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Case Number 489,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARVIN SWANSON, Defendant-Below, Appellant v. STATE OF DELAWARE Plaintiff-Below, Appellee.	)))))))))))	No. 489, 2024

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On January 2, 2024, Marvin Swanson, (Sawnson), was indicted on one count of possession of a firearm by a person prohibited and one count of possession of ammunition by a person prohibited.[1]

On April 12, 2024, Swanson filed a motion to suppress the DNA evidence taken from him following his unlawful stop, unlawful transportation to the police station and unlawful continued detention.[2] The State responded on May 22, 2024.[3] Swanson filed a reply on June 7, 2024[4] and on that same day, a suppression hearing was conducted. The judge denied the motion in a written decision issued. July 19, 2024.[5]

On August 5, 2024, Swanson went to jury trial. He continued to be represented by counsel through jury selection. For the remainder of the 2-day trial, he represented himself. In the end, he was convicted of both counts. When he was later sentenced, he was again represented by counsel. The judge imposed 5 years in prison followed by probation.[6] This Swanson's Opening Brief in support of a timely-filed appeal.

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[1] A1, 7.
[2] A9.
[3] A20.
[4] A41.
[5] July 19, 2024 Denial of Swanson's Motion to Suppress, Ex. A.
[6] November 1, 2024 Sentence Order, Ex. B.

SUMMARY OF THE ARGUMENT

1. Corporal Lerro's observation of a video made at an unknown time along with a tip from a confidential informant did not provide reasonable suspicion to stop Swanson as part of an investigatory detention. Assuming, *arguendo*, police had reasonable suspicion that Swanson was in possession of a handgun, they unlawfully converted that stop into a *de facto* arrest when they transported him to the police station without a non-investigatory reasonable and necessary reason. Thus, the exclusionary rule dictates that the items seized from Swanson at the station, including his DNA sample and admissions must be suppressed.

2. The trial court committed plain error when it failed to ask potential jurors during *voir dire* whether they had been or were currently a victim in a criminal case. Pursuant to *Knox v. State*, that question is necessary in order to identify any "victim bias" toward the prosecution. By failing to ask the question, Swanson was denied the opportunity to sufficiently probe the potential jurors with respect to bias. This, in turn, denied him his fundamental rights to trial by an impartial jury as set forth in Sixth Amendment of the United States Constitution and Article I, § 7 of the Delaware constitution, thus, his convictions must be reversed.

STATEMENT OF FACTS

On August 22, 2023, Corporal Lerro of the Wilmington Police Department, conducted "routine social media surveillance" in which he monitored the social-media accounts of multiple individuals.[7] One Instagram account that he followed, “lamotte margeez," purportedly belonged to Marvin Swanson. Lerro claimed that he was familiar with Swanson from prior interactions with him on the street.[8] According to the officer, he believed that “Lamotte” represents the name of a street on the north side of the city on which he believed Swanson frequented. The officer believed “Margeez” is Swanson’s street name.[9]

At a suppression hearing, Lerro told the judge that, at 1:26 p.m., he landed on the “lamotte margeez” account.[10] He claimed that he viewed a video on that account that had been posted about 28 minutes earlier, at or around 1:00 p.m.[11] Lerro conceded that he had no idea when the video was made.[12] In fact, it was possible that it was no even made the same day.[13] While the

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[7] A51-52.
[8] A53.
[9] A53.
[10] A55-56.
[11] A55-56.
[12] A87.
[13] Ex.A at p. 12 n.68.

officer “screen recorded” the video with an application from his phone,” he did not capture any sound.[14]

The video depicts two individuals. While the officer never identified one of them,[15] he claimed the other was Swanson and that he was wearing a white bucket hat, a black hoodie with Rick and Morty symbols, and jeans.[16] Lerro claimed that from viewing the background, he believed the video was made near the intersection of 23rd Street and Jessup Street.[17]

According to Lerro, he viewed at the 32 second mark of the video what appeared to be Swanson miming with his hands, the act of shooting a gun. There was no actual gun. Lerro then claimed that, at the 57 second mark, Swanson lifted his hooded sweatshirt from his waistband revealing "what appeared to be a magazine to a firearm."[18] The officer told the judge that based on his experience, it is “common” for individuals to hold a gun in that particular spot in their waistband.[19] He also stated that, at that time, he was aware that Swanson was prohibited from possessing a firearm.[20] Significantly, however, the trial court noted at the hearing and later explained

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[14] A56-57,63.
[15] A60.
[16] A55-56.
[17] A59-62.
[18] A64-65.
[19] A66.
[20] A66-67.

in its decision that "despite its best efforts, [it] is unable to make out a firearm (or any part of a firearm) on Defendant's waist in the video[.]"[21]

In Lerro's police report, he asserted that an informant also contacted him "involving Mr. Swanson being in possession of firearm." [22] The report did not provide any details of the tip as far as when he received it, the manner in which he was contacted, how the informant new Swanson was in possession of the gun, or where Swanson was located.[23]

At the hearing, 2 years after Swanson's detention, Lerro provided the court with more detail. He claimed that just about 25 minutes after he viewed the video, 1:50 p.m., a past proven reliable confidential informant happened to text him a screen recording of the same video he had just viewed.[24] The informant purportedly relayed that he too believed he could see in the video Swanson pull up his sweatshirt and reveal a magazine or handle. Then, at 2:10 p.m., about 20 minutes later, the informant purportedly texted Lerro again and claimed to be near the intersection of 23rd and Jessup. He supposedly told Lerro that Swanson was there and that he was wearing the same clothes as in the video.[25] Finally, Lerro claimed at the hearing, the

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[21] Ex. A at p.12.
[22] A91-92.
[23] A91-94, 108-109.
[24] A67-68.
[25] A69-70.

informant asserted that Swanson is still in possession of a gun. No information was provided to the court as to how he was aware of Swanson's possession.[26] Nor did the informant give a description of the weapon.

After the "tip," Lerro and assisting detectives decided to head out to the area of E. 23rd and Jessup. He claimed that as they approached the area in their unmarked vehicle, he could hear, through an open window, unknown individuals in the block call out warnings that police were in the vicinity.[27] He could not recall the specific warning that were made in this case. Just after 2:15 p.m., nearly an hour after the video was posted, police identified Swanson standing on the north side of the 300 block of 23rd Street. According to Lerro, Swanson was wearing the same clothes as he was wearing in the video.[28]

Lerro's partner stopped Swanson and patted him down.[29] No firearm was found.[30] Nonetheless, he remained in custody as detectives canvassed the area in hopes of finding a firearm.[31] Eventually, one officer lifted up a lid on

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[26] A69.
[27] A73.
[28] A74-78.
[29] A79.
[30] A79.
[31] A79.

a recycle bin and saw a silver and black handgun laying on top of the trash.[32] It was a Taurus G3 9mm loaded with 24 rounds of 9 mm ammunition in an extended magazine and one round in the chamber. The informant had never mentioned that the gun was located at a location separate from Swanson.[33] In any event, police placed Swanson in handcuffs, put him in the back of the police vehicle and took him to the Wilmington Police Station.[34]

Lerro told the judge that police took Swanson to the station to continue their investigation. They sought to obtain a DNA sample from him and a sample cannot be obtained at the scene.[35] In its later decision, the trial court found that the reason police transported Swanson to the station was, in fact, to continue their investigation by obtaining DNA evidence.[36]

Once at the station, police did not simply obtain Swanson's DNA sample. Rather, they first conducted a custodial interrogation.[37] It was only during that interrogation, that the topic of DNA was raised, and it was raised spontaneously by Swanson.[38] He purportedly gave "consent" for police to

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[32] A80-81.
[33] A95.
[34] A81-82.
[35] A81-82, 96-97.
[36] Ex. A at pp. 5, 16-17.
[37] A83-84.
[38] A84.

take his DNA.[39] After police obtained the reference sample from him, they released him from custody without charges at 3:10 pm.[40]

It was not until about 4 months later, after receiving the results from the DNA testing on the firearm, that police arrested Swanson and charged him with unlawfully possessing the firearm and ammunition.

[39] A84.
[40] A84.

I. POLICE UNLAWFULLY OBTAINED STATEMENTS AND DNA EVIDENCE FROM SWANSON AT THE POLICE STATION BECAUSE THEY LACKED REASONABLE SUSPICION TO CONDUCT AN INVESTIGATORY STOP AND THEY HAD NO REASONABLE OR NECESSARY NON-INVESTIGATORY PURPOSE TO TRANSPORT HIM AWAY FROM THE SCENE OF THE STOP.

Question Presented

Whether police unlawfully obtained statements and DNA evidence from Swanson when he was stopped without reasonable suspicion and when, even if there was reasonable suspicion for the stop, police transported him from the scene to the police station to continue their investigation through questioning and obtaining a DNA sample from Swanson.[41]

Standard And Scope Of Review

When reviewing a denial of a motion to suppress evidence, this Court reviews the trial court's legal conclusions *de novo*. When reviewing the trial court's factual findings, this Court determines whether the trial court abused its discretion in deciding whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous.[42]

Argument

An individual's right to be free of unlawful searches and seizures in

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[41] A9.

[42] *See Lopez-Vazquez v. State*, 956 A.2d 1280 (Del. 2008).

Delaware is secured by two constitutional provisions. First, "[t]he Fourth Amendment to the United States Constitution guarantees to individuals the right to be 'secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' [And, second,] Article I, § 6 of the Delaware Constitution guarantees that the people of the State of Delaware 'shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures.'" [43] In addition, under 11 Del. C. § 1902 (a), "[a] peace officer may stop a person abroad, or in a public place, who the officer has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand the person's name, address, business abroad and destination." The term "reasonable ground" has the same meaning as reasonable and articulable suspicion.[44] To the extent an investigatory detention is supported by reasonable articulable suspicion, it must be minimally intrusive and reasonably related to the circumstances justifying the interference.[45]

In response to Swanson's motion to suppress and at the suppression hearing, the State claimed that police "lawfully detained Swanson based on

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[43] *Jones v. State*, 745 A.2d 856, 860 (Del. 1999) (quoting U.S. Const. amend. IV; Del. Const. art. I, § 6).
[44] *Jones*, 745 A.2d at 861.
[45] *Hicks v. State*, 631 A.2d 6, 11 (Del. 1993).

reasonable suspicion that he was committing or had committed [weapons] offense[s]"[46] and that it was reasonable and necessary under 1902(c) to transport him from the scene to continue an investigation.[47] The trial court's subsequent decision turned on its analysis of reasonable suspicion because, as it noted, "[b]oth sides agree the officers needed reasonable articulable suspicion to stop and detain Defendant without a warrant." [48] Here, police had no reasonable basis to stop Swanson and his removal from the scene was far from minimally intrusive. Accordingly, the DNA evidence and statements made by Swanson at the station should have been excluded from trial. His convictions must now be reversed.

1. Lerro's observations along with the purported tip from a confidential informant did not provide reasonable suspicion to stop Swanson as part of an investigatory detention.

A determination as to reasonable, articulable suspicion must be evaluated in the context of the totality of the circumstances.[49] Under this test, an officer must "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion."[50] Here, court erroneously found that Lerro lawfully stopped Swanson based on

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[46]A37, 109.
[47] A34, 109.
[48] Ex. A at p. 8.
[49] See *United States v. Cortez*, 449 U.S. 411, 417-418 (1981).
[50] *Coleman v. State*, 562 A.2d 1171, 1174 (Del. 1989). *Jones*, 745 A.2d at 860.

his observation of a video on Instagram and a "tip" from a confidential informant. Specifically, the court pointed to: Lerro's belief that he could see, in the video, Swanson miming the shooting of a gun; the officer's belief that he could see, in the video, a magazine or handle of a firearm peeking out of Swanson's waistband; the timing of the video's posting in relation to the search (i.e., that the video was posted within hours of the search on the same day); Swanson's clothing when they encountered him matched his clothing in the video; the "call out" by neighbors as the officers approached; and the criminal informant's purported statements to Lerro.[51] Contrary to the trial court's conclusion, the totality of these circumstances did not provide reasonable suspicion to stop Swanson.

Lerro had no idea whether the video was created the same day that it was posted. He offered no explanation, based on training, experience or otherwise, as to how Swanson's miming the shooting of a gun contributed to reasonable suspicion. Lerro did testify that he believed he observed in the video what appeared to him to be a portion of a firearm protruding out of the top of Swanson's pants. However, the officer acknowledged that one could conclude that the item was something other than a firearm, such as a cell

[51] Ex. A at pp. 12-13.

phone.[52] In fact, in its decision, the court expressed that, even after having the opportunity to watch the video multiple times, "despite its best efforts, [it] is unable to make out a firearm (or any part of a firearm) on Defendant's waist in the video[.]"[53]

The remaining observations from the video (time of posting, clothing and possible location) only supported reasonable suspicion that whenever Swanson made the video, he may have been located near 23rd and Jessup. And the informant's "tip" added nothing to Lerro's observations.

According to the police report, Lerro was "contacted by a confidential past, proven, reliable source that Swanson was in possession of a firearm and advised he was wearing a white in color hat."[54] No details were provided regarding the method of contact, the time of the tip, or the informant's means of knowledge of Swanson's purported possession. It was only two years later, at the suppression hearing, that Lerro expanded on the nature of the tip.

Even accepting the additional information, which the trial court did, the tip fell short of supporting reasonable suspicion. The informant apparently texted the officer a recording of the same video he already viewed. This information added nothing at it was the same that Lerro already viewed. The

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[52] A89.
[53] Ex. A at p.12.
[54] A117.

additional "tip" provided at 2:10 p.m. claimed the informant was located at 23rd and Jessup, that Swanson was present and wearing the same clothes as in the video, and that Swanson had a gun. There was still no information as to how the informant was aware Swanson had a gun, as to where Swanson possessed the gun, or as to a description of the gun.

To the extent the informant's tip was as Lerro described at the hearing, it provided, at best, only confirmation of Swanson's location.[55] There were no details allowing police to confirm the claim that Swanson was engaged in unlawful activity. In other words, there was insufficient detail to support a finding of reasonable suspicion.[56]

It is true that a "call out" can be a factor in the reasonable suspicion analysis as a specific fact.[57] Here, however, it provides has little value. Lerro testified that it is not unusual for individuals to call out warnings when they see police in the area. There were multiple people in the area when police

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[55] See *Riley v. State*, 892 A.2d 370 (Del. 2006) (holding that the defendant's "mere presence in a shopping center being monitored for underage liquor sales" did not equate to reasonable articulable suspicion and that the "observations of the officers were all consistent with innocent behavior.")

[56] See *Purnell v. State*, 832 A.2d 714, 720 (Del. 2003) (finding sufficient information provided by past proven reliable informant because, in large part, because he matched "detailed description" of what the suspects were wearing and unlawful activity in which they were engaging).

[57] See, e.g., *State v. Rollins*, 922 A.2d 379, 385 (Del. 2007) ("[T]he focused warning shout 'five-O' contributed to the police officers' reasonable suspicion that the [suspect] might be engaged in criminal activity.").

arrived. There is no information as to whether the call out was directed at Swanson or that Swanson even heard the call outs.

Finally, the search of Swanson resulted in no discovery of a firearm at his waist or on any other part of his body or clothes. To the extent police had any reasonable suspicion that Swanson possessed a gun, it was dispelled at that moment. It is at this point that he should have been released. Yet, police continued to unlawfully detain him while they hunted for evidence in the area.

When police found a gun in the recycle bin, they had nothing linking that weapon to Swanson. As Lerro testified, it is not unusual in that area for various individuals to ditch their guns or drugs after hearing a "call out." Accordingly, the gun could have belonged to any of the multiple individuals on the street that day, or from any other day.

Accordingly, at that point, police had no reasonable articular suspicion to justify Swanson's continued detention.

2. Assuming, *arguendo*, police had reasonable, suspicion to justify Swanson's initial detention, police unlawfully converted that stop into a *de facto* arrest when they transported him to the police station.

Lerro testified and the trial court subsequently found that the only reason police transported Swanson to the station was to continue his investigation by obtaining DNA evidence. The officer claimed the transportation was necessary as it is not possible to conduct a "cheek swab"

of an individual on the street. The trial court erroneously concluded that this explanation was sufficient to allow police to transport Swanson to the station even though there was no probable cause to arrest him. The court also erroneously found the transport to the WPD station to collect his DNA was "minimally intrusive and reasonably related in scope[.]"[58]

The court's decision in our case is directly contrary to the holding in *Hayes v. Florida* that "the line is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home *or other place in which he is entitled to be* and transport him to the police station, where he is detained, although briefly, for investigative purposes."[59] *Hayes* does recognize that in limited non-investigative circumstances, such as the interest of safety or security, transportation from the scene may be reasonable and necessary short of a finding of probable cause.[60] No such non-investigatory interests were offered as the basis for Swanson's transportation.[61]

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[58] Ex. A at 17.

[59] 470 U.S. 811, 816 (1985). *See State v. Murray*, 213 A.3d 571, 577 (Del. 2019) (noting the holding in *Hayes)*. *But see State v. Biddle*, 1996 WL 527323, at *18 (Del. Super. Ct. Aug. 9, 1996) (finding that fingerprinting taken at the station was not unlawful because the defendant consented to the transportation).

[60] *Id.*

[61] Ex. A at 16.

The trial court did recognize the significance of the lack of safety or security concerns in our case when it explained the distinction between our case and that of *State v. Kang*.[62] In *Kang*, the court concluded that it was "reasonable and necessary" to transport the defendant to a controlled location to conduct a sobriety test because the roadway was at an incline, it was dark, there was a large crowd, and the defendant's deceased friend was still at the scene.[63] Here, on the other hand, police transported Swanson solely for purposes of investigation. "[T]here was no probable cause to arrest, no consent to the journey to the police station, and no judicial authorization for such a detention for [DNA] purposes."[64]

"The 'line' between an investigative stop and a de facto arrest was certainly "crossed" when the police forcibly removed [Swanson] from a place he was entitled to be and transported him to the police station and detained him" in a "custodial setting."[65] In fact, the circumstances reveal that the officer knew they needed "more" before they could obtain the DNA evidence.

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[62] 2001 WL 1729126, at *7 (Del. Super. Nov. 30, 2001).
[63] *Id.*
[64] *Hicks*, 631 A.2d at 12 (finding unlawful transportation from the scene to hardware store about ½ mile away "to avoid any potential threat from the growing crowd" during a continued investigation). See *Florida v. Royer*, 460 U.S. 491, 504–05 (1983) (finding continued investigation after relocating the defendant to a police room in the airport to be unlawful).
[65] *United State v. Wrensford*, 866 F.3d 76, 87 (3d Cir. 2017).

For investigative purposes, probable cause is required to gain a DNA sample from a suspect.[66] However, rather than continuing their investigation in this case by seeing a search warrant, police chose to forcibly remove Swanson from the scene to question him at the station and obtain consent. Lerro stated that, had they not obtained consent from Swanson, they would have sought a search warrant.[67]

Unlike other evidence, such as blood alcohol content, there were no exigent circumstances that required Swanson's DNA sample be obtained immediately. Police had taken the gun off the street. Any DNA sample from Swanson that police thought they may for their investigation was not going to disappear. Police can obtain DNA anytime so long as they had probable cause. Finally, once police obtained Swanson's unlawful consent and unlawfully obtained his buccal swab, they released him uncharged. He remained uncharged and "on the street" for four months. This only reinforces the fact that there was no lawful basis to take him to the station in the first place.

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[66] *Flonnory v. State*, 109 A.3d 1060, 1063 (Del. 2015) (internal quotations omitted); *Hunter v. State*, 783 A.2d 558, 560 (Del. 2001).
[67] A84.

3. The exclusionary rule dictates that the items seized from Swanson, including his DNA sample, and admissions made following his stop and search must be suppressed.

The Delaware Supreme Court has stated: "The exclusionary rule acts as a remedy for a violation of a defendant's right to be free of illegal searches and seizures. It provides for the exclusion from trial of any evidence recovered or derived from an illegal search and seizure."[68]

Here, Swanson's statements at the station and his "consent" to provide police with his DNA were obtained through an illegal detention. The officers in this case did not have reasonable suspicion to believe that he had committed or was committing a crime. Therefore, there was no lawful reason to seize him. Assuming, *arguendo*, this Court finds that his detention was supported by reasonable suspicion, the DNA sample and any admissions made at the station were unlawfully obtained as they were the result of Swanson's unlawful transportation by police to the station. Therefore, the evidence should have been suppressed. His convictions must now be reversed.

[68] *Jones*, 745 A.2d at 872 (citing *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wong Sun v. United States*, 371 U.S. 47 (1963)).

II. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO ASK POTENTIAL JURORS DURING VOIR DIRE WHETHER THEY HAD BEEN OR WERE CURRENTLY A VICTIM IN A CRIMINAL CASE.

Question Presented

Whether the trial court is required, as a matter of routine, to ask potential jurors whether they have been or currently are victims in a pending criminal case.[69]

Standard And Scope Of Review

Generally, "when the trial judge fails to conduct a sufficient inquiry into juror bias, [this Court is] required to independently evaluate the fairness and impartiality of the juror."[70] A review of a trial judge's failure "to make a sufficient inquiry into potential juror bias, our examination is more analogous to *de novo* review."[71] When an issue is not raised below, it is reviewed under a plain error standard to determine whether there are any "material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[72]

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[69] Delaware Supreme Court Rule 8.
[70] *Schwan v. State*, 65 A.3d 582, 590 (Del. 2013).
[71] *Id.* (citing *Knox v. State*, 29 A.3d 217 (Del. 2011)).
[72] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

Argument

During *voir dire*, the trial court did not ask the potential jurors whether they had been or were currently victims of a crime.[73] While defense counsel did not submit this question to the court to be asked, this Court's decision in *Knox v. State*[74] requires the question be asked as a matter of routine to ensure a sufficient inquiry into juror bias.

In *Knox*, the trial court did not ask the potential jurors whether they had been or currently were victims in a criminal case. Subsequently, facts came out that the particular juror was currently a victim in a pending case. The trial court failed to perform an adequate follow up with that juror to ensure that she was impartial during trial. Defense counsel did not object to the means by which the trial court handled the issue. In reviewing the denial of Knox's subsequent motion for new trial, the trial court found plain error and reversed.

Here, because the question was not asked, there was no way for Swanson to probe the potential bias during *voir dire.* Had the judge questioned the potential jurors in our case as to whether they had been or were currently victims in a criminal case, it would have allowed Swanson to probe potential bias. And, even if the court found that a potential juror who was a

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[73] A133-134.
[74] 29 A.3d 217, 224 (Del. 2011).

victim of a criminal case could serve, "any rational defense counsel would be alerted to exercise a peremptory challenge to strike" that juror.[75]

The question is required even though the jury was asked the narrow question as to whether they knew the prosecutor or anyone in her office.[76] The more specific question is necessary in order to identify any "victim bias" toward the prosecution.

> Unlike a witness who is indifferent to the resolution of a case and has no formal relationship with the prosecution, a victim is emotionally invested in the outcome and personally dependent on the attorney general to bring the person the victim perceives to be the wrongdoer to justice.[77]

Significantly, the State was given the opportunity to weed out jurors who may have had a bias against it when the judge asked,

> Are you, any member of your immediate family, or a close personal friend, under investigation for, or being prosecuted for any criminal offense anywhere?[78]

The court's failure to ask that question in our case amounts to plain error. It denied Swanson his fundamental rights to trial by an impartial jury as set forth in Sixth Amendment of the United States Constitution and Article I, § 7 of the Delaware Constitution, thus, his convictions must be reversed.

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[75] *Knox*, 29 A.3d at 224.
[76] *Id.*
[77] *Id.* at 221.
[78] A134.

CONCLUSION

For the reasons and upon the authorities cited herein, Swanson's convictions must be reversed.

Respectfully submitted,

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DATED: May 14, 2025