspected to be MDMA was found. A26. The bottle had previously been used by Ms. Hazelett for prescription medication. A26.

Officer Moses was aware that the car (in which drugs were found in multiple locations) was not Ms. Hazelett's but made no attempt to speak with owner. A27.

Officer Moses did not photograph the blunt. A28. He sent the gun out for DNA testing (despite that Ms. Hazelett had claimed ownership) but declined to send the drug containers out for DNA or fingerprint testing (despite that nobody had claimed ownership, and they were found closer to passengers than to Hazelett). A29—30.

Officer David Schulz

Officer Schultz was called to assist, and arrived after the traffic stop was conducted. A34. He indicated there was an odor of marijuana coming from the vehicle. A35. He searched the car on scene. A35—46. He observed marijuana and something he believed "more than likely [to have been] a blunt" near the emergency brake handle, bags of marijuana and a "cross body bag" near the passenger seat, and in the back seat. A36—37, 40. During the inventory search at WPD, inside the cross-body bag he located a prescription pill bottle with Hazelett's name, which contained suspected MDMA. A39.

Officer Chris Rosaio

Officer Rosaio was in Officer Moses' car for the traffic stop. A144. He testified that the Ms. Hazelett's car turned without a signal. A44. He testified that upon approach, for safety reasons, Ms. Hazelett had stuck her hands out the window. A44.

Officer Leonard Moses (2 of 3)

Officer Moses submitted the suspected marijuana for testing, and described specific procedures he used to ensure that the evidence was properly preserved. A45.

Anna Wyckoff

Ms. Wyckoff is an analytical chemist at DFS. A46. She tested all the suspected drugs and determined that the suspected marijuana was marijuana, and that the suspected MDMA was methamphetamine. A50.

Officer Hugh Stephey

Officer Stephy is employed in Forensic Service Unit of the WPD. A51. He tested the firearm and confirmed it was operable. A52.

Briana Hazelett

Ms. Hazelett is a billing administrator at UPS and mother who lives in Southbridge Wilmington with her two children and an adult housemate. A58—59. On March 2, 2022, she picked up her friend Mahogany, and Mahogany's two children and the four were on their way to go shopping when they were pulled over. A59. Ms. Hazelett immediately put her hands out the window out of fear of what would happen when she informed police about the gun in the car. A59.

Ms. Hazelett testified that the gun was hers, just as she had stated at the scene. A59. However, Ms. Hazelett does not use drugs, the drugs in the car were not hers, and, because of the packaging, she was unaware that there was marijuana in the cup

holder. A59. Ms. Hazelett also explained that the blunt was not lit in the car and was adamant that she would not have allowed it to be. A60. Ms. Hazelett explained she had previously given her housemate, Amy, antibiotics Hazelett had been prescribed, which is why the pill bottle was in the satchel, and that the car and the satchel were Amy's. A59.

***Officer Leonard Moses* (3 of 3)**

After Ms. Hazelett testified the State recalled officer Moses and had him address various factual disputes. Moses reaffirmed his previous claims that the blunt was lit, and that he smelled marijuana. A70.

On cross, Officer Moses acknowledged that, just as he had done in this case, he provided sworn testimony in *State v. Whittle*, a 2016 case. A72. Officer Moses conceded that he had claimed during sworn testimony that he had observed Whittle remove a gun from his waist band. A72. However, he had only observed a video of the incident, and even that was not until *after* arresting Whittle. A72.

On redirect, Moses explained that in the *Whittle* Case, an individual from Downtown Visions had observed Whittle remove the gun, and informed Officer Moses and his partner. Moses claimed that he testified to having observed the gun himself because he was concerned that identifying the informant in the Affidavit of Probable Cause (APC), which he believed to be publicly accessible (they are not), could create safety issues. A72—73. As to the preliminary hearing, he first suggested

(during his sworn testimony) that it was an accident: he didn't mention the informant because he was relying on his APC. A73. Later he provided a different and (inconsistent) explanation: he (deliberately) maintained the ruse during the preliminary hearing because the preliminary hearing is not a "closed forum," and which he contrasted to a trial which he claimed to believe was a "closed forum" (it is not). A73—74.

When asked why he did not use the word "witness" or confidential source" Officer Moses claimed it was because of his lack of experience. A74. He repeatedly claimed the whole incident was due to his "inexperience at that point," and that he was "very new in [his], policing at that point," a "very new officer" and "pretty much new into [his] career." A72—73.

It's possible to square his sworn claims of inexperience with his testimony in the instant case, according to which he had been a WPD officer for three years or so at the time of his *Whittle* testimony (A18); but those claims are irreconcilable with his sworn statements elsewhere, where he concedes to have had eight years of experience as an officer at the time of his *Whittle* testimony. A119.

I. THE TRIAL COURT VIOLATED MS. HAZELETT'S CONSTITUTIONAL RIGHTS TO PRESENT A COMPLETE DEFENSE AND TO CROSS EXAMINE HER ACCUSERS BY "SEVERELY RESTRICT[ING]" HER RIGHT TO IMPEACH THE CHIEF INVESTIGATING OFFICER'S CREDIBILITY IN RELIANCE ON UNSUPPORTED FINDINGS ABOUT THE IMPEACHMENT MATERIAL, AND LEGAL ERRORS IN HOLDING THE DEFENDANT RESPONSIBLE TO INFORM THE STATE OF THE IMPEACHMENT MATERIAL AND FAILING TO APPLY THE TEST MANDATED BY THIS COURT.

Question Presented

Whether the rights to present a defense and to cross examination are violated by "severely restrict[ing]" impeachment of the chief investigating officer in reliance on unsupported findings about the impeachment material, and legal errors in holding the defendant responsible to inform the State of the impeachment material and failing to apply the test mandated by this court? A32—33; A42—43; A74—75.

Scope of Review

Whether restrictions on a criminal defendant's use of impeachment material violate the constitutional right to cross examination is reviewed *de novo*.[1] Non-constitutional components of such restrictions are reviewed for abuse of discretion.[2]

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[1] *Wilson v. State*, 950 A.2d 634, 638 (Del. 2008) (reviewing, *de novo*, claim that evidentiary ruling unconstitutionally restricted right to effectively cross-examine).
[2] *Garden v. Sutton*, 683 A.2d 1041, 1043 (Del. 1996) (addressing cross-examination of police officer in civil suit, *without constitutional implications*).

Merits of Argument

a. ***Officer Moses' Testimony was critical to the State's Case.***

As chief investigation officer, Moses' credibility was a significant factor in the jury's assessment of the reliability and adequacy of the investigation. The State elicited extensive narrative testimony from Officer Moses, which is permissible (in part) because it has added value (i.e. is not cumulative). One reason it was not cumulative, and actually quite critical, is that – as the transcript reflects – the video evidence, as introduced, was extremely low quality to the point that officers on seen had trouble identifying what was being displayed. A35—36; A49.

Impeachment of Officer Moses' credibility, and by extension, "the reliability of the investigation" he oversaw, was important for the jury to consider.[3] Hazelett recognized as much, and placed Officer Moses' investigatory decisions at issue by suggesting numerous inadequacies during her cross examination: Officer Moses did not send the pill bottle out for testing (which could have corroborated the claim that the pills were Ms. Hazelett's housemates) (A74), did not interview Ms. Hazelett's

[3] *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 308 (3d Cir. 2016) ("*Kyles* makes clear that evidence is material under *Brady* when the defense could have used it to 'attack the reliability of the investigation.'") (citing *Kyles v. Whitley*, 514 U.S. 419, 446 (1995); *see United States v. Howell*, 231 F.3d 615, 625 (9th Cir. 2000) (holding errors in police reports are exculpatory "evidence of a flawed police investigation" that present defense "the opportunity to attack the thoroughness, and even good faith, of the investigation"); *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant.").

housemate (the registered owner of the car and the person alleged to have been the actual owner of the pills) (A63), did not conduct sobriety tests for marijuana (which could have corroborated or rebutted the suggestion that Ms. Hazelett had been smoking) (A75), and did not photograph the lit blunt he supposedly observed (despite it being the most direct evidence of Ms. Hazelett's supposed awareness of the drugs). A28.

Because Ms. Hazelett had no drugs on her person (i.e. actual possession), to establish her gun possession as prohibited,[4] the State needed to prove she knew the location of the drugs and intended to guide their destiny (i.e. constructive possession).[5] Officer Moses' testimony, and by extension his credibility, was key to numerous factual disputes at issue in the State's constructive possession argument (A84—85): Officer Moses testified that there were "furtive movements" in the car (which allowed the jury to place minimal significance on the fact that the drugs were found closer to passengers than Ms. Hazelett) (A21); Ms. Hazelett claimed that nobody was smoking marijuana in the car, and that she had no knowledge of any drugs in the car. A59—60. To dispute her claim, Officer Moses testified that he observed a lit blunt. A21, 70. Ms. Hazelett did not dispute that there was a blunt, but testified that she would not have, and did not allow, the blunt to be lit in the car.

[4] 11 *Del. C.* §1448(a)(9) (prohibiting simultaneous possession of guns and drugs).
[5] *Lecates v. State*, 987 A.2d 413, 426 (Del. 2009).

A60—61. Officer Moses claimed to have smelled marijuana upon approach (A21—22, 70), which Ms. Hazelett also disputed (A61). Officer Moses was essential to establishing the chain of custody of the marijuana (A76); and finally, the legitimacy of the stop, the basis of Count V (Failure to Use Turn Signal) relied on Officer Moses' testimony. A20

b. ***Ms. Hazelett sought to impeach Officer Moses using material which provided a logical basis for a jury to question Moses' credibility.***

At trial, Hazelett sought to use past sworn testimony of Officer Moses to impeach his credibility, minimize the probative value of his testimony, and cast doubt on the adequacy of the investigation. A16. In his 2016 Affidavit of Probable Cause (APC) and preliminary hearing testimony in *State v. Whittle*, Officer Moses provided sworn testimony about the circumstances purportedly justifying his arrest of Whittle. He claimed he "observed," "saw," and "was looking at" Whittle as he pulled a gun out of his waistband. A100—04; A129. A few months later Officer Moses provided materially different testimony: he conceded at trial that, prior to arresting Whittle, he had not seen, observed, or looked at Whittle remove a gun from his waistband. A120-24. Instead, a Downtown Visions employee had told Officer Moses about the gun, and Moses saw a video *after* the arrest. A120.

Similarly, at the preliminary hearing, when specifically asked if he had gone to Whittle's location because of a call, Officer Moses swore that he had not. A102.

This too was untrue. At trial Officer Moses conceded that he and his partner went to the location because "they were called." A120.

Officer Moses eventually admitted that *he was deliberately deceptive in these sworn statements* because he did not want to reveal his source.[6] A72—73. He attempted to mitigate the significance of his conduct by repeatedly swearing he was a "very new officer." A72. But this claim too, appears untrue: in the case at bar Officer Moses mentioned his WPD employment, which he says began in 2013 (A18), implying that he had been an officer for three years at the time of the *Whittle* testimony in 2016 (a stretch for "very new"); but, during the *Whittle* trial itself he testified that he had been an officer for "eight years." (unreconcilable with "very new"). A119.

c. *The Trial Court "greatly restricted" Hazelett's cross examination of Officer Moses, thereby eliminating her "opportunity to present a complete defense."*

Ms. Hazelett's constitutional rights to confrontation and "a meaningful opportunity to present a complete defense"[7] entitled her to make use of the *Whittle*

[6] Protecting his source may be a noble objective but is still not permitted. *See State v. Jackson*, 2022 WL 18401412 at n.50 (Del. Super. Ct. Dec. 28, 2022) ("some amount of deception as investigative tools have been long-tolerated… [b]ut that must all end at the courthouse door. If a police officer undertakes to present the covertly developed information to a judicial factfinder whose probable cause (or other necessary legal finding) she's seeking, she must use no false label to try to conceal its source… [the prosecutor's] attempt[s] to accommodate law enforcement's want … was inexplicable.")

[7] *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

material to impeach Officer Moses' credibility and argue that the jury should not trust Moses' testimony. Jurors should have every opportunity to hear impeachment evidence that may undermine any witness' credibility.[8] "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."[9] Given the "crucial" nature of his testimony, (A55) and the "real danger that the jury ascribed undue weight to [Moses'] testimony because he was a [] police officer," it was especially important to allow counsel to explore the misconduct on cross and make pertinent arguments "to temper any undue assumptions made about [Moses'] trustworthiness."[10] Moreover, the type of cross examination proposed – impeachment of an arresting officer through prior inconsistent statements[11] and individual instances of misconduct bearing on truthfulness[12]– is "paradigmatic impeachment"[13] specifically allowed by the Delaware Rules of Evidence.

"[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits;" but that "discretion is not absolute,"[14] and is abused when exercised to defeat effective cross-examination.[15] Prohibitions on

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[8] *Jackson v. State*, 770 A.2d 506, 515 (Del. 2001) (internal quotations omitted).
[9] *Davis v. Alaska*, 415 U.S. 308, 316 (1974).
[10] *Garden v. Sutton*, 683 A.2d 1041, 1044 (Del. 1996) ("A witness' association with the police department tends to provide [] independent guarantee of trustworthiness.")
[11] D.R.E. 613.
[12] D.R.E. 608(b).
[13] *State v. Jackson*, 2022 WL 18401412, at *6.
[14] *Smith v. State*, 913 A.2d 1197, 1233 (Del. 2006).
[15] *Garden*, 683 A.2d at 1044.

"otherwise appropriate cross-examination designed ...to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness" are not permitted.[16] As the Third Circuit has held, restrictions which prevent a jury from receiving "sufficient information to make a discriminating appraisal of a witness[]" are prohibited.[17]

This was "paradigmatic impeachment"[18] of the State's chief investigating officer, a "crucial" witness (A55), not one of "marginal relevance [which] the trial court …[could] properly prohibit cross-examination or allow only limited questioning."[19] Nonetheless, as the trial court repeatedly acknowledged, its ruling "greatly restricted" Hazelett's use of the impeachment material. A57—58. Specifically, the trial court delayed cross-examination[20] (A33—34, 43), and prohibited Hazelett from suggesting Officer Moses had lied, was found to have

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[16] *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (internal quotations omitted).
[17] *Douglas v. Owens*, 50 F.3d 1226, 1230 (3d Cir. 1995).
[18] *State v. Jackson*, 2022 WL 18401412, at *6.
[19] *Weber v. State*, 457 A.2d 674, 682 (Del. 1983).
[20] *Perry v. Leeke*, 488 U.S. 272, 282 (1989) ("[c]ross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony *at just the right time*") (emphasis added); *Lawson v. State*, 697 S.W.2d 803, 806–07 (Tex. App. 1985) ("this right [to cross-examination] must not unreasonably be delayed"); *see Illinois v. Bastien,* 541 N.E.2d 670 (Ill.1989) (holding statute authorizing video testimony which prevented contemporaneous cross-examination, impermissibly infringed on an accused's right of confrontation); *Barrow v. State*, 749 A.2d 1230, 1244 (Del. 2000) (finding absence of "contemporaneous cross-examination" prevents "particularized guarantees of trustworthiness").

testified untruthfully, or from advancing an argument which challenges the basis for the car stop. A57—58, A64. Exhibit B.

d. *The restrictions on Hazelett's cross-examination were not justified.*

i. The trial court's expectation of Hazelett to notify the State of its impeachment strategy misapprehends the law.

Hazelett's decision not to provide the *Whittle* material to the State in advance of trial framed the trial court's approach to the impeachment restrictions.

> TRIAL COURT: *we* [] *don't partake in trial by ambush here. The State has discovery obligations. [A]ll parties who come before the Court are expected to… act in a fair and judicious manner and considerate of all of the time of all parties… I was aware of the potential issues, and it seems like all parties were, but to give somebody 195 pages of documents over a lunch break and expect them to be prepared, let's just imagine if the State gave the defense 195 pages of something during cross-examination, I think that the defense would ask, and that it's only fair, that they've been given some time to review that. And I would love to hear if the defense thinks differently*. A42—43.

The trial court's holding – that Hazelett had the same obligation to provide the materials as the State would have if the situation were reversed, and that Hazelett's failure to do so constituted "trial by ambush" supporting restrictions on otherwise permissible cross examination – is legal error. A42—43, A55, A58. Hazelett had no duty to provide the material or reveal that her strategy: impeachment material is

excised from Rule 16's reciprocal discovery obligations;[21] and *Brady* places no disclosure obligations on the defendant.[22]

The prosecutor on the other hand had no excuse for her apparent surprise. She was aware of the material and the issues it presented (A29, A32—33, A42) and was obligated to learn about Officer Moses' conduct in the *Whittle* prosecution and to inform Hazelett.[23] The fact that Hazelett possessed the material means that the State's failures were not, technically, *Brady* violations, but it does not change the fact that the State abandoned its responsibilities,[24] and certainly does not suggest that Hazelett did anything improper.

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[21] *United States v. Robertson*, 2020 WL 6786186, at *3 (D.N.M. Nov. 18, 2020) ("discovery obligations are not symmetrical. The government must turn over any requested documents … it 'intends to use … in its case-in-chief at trial' *or if the item is 'material to preparing the defense.*' The defense, by contrast, must only turn over documents … it 'intends to use ... in the defendant's case-in-chief at trial.'"); *United States v. Medearis*, 380 F.3d 1049, 1057 (8th Cir. 2004) ("reciprocal pre-trial disclosure … includes only documents [] the defendant intends to introduce during his own case-in-chief"); *United States v. Moore,* 208 F.3d 577, 579 (7th Cir.2000) (holding document used only for impeachment is not excludable under Rule 16); *United States v. Gray-Burriss*, 791 F.3d 50, 57 (D.C. Cir. 2015) (same).

[22] *Robertson*, 2020 WL 6786186, at *3 ("The government's constitutional duty to disclose impeachment evidence …stems from …[amendments which do not] place symmetrical discovery obligations on the defense.")

[23] *Kyles v. Whitley,* 514 U.S. 419, 437 (1995) ("individual prosecutor has a duty to learn of any favorable evidence").

[24] *See Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 292 (3d Cir. 2016) ("Only when the government is aware that the defense counsel already has the material in its possession should it be held to not have 'suppressed' it … Any other rule presents too slippery a slope."). The fact that the DOJ has (unilaterally) chosen to leave Officer Moses off its *Brady* list (A55) (despite the *Whittle* material) helps to understand, but cannot justify this failure; it simply reflects a deeper systemic

If the State had any doubt as to its obligations, that doubt should have been resolved in favor of obtaining and disclosing,[25] or at a minimum, *in camera* review[26] as specifically requested in Hazelett's discovery letter and purported to be the policy of the DOJ. A95; A131. That Hazelett was deemed responsible, and the State was granted relief, for the State's failure to abide by its *Brady* obligations turns established constitutional law on its head and incentivizes further non-compliance.

ii. The trial court misread the record in finding that there was no previous finding of dishonesty and erred as a matter of law by relying on that misreading to restrict Hazelett's cross examination.

The trial court restricted the cross examination based on its determination that there was no finding that Officer Moses had testified dishonestly. A44; A56. This ruling is flawed in two regards. First, it is not supported by the record: Whittle's trial judge found that Officer Moses had "sworn under oath in the Court of Common Pleas that he actually saw this happen," and by doing so, "[mis]led both th[e] court and defense… to believe" he had directly observed Whittle with the gun. A120. This

problem. *See Kyles*, 514 U.S. at 438 (establishing institutional responsibility to establish "procedures and regulations … [which] insure communication of all relevant [*Brady* related] information on each case to every lawyer who deals with it"); *State v. Wright*, 67 A.3d 319, 324 (Del. 2013) (recognizing the same and citing *Kyles*).

[25] *United States v. Bundy*, 968 F.3d 1019, 1041 (9th Cir. 2020).

[26] *United States v. Agurs*, 427 U.S. 97, 106 (1976) ("if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge.").

reflects a finding of dishonesty. The Judge was so disturbed by Moses' conduct that he directed the prosecutor to report the occurrence to the Moses' supervisors. A125.

Second, a defendant's constitutional right to impeach an accuser's credibility is not predicated on a judicial finding of dishonesty. The *Whittle* materials speak for itself and establishes dishonesty as (at least) a fair and legitimate inference. The prosecutor agreed that dishonesty was a "logical conclusion," (A57) and Moses admitted to being deliberately deceptive (A72—73). And, even if non-impeaching explanations for Moses' statements were possible, Hazelett should have been free to argue and attempt to establish the impeaching "logical conclusion[s]" for the jury.[27]

iii. The trial court should not have relied on a lack of police-imposed discipline to justify restrictions on Hazelett's cross examination.

The trial court also erred by restricting use of impeachment material in reliance on the fact that Officer Moses was, apparently, not disciplined by his fellow officers. A66. This should not have been considered. Firstly, it is not clear from this record that police ever investigated Moses' conduct.[28] Second, the trial court's

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[27] *Weber*, 457 A.2d at 683 (finding error in restricting impeachment "even if the jury was unlikely to conclude that the [impeaching information] enhanced the witnesses' bias or would have any effect on their testimony"); *Daniels v. State*, 859 A.2d 1008, 1012 (Del. 2004) ("legitimate inferences" are permitted to be argued despite "the existence of alternative inferences.")

[28] The prosecutor (A55) and trial counsel (A54) were both under the impression that Officer Moses had not been disciplined. But each expressed uncertainty, and more importantly, neither suggested that his conduct had ever been investigated or otherwise considered for discipline. If there was an investigation, it was not provided to trial counsel, and does not appear to have been submitted to the trial court.

reliance on *State v. Tilghman* to support its ruling is misplaced. In *Tilghman*, the trial court restricted cross examination of a police officer in reliance on its review of the pertinent police investigation and determination that it had "exonerated" the officer at issue.[29] In this case, the trial court did not review the investigation, and there is no suggestion (or possibility) that it exonerated Officer Moses. Thirdly, the entirety of the alleged misconduct is recorded in a transcript, such that the trial court was equipped to evaluate its impeaching nature on its own; in this context, police internal investigations– which have no established reliability, and assess different questions than those before a trial court – should play no role in determining the scope of impeachment.

iv. Because Hazelett was charged with a turn signal violation, she was entitled to argue that Moses' testimony about the alleged violation was not true (even though this was not a suppression hearing).

Despite acknowledging that "there is a turn signal violation that is before the jury," the trial court ruled that "there will be no tolerance for any argument that the stop should not have been made, because this is not a motion to suppress." A57. This was an error which effectively relieved the State from its burden to prove every charge beyond a reasonable doubt, and to instead tell the jury, "the issue is not whether, and at the end of day she committed a turn signal violation." A83.

[29] *State v. Tilghman*, 2010 WL 703055, at *2 (Del. Super. Ct. Feb. 25, 2010).

True, this was not a suppression hearing and suppression arguments were arguably waived; but it was a trial in which "[t]he United States and Delaware confrontation clauses create a presumption in favor of cross-examination, especially in matters relevant to credibility."[30] The State relied on Officer Moses' testimony to prove that Ms. Hazelett committed a turning signal violation, so Hazelett was constitutionally entitled to challenge his credibility in pursuit of an argument that she did not commit the violation (i.e. the stop should not have been made). That the argument has suppression implications does not justify precluding the argument's use to challenge the State's proof.

v. The trial court erred as a matter of law in applying the test, mandated by this Court, for restricting impeachment.

Delaware Courts typically consider four factors when assessing the permissibility of restrictions on cross-examination: "(1) whether the testimony … is crucial; (2) the logical relevance of the specific impeachment evidence …; (3) the danger of unfair prejudice, confusion of issues, and undue delay; and (4) whether the evidence … is cumulative."[31] However, restrictions on a criminal defendant's use of impeachment material are further constrained by the question of "whether the jury had in its possession sufficient information to appraise the biases and motivations of the witness… [a determination for which two factors are considered:]

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[30] *Weber*, 457 A.2d at 682.
[31] *Snowden v. State*, 672 A.2d 1017, 1025 (Del. 1996).

[(5)] if the jury was exposed to facts sufficient for it to draw inferences as to the reliability of the witness and [(6)] if defense counsel had an adequate record from which to argue…"[32]

The trial court only considered the first four factors. A55—58. It committed legal error by failing to consider factors (5) and (6). As to factors (1), (2), and (4), the trial court correctly found that Officer Moses' testimony was crucial, the specific impeachment evidence was logically relevant to the question, and not cumulative. A55—56. As to factor (3), the trial court erred in finding that Hazelett's impeachment tactic caused undue delay, was unfairly prejudicial, and risked confusing the jury. A55—57.

For the reasons described above, no undue delay is attributable to Hazelett. *Supra* pp. 16—18. As Hazelett argued (A35), and was the case in *Garden v. Sutton*, "cross-examination could have proceeded immediately had it been allowed."[33]

The trial court should have found that there was a risk of confusion or unfair prejudice because the *Whittle* Judge did find that Moses testified dishonestly, and the judge's conclusion conclusion was supported by the record. The prosecutor argued there was a "danger of confusion associated with admitting this evidence [because a] logical conclusion …[from] differing – of preliminary hearing testimony

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[32] *Smith v. State*, 913 A.2d 1197, 1233 (Del. 2006).
[33] *Garden*, 683 A.2d at 1044.

versus what happened in the Whittle trial, … [is] that Corporal Moses committed perjury… and this risks a real chance of a jury … thinking that Corporal Moses is a liar and that his testimony is not to be trusted." A57. This argument should have been rejected. That the State conceded these conclusions are "logical" reflects that the inferences it sought to preclude Hazelett from arguing, and the jury from adopting, were not functions of "jury confusion" but rather, were evidence-based "logical" inferences a reasonable jury might make.

Nonetheless, the trial court agreed that there was a risk of confusion and danger of unfair prejudice:

> *because I have no evidence before me that there was a finding of untruthfulness, I will not allow that language to be used……[or] any questioning and any sort of inference to be made to the jury that the Whittle case was dismissed because of this… I will allow some brief and limited cross-examination on the subject. But, again, the defense is not allowed to give the impression that there was any sort of finding of dishonesty, and certainly cannot leave the impression that a case was dismissed because of a finding of dishonesty*. A57.

As described above (*supra* p. 18—19) the trial court's conclusions that there was "*no evidence* ... that there was a finding of untruthfulness" is a misreading of the *Whittle* transcript. This Court should reject that finding. The fact that Officer Moses eventually admitted that his "misstatements" were deliberate further reflects the unconstitutionality and prejudice of the restrictions. A72—73. But for the

misreading, Hazelett would have made valuable use of the finding,[34] and Officer Moses' admission.

And the impact of the ruling was far more expansive than prohibiting use of the finding of dishonesty; it also prohibited cross examination, or arguments which would allow "any sort of inference… [or] give the impression that there was" such a finding. A57. It's difficult to know what might "give th[at] impression," but – coupled with the trial court's approach to Hazelett's "late" disclosure and its repeated warning that only an extremely limited impeachment would be permitted (A57—58) – the vague parameters of the ruling, appear to have been understood broadly and resulted in a significant, and unjustified, chilling of permitted impeachment.[35]

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[34] This is clear from the trial court's ruling, and in line with numerous courts which have recognized the propriety of introducing evidence of judicial findings of dishonesty. *See e.g. United States v. Cedeño,* 644 F.3d 79, 82–83 (2d Cir. 2011); *United States v. Woodard*, 699 F.3d 1188 (10th Cir. 2012) (applying *Cedeño*); *United States v. Dawson,* 434 F.3d 956, 957–59 (7th Cir.2006) ("[T]he decision whether to allow a witness to be cross-examined about a judicial determination finding him not to be credible is confided to the discretion of the trial judge; it is not barred by Rule 608(b), which, to repeat, is a rule about presenting extrinsic evidence, not about asking questions."); *United States v. Whitmore,* 359 F.3d 609, 619–22 (D.C. Cir. 2004) (holding district court erred in refusing to allow the defendant to cross-examine an officer about a judge's conclusion that "I think [the officer] lied").

[35] The United States Supreme Court has recognized, in a variety of contexts, that vague rules have a chilling effect on permitted portions of the conduct they address. *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) (vague laws chill speech); *Colautti v. Franklin*, 439 U.S. 379, 394 (1979) (vague laws chill exercise of abortion rights).

CONCLUSION

For the reasons and upon the authorities cited herein, Defendant's aforesaid convictions should be vacated.

Respectfully submitted,

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