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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 REPLY BRIEF

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The Answer's primary dispute with the Opening Brief is directed at Hazelett's position that the trial judge's ruling "severely restricted" Hazelett's use of the *Whittle* material. The State's disagreement, however, fails to address Hazelett's direct treatment of that very issue (Op. Br. at 13—15, 24), or even acknowledge that the specific characterization which it so resolutely disputes – *severely restricted* – is not just Hazelett's, but also the trial judge's. A57—58. The trial court itself described the permitted questioning and argument as "brief and limited," "very limited," "greatly restricted," and (again) "very limited." A57—58. And, while the Answer eventually concedes that "Hazelett was under no obligation to provide the State with impeachment material" (at 17), the State continues to minimize the significance of lying under oath and fails to grapple with the way in which the prosecutor's and trial court's misapprehension of the State's *Brady* obligations infected this entire trial.

a. ***Context – the trial court's stern rebuke of trial counsel's purported ambush and unfair tactics– is essential to understanding the impact of the ruling.***

The Answer recognizes that the objections which prompted the rebuke of trial counsel were based on the trial prosecutor's incorrect belief that trial counsel was obligated to provide the "*Whittle* Material" to the State.[1] Answer at 17. Also, it impliedly agrees that the parameters of the trial court's ruling were vaguely defined. Answer at 15 (describing Hazelett as "conced[ing]" that the parameters were "not perfectly clear"). But it makes no attempt at addressing Hazelett's contention that, combined, the severity of the rebuke and the vagueness of the ruling, led to a chilling effect in Hazelett's use of the material. Op. Br. at 24.

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[1] The Answer (at 18) declares "[i]t was best practice for trial counsel to notify the trial judge and the prosecutor pretrial or, at minimum, prior to jury selection so that the court could adequately prepare, decide the issues, and schedule the trial based upon the pretrial ruling." That this may be best for prosecutors does not make it best practice. *See ABA Criminal Justice Standards for the Defense Function*, Standard 4–1.4(a) (4th ed. 2015) ("In light of criminal defense counsel's constitutionally recognized role in the criminal process, defense counsel's duty of candor may be tempered by competing ethical and constitutional obligations. Defense counsel must act zealously within the bounds of the law and applicable rules to protect the client's confidences and the unique liberty interests that are at stake in criminal prosecution.") Revealing trial strategy earlier than necessary is almost inherently prejudicial to a client's confidences and liberty interests. And, while there is certainly room for pretrial disclosures, those decisions are far more nuanced than the blanket pronouncement of the State's "best practice." The likelihood of a delay caused by a complex trial strategy or a complex objection to a trial strategy should be considered, but the solution to the DDOJ's misapprehension of what *Brady* requires cannot be outsourcing its requirements to the individuals they are designed to protect.

Delaware attorneys take criticism from the judiciary *extremely* seriously such that when those criticisms are misapplied, their impact becomes problematic. Numerous courts have recognized that rulings and rebukes like these cause chilling effects in trials.[2] And while chilling effects, by their nature, do not leave direct evidence for an appellate court, there is strong circumstantial evidence in the severity of this rebuke, the trial judge's repeated warnings that cross-examination would be "greatly restricted" (A57—58) the brevity of trial counsel's use cross-examination (A71—72), and trial counsel's, restrained, single reference to the *Whittle* Material during their closing argument. A87 ("the State did not ask Cpl. Moses about when he testified under oath, just like he did in this trial, about seeing a crime with his eyes that he later testified that he did not see in person").

The Answer again ignores this context in its suggestion that Hazelett agreed to the delay of her cross-examination. Answer at 7. Trial counsel's statement "I don't oppose [the prosecutor's] request to have some more time to review the documents," is easily misinterpreted when viewed out of context. After accusing counsel of

[2] *See People v. Carter*, 86 A.D.2d 451, 457–58 (N.Y. 1982) (describing how a "stern warn[ing]" by the trial court which suggested "ethical considerations … implicated by" a cross examination which violated that ruling, "could not have had [a result] other than a chilling effect upon each counsel's willingness to cross-examine vigorously and thoroughly in the area of dispute."); *State v. Foster*, 1990 WL 174008 at *5 (Ohio Ct. App. Nov. 6, 1990) (accepting counsel's representation that "accusations made against him would have a chilling effect with respect to his cross-examination.")

"partak[ing] in trial by ambush" and violating the expectation to "act in a fair and judicious manner and considerate of all of the time of all parties," the trial court explained "it's only fair" to give the ambushed party more time, and then (rhetorically) told trial counsel to speak up if they disagreed: "I would love to hear if the defense thinks differently." A43. Had trial counsel disagreed, it is more likely that they would have been sanctioned than succeeded in preventing the delay.

Trial counsel's compelled description of their proposed line of questioning should be understood similarly. Prior to the rebuke, and after speaking to the *Mobley* Judge, the trial court ruled that they would "allow the cross-examination of this impeachment line of questioning;" (A41) but after the State complained of the length of the *Whittle* Material (which neither the State (A54), nor the trial court (A56) had yet reviewed) the trial judge vacated its earlier ruling and asked trial counsel "do you have a proposed line of questioning… *if you are permitted to ask him* ***any questions*****?**" A55. Viewed in this context, there is little reason to believe that trial counsel's "proposed questions" were anything but highly hedged to account for the trial court's rebuke and indication that it might not permit any questions at all.

b. ***Prohibiting Hazelett from arguing that Officer Moses lied or directing her cross-examination to establish that point (despite clear evidence that he had done so) violated Hazelett's constitutional rights to cross-examination and to present a complete defense.***

This Court has recognized that to "label[] a witness as a 'liar' or to argue that he has 'lied' is to say something quite different [than pointing out an inaccuracy or

inconsistency] about his testimony."[3] This undisputed proposition is generally applied in cases where the term is improperly used, which can be so prejudicial that a judge's failure to act *sua sponte* constitutes plain error.[4] But the impact of that label is, necessarily, a two way street: the prejudice it produces when misapplied, becomes probative value when supported by the record.[5] Hazelett was entitled to incorporate that probative value into her cross examination and her defense.

Ultimately, the entire point of introducing specific instances of a witnesses' untruthful conduct[6] is to convince a jury that the witness's trial testimony is not reliable. When the untruthful conduct is neither *deliberately* misleading, nor pertaining to the same subject matter as the trial testimony, its connection to the reliability of the testimony is difficult to prove (everyone makes mistakes and making one in 2016 hardly suggests an unrelated mistake in 2023). But when the record supports that the prior conduct was deliberately untruthful (i.e. lies), the dynamic is *completely* different: it is easily understood, and intuitive to many, that

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[3] *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981) (recognizing inaccurate statements may be "because a witness or a party may be mistaken, uninformed, or erroneous in his facts or conclusions in many ways, and yet not be a liar").

[4] *Morris v. State*, 795 A.2d 653, 655–56 (Del. 2002) (finding plain error in trial court's failure to act *sua sponte* after prosecutor argued jury may acquit only if they find State's witnesses are "lying.")

[5] *Hughes,* 437 A.2d at 571 (permitting use of word "lie" when "(a) a legitimate inference which may be drawn from the evidence, and (b) … relates … to specific evidence which tends to show that the testimony or statement is a lie.")

[6] D.R.E. 608.

an individual who lies under oath once (which, unlike an unintentional untruth, reflects a view that testifying truthfully is a limited obligation) is more likely to (deliberately) do so again (especially when there is no accountability or remorse). The trial court's restrictions prevented Hazelett from making use of this dynamic.

i. **Evidence of lie(s), and findings of dishonesty.**[7]

The inaccuracies in Officer Moses' sworn testimony in the *Whittle* preliminary hearing and arrest affidavit have been thoroughly reviewed. Op. Br. at 7—8, 12—13. The Answer does not dispute Hazelett's description of that sworn testimony as "deliberately deceptive" (the definition of "lie") (Op. Br. at 13) but does claim that the trial court properly read *Whittle* in finding (amongst other things) that that "I can only *assume* because of the circumstances, that was misleading." Because there is "*no evidence* ... that there was a *finding* of untruthfulness." A56—57.

The trial court's reading of the *Whittle* Material is not supported by the *Whittle* Material. Op. Br. at 18—19 (describing evidence of such a finding). The trial judge did not need to rely on "the circumstances" of the *Whittle* dismissal and "*assume*" it was misleading – on the same page of the *Whittle* transcript from which the trial judge was reading (61), the *Whittle* Judge stated that the reason was "because of the

[7] Although Officer Moses' confession (A72—73) came after the trial court *began* its ruling, the trial court *sua sponte* reaffirmed the decision after the confession. A74.

circumstances of the Court of Common Pleas testimony," and immediately prior, the *Whittle* Judge described those "circumstances": "the Court of Common Pleas testimony led both this court and defense, for good reason, to believe Officer Moses had observed the conduct in person. A125.

And, to the degree that their reading of *Whittle* draws a distinction between "formal" and "informal" findings (A74; Answer at 9 and 19—20), "formality" is a distinction without a difference: this Court *routinely* recognizes and relies on implicit findings just like those in *Whittle*.[8]

Just in this record, Officer Moses provided three (or four)[9] different explanations of his inaccurate statements: to the *Whittle* jury he portrayed them as **(1)** an honest attempt to capture the chronology of what had occurred. A123. Next, for Hazelett's jury – after providing a revisionist account of his testimony at the *Whittle* trial: "when she asked me directly did you, did you see this video, I went right into it, I'm, like, Downtown Visions provided this information" (A121—124) – Officer Moses put forth two (or three) additional explanations: **(2)** he was a "very

[8] *See e.g. Sullivan v. Yanez*, 320 A.3d 195 (Del. 2024) ("the Family Court explicitly rejected his proffered theory as 'unpersuasive' and *implicitly found* that Father had engaged in a course of distressing conduct"); *Chrysler Corp. (Delaware) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1034 (Del. 2003) ("the trial judge *implicitly found* that this element was satisfied"); *Carter v. State*, 418 A.2d 989, 992 (Del. 1980) ("The Trial Judge explicitly or *implicitly found* such facts and there is sufficient evidence to support those findings.")

[9] Explanations 3a and 3b could be two parts of the same.

new officer" (A72); **(3a)** he testified differently at trial and at the preliminary hearing because the former is a "closed forum" and the latter is a "public forum" (A73); and **(3b)** he was protecting the safety of a witness (A73).

ii. **The trial court unjustifiably restricted cross-examination and defenses which suggested deliberate acts of dishonesty.**

Despite the Answer's view that there were no meaningful restrictions, the record shows that *Hazelett was prohibited* from engaging in a "line of questioning … [designed] to say that [Officer Moses] has lied" and (2) arguing that he lied. A57. The State has not even argued that such a use of the *Whittle* Material implicates any of the concerns which typically justify restrictions on cross examination: harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."[10] Moreover, upholding such restrictions on a record like this – which includes (i) sworn inconsistent statements, (ii) a suspicious number of explanations for those statements, (iii) an admission to having lied under oath on two occasions (to protect the safety of a witness) (iv) *at least* one untrue explanation (Officer Moses was not "very new") (Op. Br. at 12—13), and concessions by the trial prosecutor that (v) it is "a logical conclusion [from the record]… that Corporal Moses committed perjury," and (vi) were Hazelett permitted to engage in a cross examination designed to establish that Officer Moses

[10] *Snowden v. State*, 672 A.2d 1017, 1024 (Del. 1996).

had lied, there is "a real chance … of the jury or a juror thinking that Corporal Moses is a liar and that his testimony is not to be trusted" (A57) – would effectively sanction such restrictions in any case.

The State also fails to acknowledge Hazelett's repeated contention that the restrictions imposed on her did not just limit the questions she was permitted to ask, but her "*use* of the impeachment material" as a whole (Op. Br. at 3, 13—14, 14—15), to include the arguments she was permitted to make to the jury. Op. Br. at i, 3, 9, 13—16. Hazelett specifically argued that this part of the ruling violated her constitutional right to "a meaningful opportunity to present a complete defense"[11]

iii. The trial court's unjustified restrictions on arguments about the *Whittle* Judge's dismissal of that case.

The only restriction on cross-examination and argument which the State attempts to defend is the prohibition on arguing that *Whittle* was dismissed because of Officer Moses' dishonesty. Answer at 16. Notably, the Answer does not dispute Hazelett's position that, when supported by the record, there is nothing problematic *per se* about such arguments or lines of questioning. Op. Br. at n.34. Instead, it argues – as the trial court held – that those arguments and questions were properly prohibited because *Whittle* was *technically* dismissed because of hearsay, which would confuse the jury.

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[11] Op. Br. at n. 7 and accompanying text (citing *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)).

Whether the Officer Moses' dishonesty *caused* the *Whittle* dismissal is a question of semantics. It was important for the *Hazelett* jury to know – especially after Officer Moses' explanation of his *Whittle* testimony – that the *Whittle* Judge found Officer Moses to have been dishonest, and that finding played a key role in the dismissal. The inadmissibility of the hearsay statement which *technically caused* the dismissal was only admitted because the *Whittle* Judge was led to believe, by Officer Moses' dishonest preliminary hearing testimony, that Officer Moses would provide non-hearsay testimony about his live observations to supplement first officer's hearsay. A125.

The State's contention that the trial court was willing to permit the argument and line of questioning if "it will not tend to mislead the jury" *again misses the context*. Answer at 16. Any alternative trial counsel might have suggested would have violated the prohibition on any "line of questioning … [designed] to say that he has lied" (A57), which precluded any meaningful questioning or argument on subject matter, confusing or not.

iv. Smith v. State

In *Smith v. State* a similar but ultimately distinguishable issue was presented to this Court. Smith was accused of murder and other crimes connected to an armed robbery.[12] "During opening statements defense counsel suggested that … [the

[12] *Smith v. State*, 913 A.2d 1197, 1226 (Del. 2006).

State's two main witnesses] were lying."[13] The *Smith* trial court instructed counsel to use "untruthful," and informed the jury that it was up to them to determine if untruths were mistakes, or deliberate.[14] After openings, defense counsel asked for permission to use the word "lie" during cross-examination of these witnesses, which the judge denied.[15] Then, before closing arguments, trial counsel again asked to use the word "lie." The trial judge held that because (1) lying was a legitimate inference from the evidence, and (2) the argument relates to specific evidence tending to show as much, that the word "lie" was permitted during closing arguments.[16]

On appeal, Smith argued he should have been permitted to use the word "lie" during opening and cross-examination. The Court did not rule on that issue, and instead held, *even if that position is legally correct,* the error was harmless because

> *Defense counsel vigorously crossed [the witnesses] and was able to demonstrate that they both were "untruthful." Certainly, defense counsel's cross-examination was not less effective merely because he was required to say "untruthful" rather than "lie." Moreover, during closing arguments defense counsel was able to rehash [the witnesses'] testimony and describe the "untruthful" portions as "lies."*[17]

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[13] *Id.* 1224—25.
[14] *Id.* at 1225.
[15] *Id.*
[16] *Id.* at 1225—26; *see Hughes v. State,* 437 A.2d 559, 571 (Del.1981).
[17] *Smith*, 913 A.2d at 1226.

Not only is *Smith* distinguishable, but the basis of its ruling supports the opposite result in *Hazelett*'s case. There are three reasons:

First, Officer Moses, unlike the *Smith* witnesses, admitted to having provided deliberately deceptive sworn testimony.

Second, the ruling in *Smith* was clearly defined, and nowhere near as expansive as that imposed by the trial court here. Neither of the mitigators relied on by the *Smith* Court are present in this case: trial counsel was not just prohibited from saying "lie," or "liar," they were prohibited from arguing that Officer Moses lied (regardless of the words used), engaging in cross examination intended to establish that he lied, and "any questioning and any sort of inference to be made to the jury that the Whittle case was dismissed because of" a finding of dishonesty. A57—58.

And third, cross-examining a police officer is fundamentally different than cross-examining civilian witnesses (as was the case in *Smith*). Police officers have professional training in how to effectively testify, and benefit from the common belief that "a witness' association with the police department tends to provide [] independent guarantee of trustworthiness."[18] When these features are used to mislead a jury – as occurred here – our courts' truth-seeking function[19] and the due

[18] *Garden v. Sutton*, 683 A.2d 1041, 1044 (Del. 1996).
[19] *Buckham v. State*, 185 A.3d 1, 9 (Del. 2018) ("a trial judge must exercise [] discretion in service of the trial's truth-seeking function… [which includes their] control [of] how witnesses are interrogated") (addressing trial court's decision to allow witness to consult with counsel mid-testimony).

process principles underlying *Brady*[20] are advanced by providing more leeway for impeachment. Afterall, "cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."[21] But the trial court did the opposite.

Officer Moses is a savvy witness who, when cross-examined within the restrictions imposed by the trial court, was not just able to paint his deliberate dishonesty as the justified mistake of a young officer seeking to do the right thing; he parlayed the impeachment into an opportunity to make himself seem more sympathetic. A72—73 (claiming he was "advised…to try and not name Downtown Visions," claiming (dishonestly) that the "arrest warrant" he drafted contained accurate and complete information, describing how his *Whittle* testimony protected unarmed Downtown Visions employees, and informing the jury "even today, I still think that the protections of the people that are going out of their way to try and help police to clean up the city is important, and we need to ensure that they are not put in harm's way.") This prejudicial impact directly flowed from the trial judge's

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[20] As noted in the Opening Brief, "[t]he 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." Op. Br. at 17 (citing *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.")).

[21] *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

ruling, which left Officer Moses free to rationalize his untruths however he'd like, and trial counsel walking on eggshells without the necessary tools to control the witness.

It is nearly impossible to convince a jury that an officer has made a deliberately misleading statement unless trial counsel is permitted to conduct cross-examination designed to develop that point, and ultimately to argue that the officer in fact did so. The trial court's ruling prohibited both, despite that convincing the jury that they should not trust Officer Moses' testimony was an integral part of Hazelett's defense.

c. ***Prohibiting Hazelett from "any argument that it was an improper illegal stop" unconstitutionally restricted her rights to present a defense and to cross-examine the witnesses against her.***

The restrictions on using the *Whittle* Material to challenge Officer Moses' credibility were specifically, and expansively, applied to the alleged turn signal violation. A57 (prohibiting "any argument that the stop should not have been made"); A64 ("obviously there can't be any argument that it was an improper illegal stop"). The Answer (at 22—24) argues that the only restriction on Hazelett's traffic stop defense was that she was not permitted to argue that evidence should be suppressed because the stop should not have been made (as opposed to prohibiting her from arguing that the stop should not have been made). This would be a reasonable limitation, but it is not the one which was imposed.

Again, the context shows that the ruling effectively prohibited Hazelett from putting on any defense to the indicted turn signal violation. The ruling was issued in response to the prosecutor's position that "using Officer Moses' credibility to attack that one issue of fact, the circumstances leading up to a traffic violation is, *would be* litigating a suppression motion that never happened." A57. Importantly, the prosecutor was arguing that "using Officer Moses' credibility to attack" his claim to have seen a turn signal violation "would be" making an impermissible suppression argument and therefore should be prohibited. That argument is clearly wrong, but it is the one that the trial court adopted ((A57) ("I see your point [] about the turn")) and best explains the expansiveness of the prohibition on "*any argument* that it was an improper illegal stop." A64.

The trial court did not say that Hazelett was permitted to challenge the truth or reliability of Officer Moses' turn signal testimony, as long as she did not make a suppression argument. To the degree the judge allowed Hazelett to present any factual defense to the turn signal allegation, it was limited to "basic impeachment questions, but, again, within those parameters." A57. As the prosecutor's objection and the language of trial court's ruling suggest, the ruling was designed to restrict challenges to Officer Moses' credibility (based on the theory that, such challenges "*would be* litigating a suppression motion"), not avenues for relief which might flow from challenges to Officer Moses' credibility (like suppression).

d. ***Officer Moses' credibility was critical to the State's case.***

Because this is a constitutional error, this Court must reverse unless harmless beyond a reasonable doubt.[22] The State cannot satisfy that burden.

Hazelett's Opening Brief (at 10—12) argued that Officer Moses' credibility was critical because, as Chief Investigating Officer (CIO) and the only witness sitting at the prosecution's table, his credibility reflected directly on the adequacy of the investigation. Op. Br. at 10—11. The State has not addressed this profound prejudice. Nor has it addressed the argument that Officer Moses' (uncorroborated) claim to have seen furtive movements in the vehicle made constructive possession significantly easier by suggesting the drugs might have been moved around prior to the search, and negating the exculpatory nature of where they were actually found – not on or under Hazelett's seat. Op. Br. at 4 and 11.

In its attempt to minimize the importance of its own CIO, the State notes that the incident was captured on Officer Moses' body camera, which it argues Officer Moses was not necessary to introduce. Answer at 13. Firstly, the record does not show that other officers could necessarily have authenticated his body camera. It's certainly possible, but no officer made such a claim, and such a claim requires record evidence. Secondly, as the record indicates, and Hazelett argued (and the State does

[22] *Smith v. State*, 913 A.2d 1197, 1226 (Del. 2006).

not dispute) the quality of the videos *as shown* in the trial, was severely impaired.[23] Op. Br. at 10. And third, Officer Moses' six-minute BWC video does not come close to covering the ground of his (non-cumulative) disciplined, detailed, and step-by-step review of the encounter provided over 39 transcript-pages of direct testimony. A18—27; A47; A70—71. In particular, without Officer Moses' live testimony there is no evidence of his training in identifying marijuana through sight and smell (A18), no detailed description of his purported observations of the traffic offense (A19); no claim to have observed furtive movements prior to the stop (A21); and no claims that he smelled marijuana or observed a "burning blunt" (A21—22) (suspiciously, he alleges neither when discussing the marijuana in the video). B1 (22:18:40—19:20).

As to Hazelett's argument that Officer Moses "was essential to establishing the chain of custody of the marijuana" (Op. Br. at 12), the State only responds that Hazelett "neglects to specify how." Answer at 14 (citing Op. Br. at 12). As the record shows, the trial prosecutor took the position that Corporal Moses "had been the chain of custody for the marijuana." (A43) and Officer Moses authenticated the marijuana and explained that he is the one who "tagged" it. A45.

[23] For this same reason the videos included in the State's appendix (B1—2) – which do not capture whatever technological issue impacted the evidence presentation during trial – do not reflect the evidence considered by the jury.

CONCLUSION

The dispute regarding the *Whittle* Material began with an experienced prosecutor's concerningly flawed understanding of their *Brady* obligations and, over the course of the trial, snowballed into the trial court's unjustifiable deprivation of Hazelett's rights to cross-examination and to present a defense based on that material. The trial court was explicit; its intention was to greatly restrict these rights. And its ruling – which prevented Hazelett from establishing and arguing the significance of Officer Moses' undisputable credibility issues – did exactly that.

For the reasons and upon the authorities cited herein, this court should hold that those restrictions were unconstitutional, and Defendant's aforesaid convictions must be vacated.

Respectfully submitted,

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