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Case Number 223,2024D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ARTHUR DAVIS, Defendant—Below, Appellant v. STATE OF DELAWARE Plaintiff—Below, Appellee.	)	No. 223, 2024D

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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I. THE SUPERIOR COURT ERRED IN FINDING THAT THE STATE DID NOT NEED TO SEEK A MATERIAL WITNESS WARRANT FOR THE COMPLAINANT IN THIS CASE

Davis and the State agree that the Superior Court had to first determine if Brown was "unavailable" within the meaning of D.R.E. 804(a). The contention rests under subsection (5) and whether the State, did not by process or other reasonable means, procure Brown's attendance. Ans. Br. at 14. Even more specifically, what constitutes "reasonable means". The State relies on *Iverson v. State*[1] for the proposition that it need not "exhaust all available means or take any specific step" to procure the witness's attendance. Ans. Br. at 15.

In *Iverson,* the State had the Declarant's cooperation prior to trial. For example, the social worker spoke with the Declarant at least three times to confirm her willingness to cooperate with the DOJ. Additionally, she attended her first and final trial preparation meeting.[2] Cooperation only started to break down when the Declarant missed a trial preparation meeting, and the State could not reach her by phone.[3] In fact, three days before trial, the Declarant attended the final preparation meeting. The Superior Court opted to grant the State's motion *in limine* for leave to introduce the Declarant's statements under D.R.E. 804(b)(6) over defense counsel's

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[1] 2024 WL 4039927 (Del. Sept. 4, 2024).
[2] *Id.* at *1.
[3] *Id.* at *2.

request for a material-witness warrant when it was unclear whether she was going to show.[4]

Here, the State concedes that Brown was uncooperative as a witness right out of the starting gate. Ans. Br. at 28. The record reflects that the complainant was an uncooperative witness who changed her story. A18. The "[the complainant] was initially uncooperative with the State" and "[s]he contacted the State to drop charges and recant." A31. She voluntarily answered the phone when Davis allegedly called her and she chose not to answer when the Department of Justice contacted her. It should have been no surprise to the State that Brown would have reluctance to cooperate and that a more-intrusive means of process had an increased likelihood of success.[5]

"The right to compulsory service is not absolute and the defendant must show that the witness' testimony would be both material and favorable."[6] Brown was the State's star witness and her statements were the crux of their case. "[T]here is a reasonable likelihood that [her] testimony could have affected the judgment of the trier of fact."[7] Brown was a material witness for the defense because of the importance of cross examining her on her inculpatory statements.

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[4] *Id.*
[5] *State* v. *Iseli,* 458 P.3d 653, 669 (Ore. 2020).
[6] *Coles v. State*, 959 A.2d 18, 23 (Del. 2008).
[7] *Id.*

This established a violation of Davis's Sixth Amendment right to compulsory process and amounted to an abuse of discretion.

In its Answering brief, the State avoids addressing when a material witness warrant would have been appropriate in the instant case. This may be due to the fact that introducing the hearsay statements over Brown's live testimony was the State's trial strategy. As Davis pointed out in his Opening Brief, the State often uses material witness warrants as a tool to ensure key witnesses are available.[8] There is something fundamentally unfair for the State to cherry pick those instances where a material witness is sought, especially when a defendant's constitutional confrontation rights are at risk. Here, the Court erred by finding that Brown was unavailable. As a result of the Court's

[8] *See Watson v. State,* 80 A.3d 961 (Del. 2013)(victim's presence at trial had to be secured by means of a material witness warrant); *Miller v. State*, 222 A.3d 1042 (Del. 2019)(victim appeared at trial under a material witness warrant); *Dunn v. State*, 2014 WL 4698488 at *3 (Del. Sept. 22, 2014)(State witness was held on a material witness warrant because he failed appear on the day he initially was scheduled to testify); *Wyche v. State*, 113 A.3d 162, 165 (Del. 2015)(although witness was uncooperative the State secured his appearance with a material witness warrant); *Ashley v. State*, 85 A.3d 81, 84 (Del. 2014)(The State sought and received a material witness warrant and a new trial date was set to accommodate); *State v. Deshields*, 2008 WL 4868659, at *1 (Del. Super. Ct. Oct. 23, 2008)(State given continuance after court granted its second request for material witness warrant for an uncooperative witness); *State v. Caldwell*, 2020 WL 7752681 at *1 (Del. Super. Ct. Dec. 22, 2020)(Defendant's trial had originally been scheduled for October 2, 2018, but the victim failed to appear, so a material witness warrant was issued by the Court at the request of the State).

ruling, Davis was forced to have trial by videotape and lost the right to confront the most important witness against him. Reversal is now required.

II. THE SUPERIOR COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT THE STATE SATISFIED D.R.E. 804(B)(6), THUS PERMITTING THE STATE TO INTRODUCE THE COMPLAINANT'S INADMISSIBLE HEARSAY AGAINST DAVIS

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

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

The State's assertion that the development of the claim is limited to "a single sentence" in "the penultimate paragraph of his motion," is blatantly wrong. Terreros' State Constitutional claim was developed below in a clearly demarcated section which begins two pages before the single sentence spotted by the State. A415—17.

On top of misconstruing the record, the Answer's assertion that "an analysis of the English common law was not necessary" reflects a fundamental misunderstanding of the constitutional right at issue. The jurisprudence reviewed in the Answer does not even mention the Delaware Constitution; which – as clearly shown in the motion below (A415—17), and the Opening Brief (at 21—22), as well as the scholarly literature[9] and binding precedents[10] cited therein– incorporates the right to a jury trial as it existed at English Common law (unlike the federal analog), such that if inconsistent verdicts were prohibited at English Common Law, they are prohibited by the Delaware Constitution. Thus, not only was "an analysis of the English common law [] necessary" it was arguably the only necessary analysis. The State's description (Answer at 22—23) of Terreros' Opening Brief as an "attempt[] to ground his state constitutional claim in the English common law tenet that prohibited inconsistent verdicts," effectively concedes the claim by recognizing that

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

"English common law . . . [which is more or less dispositive, in fact] prohibited inconsistent verdicts."

CONCLUSION

For the reasons and upon the authorities cited herein, the undersigned counsel respectfully submits that Arthur Davis' convictions and sentences must be reversed.

Respectfully submitted,

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