



IN THE SUPREME COURT OF THE STATE OF DELAWARE

RONALD BOULDEN, )  
                          )  
Defendant Below,    )  
Appellant,            )  
                          )  
v.                    )      No. 309, 2025  
                          )  
STATE OF DELAWARE    )  
                          )  
Plaintiff Below,    )  
Appellee.            )

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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## **NATURE AND STAGE OF PROCEEDINGS**

On April 10, 2023, the Appellant Ronald Boulden was arrested. A1: D.I. 1. On October 7, 2024, a grand jury returned a true bill (A1: D.I. 2) charging him with Aggravated Menacing (Court I), Possession of a Firearm During the Commission of a Felony (Count II), and Felony Terroristic Threatening (Count III). A5-6.

Before trial on June 23, 2025, Boulden filed a Motion in Limine to Dismiss or, alternatively, for a *Lolly* Instruction. A3: D.I. 27; A231-248. Following the arguments of counsel, the Trial Court denied both the remedies sought in Boulden's Motion (Exhibit B; A27-30), and the case went to trial before a jury.

On June 24, 2025, the second day of trial, after the State's evidence was complete, the Trial Court granted Boulden's motion for judgment of acquittal as to Count II. A172. Later that day, following closing arguments and the reading of the instructions, the jury returned verdicts of guilty as charged to the remaining counts of Aggravated Menacing and Felony Terroristic Threatening. A4: D.I. 30, 31.

The Trial Court sentenced Boulden immediately after the verdict to terms of imprisonment suspended for 18 months of probation with several other conditions. Exhibit A; A227-228.

On July 15, 2024, Boulden filed a timely notice of appeal (A4: D.I. 35), and this is his opening brief on direct appeal to the Supreme Court of Delaware.

## **SUMMARY OF ARGUMENT**

1. The Trial Court erred in denying Defendant's Motion in Limine to Dismiss or, in the alternative to for a *Lolly* Instruction where the police failed to collect and preserve material doorbell camera video evidence presented to them by a cooperative neighbor at the scene of an alleged crime. The body-worn camera recording of the police reviewing the video clips and listening to the audio and the citation in the arrest warrant of what the police said they heard and saw show their materiality such that they would have been discoverable by the Defendant at trial if the video had been preserved and also establishes the negligence of the police in failing to preserve the clips shown to them and in making no effort to collect the rest of the doorbell camera video. Because the State's case against the Defendant consisted entirely of the testimony of the complaining witness, the missing evidence was important, and the State's negligent failure to make any effort to collect and preserve it prejudiced the Defendant. The Trial Court should have dismissed the case because the contents of the missing video could have been case dispositive. Alternatively, the Trial Judge should have given an instruction to jury that the evidence, if it had been preserved, would have tended to show the Defendant's innocence. This constitutional error was not harmless beyond a reasonable doubt.

## **STATEMENT OF FACTS**

Before trial on June 23, 2025, Boulden filed a Motion in Limine to Dismiss or, alternatively, for a *Lolly* Instruction (the “Motion” or “Boulden’s Motion”).<sup>1</sup> Attached as exhibits to the Motion were the affidavit of probable cause of the arrest warrant<sup>2</sup> and a thumb-drive containing a police body-worn camera clip that captured investigating police officers watching what the probable cause affidavit characterizes as “a ring doorbell camera.”<sup>3</sup> While the doorbell camera clips reviewed by the police on the body-worn camera clip apparently had both video and audio, the police camera only captures some of the audio.<sup>4</sup> In paragraph 6 of the arrest warrant probable cause affidavit, New Castle City Police Corporal Andrew Davis swears that “the last part of the verbal exchange was audibly captured on a ring door bell [sic] camera and retrieved by Officer’s [sic] on the scene. At no point does The Accused [sic] walk into view of the Ring doorbell camera.” Presumably, “the last part of the verbal exchange” is found in paragraph 5 where Davis swears that the “Accused stated ‘I don’t care, call the fucking cops’” to the complaining witness, Brian Alessi.<sup>5</sup> Boulden’s Motion complains of the failure of police to take any action to collect or preserve material evidence, i.e., the recorded doorbell camera

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<sup>1</sup> A3: D.I. 27; A231-248 (Boulden’s Motion).

<sup>2</sup> A245-247.

<sup>3</sup> A260 (thumb-drive attached to Boulden’s Motion in Limine at A248).

<sup>4</sup> *Id.*

<sup>5</sup> A247.

video made known, and presented, to them when the neighbor's phone was in their physical possession and they had twice viewed the clips from that camera.<sup>6</sup> It sought either case dismissal or an instruction to the jury that the missing evidence, if it had been extant, would have tended to exculpate Boulden.

### **Pre-trial Argument and Ruling on the Motion**

The Trial Court heard argument from the State and Boulden.<sup>7</sup> With regard to the Motion, Defense Counsel argued

that police have this surveillance video. They actually had it in their hand. They listened to it twice. It was very difficult to hear and to see. At one point they're holding it up to the ear to try to see if (\*A17) they can hear anything. They claim they can hear things, then they give it back and walk away.<sup>8</sup>

The Trial Court's noted that "this is a video that is from a neighbor who could have or could not have given it voluntarily to the police. And if they didn't, then it was going to have to be subpoenaed." The Trial Court then asked, "[H]ow do we know that they have the sort of ring subscription that even allows them to do it?"<sup>9</sup>

To dispel the Trial Court's expressed belief that the police body camera video might be considered the same or an adequate "copy" of the ring camera clips, the

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<sup>6</sup> A231-248 (Boulden's Motion); A260 (thumb-drive attached to Boulden's Motion in Limine at A248).

<sup>7</sup> A16-27.

<sup>8</sup> A17-18.

<sup>9</sup> A18.

Defense noted the clips were merely “a brief excerpt” and that the video images and stream from the clips cannot be seen on the body worn camera footage:

You can't see images there. Police say you don't see anyone here, but you can hear them. We don't know if that's the case. We don't know if there was something before or afterwards, so this is not simply a facsimile, an exact replica of what actually happened. This is an excerpted portion of low quality where even the police are trying to listen to it more than once to make out what's happening there.<sup>10</sup>

With regard to the duty to preserve evidence, the Trial Court commented on the lack of information existing in the case about the nature of the doorbell camera clips:

I know there's several different types of ring subscriptions, some that you can send to the police; some that just go away; some that for some reason or another may take a while because somebody refuses to turn it over to the police. So like, you know, when I think about a duty to preserve, I understand that perhaps at one point it was in the (\*A20) possession of the police because the police actually saw the video on the phone, but that neighbor would have had to sort of voluntarily turn it over or be subpoenaed.

MR. FLOCKERZIE: Or be asked, right. And so --

THE COURT: That's what I mean, asked, but they could have refused, though.

MR. FLOCKERZIE: Sure. But they were never asked. And I think if the evidence was police asked the neighbor, he refused; police followed up and asked; police went to Ring.com to get the evidence and it had been overwritten, I wouldn't be making this application. But the reality is the police listened to it, say thank you, and walk away. And that's it. There's no effort. There's no attempt to preserve what has been in their hands, and that's why this was negligent is because they never even sought to do it.<sup>11</sup>

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<sup>10</sup> A19. The complaining witness' trial testimony confirmed the poor quality of audio captured on the police body-worn camera. A107-108.

<sup>11</sup> A19-20

Defense Counsel went on to highlight the neighbor's obvious willingness to cooperate with the police:

But I think the other part of this is they asked the neighbor if they could view it, and he says yes. So there's not any indication that this person was unwilling or uncooperative to provide what information he had, but if the -- I mean, downloading a video, I think, is not all that challenging, but I think the important part is that they have it and gave it back and it's just gone now. They never even sought to preserve it.<sup>12</sup>

I think the reality is what we're being told is just trust the police, they saw it, that's good enough for you. And that's not how the system works. We should be allowed to review this for ourselves. Maybe there was something that happened, an altercation that predated this that happened earlier on in the video that they didn't look for, or a follow-up that we're not able to see. We're being told, trust the officers, they saw it. The fact that you can't see it, well, they said there's nothing there, so don't worry about it.<sup>13</sup>

The Trial Court did not dismiss the case and made the following ruling denying Boulden's request for a *Lolly* missing evidence instruction:

As to the Lolly/Deberry instruction, *Johnson v. State* holds that a three-step inquiry is required. One with the requested material if extent in the position of the State at the time the defense requires have been subject to disclosure under Rule 16 or Brady. If so, did the government have a duty to preserve the material. And third, (\*A29) if there was a duty to preserve, was the duty breached and what consequences flow from the breach. If the Court determines that the State did indeed have a duty to preserve evidence and that duty was breached, the Court must next determine the appropriate sanction for the breach which is determined by analyzing, one, the degree of negligence or bad faith involved; two, the importance of the missing evidence considering the probative value and reliability of the

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<sup>12</sup> A21.

<sup>13</sup> A23.

secondary or substituted evidence that remains available; and three, the sufficiency of the other evidence produced at trial to sustain the conviction.

Here the video is not in the possession of the police. While known to the police that the evidence existed, the Court is not convinced that the police would have been able to actually collect the video, given the other concerns that I raised previously, such as whether the neighbor would have voluntarily turned it over without a subpoena, and whether the Ring subscription even would have enabled the neighbor to do that. The Court is not prepared to make a blanket statement at this time (\*A30) that the police are required to ask for the video under every circumstance as the defense implies. Even if required under Brady or Rule 16, the Court finds that the purported failure to collect the evidence was not negligent or in bad faith. The officers recorded the video on their body cam, so the evidence was preserved in that sense. The defendant is, of course, free to make any other argument at trial regarding the video and cross-examine each witness regarding the video.<sup>14</sup>

### **Trial**

The Defendant Ronald Boulden, who lived at 9 Victorian Court in the City of New Castle, was accused of threatening and pointing what appeared to be a gun at his neighbor Brian Alessi, who lived two houses away at Number 7.<sup>15</sup> The doorbell camera footage came from the neighbor's house located between them.<sup>16</sup>

### **Testimony of Complaining Witness**

According to the testimony of the complainant Brian Alessi, he was changing a tire on his vehicle in his driveway when Boulden's granddaughter came home.

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<sup>14</sup> A28-30. Exhibit A.

<sup>15</sup> A5-6; A71.

<sup>16</sup> A71.

Alessi stopped what he was doing and left his property to talk to her about a “falling out” between her and Alessi’s stepdaughter that had gotten “ugly between them.”<sup>17</sup> Alessi testified that “[s]he stopped in front of her front door” and “I stopped on the driveway between our houses, the neighbor between us.”<sup>18</sup> Alessi then describes his conversation with Boulden’s granddaughter as he stood in the neighbor’s driveway:

And I said, "Look, you guys have a problem. Why don't you come over, sit down like adults and talk? Stop this ghetto stuff coming to the house on the property threatening her." She starts telling me everything that's going on. I said, "I don't care. I don't want to know. I'm not interested in what happened. All I want is for you guys to be adults about it. Stop this stuff."

And as I'm talking, her grandmother comes out and she standing there holding her shoulders listening. I look at her and said, "Am I making sense?" "Yes, you are."<sup>19</sup>

According to Alessi, Boulden then

comes out with a revolver. I saw it was a revolver, handgun. And he comes out, makes a left, and he's screaming at me, "Get out," pointing the gun at me.

I said, "Sir, I'm not on your property." And what I started to say was, I'm just trying to have a reasonable conversation with your granddaughter. As I said, "I'm not on your (\*A101) property," he said, "I don't care. I'm going to kill you." I backed out, went into the garage, called 911.<sup>20</sup>

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<sup>17</sup> A98-99.

<sup>18</sup> A99.

<sup>19</sup> A100.

<sup>20</sup> A100-101.

Alessi later admitted that he did not originally tell the police that he had been verbally threatened and had to call them back to amend his version of the events to include the allegation that formed the basis for the Terroristic Threatening charge.<sup>21</sup>

Alessi testified at trial that at some point he was played the body-worn camera footage that captured the police playing the doorbell camera clips. He described it as “very hard to hear much of what was being said.” Alessi said that he heard his own voice and “may have heard—I heard [Boulden’s] voice, but I couldn’t make out what he was saying.”<sup>22</sup>

### **Police Testimony**

When the police arrived at the scene, the neighbor from 8 Victorian Court, whose home was located between Alessi’s and Boulden’s houses, came outside, and handing his phone over to the police, showed them two clips from a Ring, or Ring-like, camera.<sup>23</sup> Although the Corporal Davis’s sworn affidavit supporting the arrest warrant described “the verbal exchange audibly captured on a ring doorbell camera,”<sup>24</sup> his trial testimony hedged as he backed away from his sworn statement in the affidavit:

Q. When you looked at the surveillance footage, how did that surveillance system operate?

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<sup>21</sup> A115-117.

<sup>22</sup> A107-108.

<sup>23</sup> A71.

<sup>24</sup> A247.

A. It's a Ring camera system. *I'm not sure if it was Ring, but it's like a Ring camera system. There's multiple out there. But it just comes in with little clips motion-activated typically.*<sup>25</sup>

Nevertheless, Corporal Davis testified to the neighbor being very cooperative:

Q. What was your -- was that the next step in your investigation?

A. Yes. So it worked out pretty well that -- so Mr. Alessi lives at 7; Mr. Boulden was at 9 Victorian Court. The neighbor in between has a Ring doorbell camera. He just happened to come outside as we were there, so I made contact and was able to review surveillance on his cell phone.<sup>26</sup>

After reviewing the video, the police handed back the phone to the neighbor.<sup>27</sup>

After the police arrested Boulden, they “secured the residence,” leaving “an officer [to] stand by. . . to make sure no evidence was taken out, messed with, whatever.”<sup>28</sup> They then obtained search warrants from the Justice of the Peace Court to search for the gun allegedly used.<sup>29</sup> Although warrants were obtained for both Boulden’s house and his pick-up truck, and guns were collected from a safe in the basement,<sup>30</sup> the police did not seek a warrant, subpoena, or the neighbor’s cooperation or consent to obtain or preserve the neighbor’s doorbell camera video clips either from the neighbor himself or from the camera’s carrier. The record of

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<sup>25</sup> A71 (italics added).

<sup>26</sup> Id.

<sup>27</sup> A260 (thumb-drive attached to Boulden’s Motion in Limine at A248).

<sup>28</sup> A79.

<sup>29</sup> A80.

<sup>30</sup> A84-85.

the trial is bare of any indication the police even considered asking the cooperative neighbor if they might make them a copy or if he would send them one.<sup>31</sup>

The State was ultimately unsuccessful in its attempts both to lay an adequate foundation for the admission of the body-worn camera footage showing the officer's review of the doorbell camera clips<sup>32</sup> and to establish relevancy for the admission of any particular firearm that had been seized,<sup>33</sup> and the Trial Court dismissed the weapons charge on a motion for judgment of acquittal.<sup>34</sup>

In closing, Boulden argued to the jury that the State failed to meet its burden of proving the charges beyond a reasonable doubt because

the State told you that you would see video surveillance of this incident. The State failed to provide that to you. The State told you yesterday in their opening they were going to show you photographs. The State failed to show photographic evidence in this case. The one thing the State did was introduce this map. It's the only piece of evidence they admitted. Never admitted a gun. Never admitted video surveillance.<sup>35</sup>

Because of these failures, Boulden argued that the State had failed "to provide. . . corroboration" necessary to convict.<sup>36</sup>

Following final jury instructions and deliberation, the jury sent a note saying they had reached a verdict for the Aggravated Menacing count but were unable to

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<sup>31</sup> A20.

<sup>32</sup> A111-112.

<sup>33</sup> A128-132.

<sup>34</sup> A172.

<sup>35</sup> A183.

<sup>36</sup> Id.

reach a verdict on the Terroristic Threatening charge.<sup>37</sup> An Allen charge was read over Boulden's objection,<sup>38</sup> and less than an hour later the jury reached a verdict convicting Boulden of both charges at 4:35p.m.<sup>39</sup>

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<sup>37</sup> A212.

<sup>38</sup> A213.

<sup>39</sup> A220-221.

## **I. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION IN LIMINE FOR DISMISSAL OR A *LOLLY* INSTRUCTION.**

### ***Question Presented***

Whether due process was violated when the police failed in their duty to make reasonable efforts to preserve video-recorded evidence made known and presented to them during the course of an investigation that they knew had recorded aspects of the incident giving rise to the charges against the Defendant; and, if so, whether the Trial Court erred by failing either to instruct the jury that the evidence would have been exculpatory, or, alternatively, to dismiss the charges.<sup>40</sup>

### ***Scope of Review***

The scope of review for the denial to give a *Lolly* Instruction involves an issue of law and is, therefore, plenary and *de novo*.<sup>41</sup> When error at trial is based on the Delaware Constitution, the State bears the burden on appeal of establishing it to have been harmless beyond a reasonable doubt.<sup>42</sup>

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<sup>40</sup> A17-30 (Counsel's argument and oral ruling of the Trial Court); A231-248 (Boulden's Motion); Exhibit B (Oral ruling of the Trial Court).

<sup>41</sup> *McNair v. State*, 990 A.2d 398, 403 (Del. 2010); *Lunnon v. State*, 710 A.2d 197, 199 (Del. 1998), citing *Seth v. State*, 592 A.2d 436, 439 (Del. 1991) (standard of review for issues of law is *de novo*).

<sup>42</sup> *Van Arsdall v. State*, 524 A.2d 3, 11 (Del. 1987) ("In view of the fundamental nature of the rights guaranteed under the State Constitution, we adopt as State law a standard such as that used in the *Chapman* court, whereby reversal is required whenever the reviewing court 'cannot say that the error was harmless beyond a reasonable doubt.' *Chapman v. U.S.*, 386 U.S. 18, 24 (1967)"); *Johnson v. State*, 27

### *Merits of Argument*

In this case, police officers made no effort to collect or preserve material evidence presented to them by a cooperative witness that could have been helpful to the accused. That missing evidence, now lost, was doorbell camera video, clips of which the police played and then cited in the arrest warrant's affidavit of probable cause because the police claimed it contained the final part of the verbal interchange between the complaining witness and the accused.<sup>43</sup> Before trial, Defendant Boulden moved for either case dismissal or an instruction to the jury that the missing evidence, if it had been extant, would raise a rebuttable inference of innocence.<sup>44</sup> The Trial Court denied Boulden's Motion and gave no such jury instruction, after which the case proceeded to trial and Boulden was convicted of Aggravated Menacing and Terroristic Threatening.

Delaware's Constitution does not require an accused to prove bad faith on the part of police when they fail to preserve material evidence to establish a due process

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A.3d 541 (Del. 2011) ("Based upon our review of the State's case against Johnson, we are not convinced beyond a reasonable doubt that the Superior Court's failure to give a *Lolly* instruction was harmless error." *Id.* at 549).

<sup>43</sup> A247 (paragraph 6 of arrest warrant affidavit of Cpl. Andrew Davis).

<sup>44</sup> *Lolly v. State*, 611 A.2d 956, 961 (Del. 1992).

violation.<sup>45</sup> It imposes a “more exacting standard” on the police and prosecution.”<sup>46</sup>

In *Deberry v. State*, this Court first described how the State’s duty to disclose material evidence in discovery creates and includes the State’s concurrent obligation to preserve it.<sup>47</sup> In *Lolly v. State*, the Court reaffirmed that right based upon “Delaware constitutional norms,” reversing the conviction and holding that “Superior Court erred in instructing the jury on the effect to be accorded missing evidence.”<sup>48</sup>

In *Johnson v. State*,<sup>49</sup> Justice Holland detailed the required step-by-step analysis:

- 1) [W]ould the requested material, if extant in the possession of the State at the time of the defense request, have been subject to disclosure under Criminal Rule 16 or *Brady* [v. *Maryland*]?
- 2) If so, did the government have a duty to preserve the material?
- 3) If there was a duty to preserve, was the duty breached, and what consequences should flow from a breach?<sup>50</sup>

If the Court determines that a duty to preserve was breached, then the trial court decides the sanction by analyzing:

- 1) The degree of negligence or bad faith involved,

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<sup>45</sup> *Id.* at 957 (citing Del. Const. art 1, § 7) (rejecting holding of *Arizona v. Youngblood*, 488 U.S. 51 (1988) that federal due process requires only a lack of bad faith on part of police in the failure to preserve material evidence and basing its decision in Article 1, Section of Delaware Constitution).

<sup>46</sup> *Lolly v. State*, 611 A.2d at 957.

<sup>47</sup> 457 A.2d 744 (Del. 1983).

<sup>48</sup> 611 A.2d at 957.

<sup>49</sup> 27 A.3d 541 (Del. 2011).

<sup>50</sup> *Johnson*, 27 A.3d at 545.

- 2) The importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available, and
- 3) The sufficiency of the other evidence produced at the trial to sustain the conviction.<sup>51</sup>

It is well-settled that “[t]he failure to gather and/or preserve case dispositive evidence will completely preclude a prosecution.”<sup>52</sup> If, however, the missing evidence is not case dispositive, the consequence for the State’s failure to gather or preserve evidence is that the accused is entitled to a *Lolly* instruction that tells the jury that it must draw an inference that the missing evidence would have been exculpatory.<sup>53</sup>

**A. The doorbell camera clips, had they been collected and preserved, would have been discoverable under Superior Court Rule 16.**

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<sup>51</sup> *Id.* at 546.

<sup>52</sup> *Johnson*, 27 A.3d at 548.

<sup>53</sup> *Lolly*, 611 A.2d at 961 footnote 6 (“In this case the court has determined that the State failed to collect/preserve certain evidence which is material to the defense. The failure of the State to collect/preserve such evidence entitles the defendant to an inference that if such evidence were available at trial it would be exculpatory. This means that, for purposes of deciding this case, you are to assume that the missing evidence, had it been collected/preserved, would not have incriminated the defendant and would have tended to prove the defendant not guilty. The inference does not necessarily establish the defendant’s innocence, however. If there is other evidence presented which establishes the fact or resolves the issue to which the missing evidence was material, you must weigh that evidence along with the inference. Nevertheless, despite the inference concerning missing evidence, if you conclude after examining all the evidence that the State has proven beyond a reasonable doubt all elements of the offense(s) charged, you would be justified in returning a verdict of guilty.”).

Boulden was entitled to inspect or copy any “...objects ... that are within the possession, custody or control of the state and that are material to the preparation of the defendant’s defense or are intended for use by the state as evidence in chief at the trial . . . .”<sup>54</sup> Furthermore, the State has the duty to collect material evidence that it comes across *ab initio* and to preserve it thereafter.<sup>55</sup>

Superior Court Criminal Rule 16’s discovery requirements are interpreted “broadly.”<sup>56</sup> Evidence is material under Superior Court Criminal Rule 16 when it could be helpful to the preparation of a defense in any number of ways.<sup>57</sup> For example, the evidence is material if might contradict a State’s witness’s testimony and affecting their credibility.<sup>58</sup> Sister courts in the federal system similarly define evidence as material for the purpose of discovery if it might uncover admissible evidence, aid in witness preparation, corroborate testimony, or assist in impeachment and rebuttal.<sup>59</sup>

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<sup>54</sup> Del. Super. Ct. Crim. R. 16(b)(1)(E).

<sup>55</sup> *Lolly*, 611 A.2d at 960,

<sup>56</sup> *Valentin v. State*, 74 A.3d 645, 649 (Del. 2013).

<sup>57</sup> *E.g., Johnson*, 27 A.3d 541(holding the clothing which allegedly concealed each of the weapons would have been discoverable under Superior Court Rule 16 because it would have been material to a defense argument that items did not belong to the accused); *Lolly*, 611 A.2d 956 (uncollected blood samples would have been important because they could have connected the defendant to the burglary or would have been material to his defense if the blood was not his).

<sup>58</sup> *Valentin*, 74 A.3d at 650.

<sup>59</sup> *E.g., United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir. 1989).

As Boulden correctly predicted in his Motion before the Trial Court,<sup>60</sup> the State's case relied entirely upon the complaining witness' account to prove the charges in the indictment.<sup>61</sup> The police witnesses did not see the events that were the basis for the charges against Boulden. And no other eyewitnesses testified. As a result, the doorbell camera surveillance video, clips from which the police cited in the arrest warrant's probable cause affidavit, would have been important evidence if only it had been preserved after the police viewed the parts the neighbor showed them. Their materiality was that neighbor's doorbell camera captured (or failed to capture) both or either of the conduct and/or the verbal exchange between the complaining witness and the Defendant testified to by the former;<sup>62</sup> and, therefore, they would have corroborated (or failed to corroborate) his testimony. The officers themselves swore that the portions they were shown captured audio of the altercation.<sup>63</sup> This type of evidence, if preserved, would have been material to the defense under Rule 16 because without it what remained was a fragment of poor quality audio captured by the officer's body-worn camera<sup>64</sup> that was useless in preparing cross-examination or a defense to the complainant's version of what happened and what was said.

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<sup>60</sup> A236.

<sup>61</sup> See State's summation A179-182.

<sup>62</sup> See *supra* Op. Br. at 8 (from Statement of Facts).

<sup>63</sup> A247.

<sup>64</sup> A17-19; A71.

**B. The police had a duty to take reasonable steps to collect and preserve the doorbell camera video and audio recording because it was material evidence that was brought to their attention and placed in their possession.**

While this Court has declined to prescribe the exact procedures that the various law enforcement agencies must follow in order to fulfill their duties to preserve evidence, at a minimum police procedures must be “broad enough to encompass any material that could be favorable to a defense.”<sup>65</sup> As Boulden asserted in the Motion before the Trial Court, he had

no way to even verify whether the surveillance footage captures the incident in question at all. Mr. Boulden cannot analyze what the video actually depicts. It is also impossible to verify that the voices heard on the recording even are the complainant’s and Mr. Boulden’s, as the fragment of audio is difficult to hear on the officers’ BWC.

All the defense has is Officer Davis’s opinion that it did, and evidence that the police did view some footage.<sup>66</sup>

The doorbell camera evidence, if collected and preserved, could have proven the complainant’s account inaccurate and self-serving, enabling Boulden to credibly call into question the reliability of the only evidence against Boulden, the complainant’s testimony. The lost evidence would have helped Boulden better cross-examine the complainant— which is “the principal means by which the

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<sup>65</sup> *Johnson*, 27 A.2d at 547 (citing *Deberry*, 457 A.2d at 752).

<sup>66</sup> A239 (from Boulden’s Motion).

believability of a witness and the truth of his testimony are tested.”<sup>67</sup> Therefore, the doorbell camera evidence was material to Boulden’s case, discoverable under Rule 16, and the police had a duty to collect and preserve it.<sup>68</sup>

**C. The State breached its duty by failing to take any action to collect or preserve the doorbell camera evidence.**

The State’s failure to take steps to collect and preserve the doorbell camera evidence also constituted a breach of its duty to Boulden under Delaware’s Constitution. In *Deberry v. State*, the Court stated:

It is most consistent with the purposes of those safeguards to hold that the duty of disclosure attaches in some form once the Government has first gathered and taken possession of the evidence in question. Otherwise, disclosure might be avoided by destroying vital evidence before prosecution begins or before defendants hear of its existence.... Only if evidence is carefully preserved during the early stages of investigation will disclosure be possible later.<sup>69</sup>

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<sup>67</sup> See *Snowden v. State*, 672 A.2d 1017, at 1024 (Del. 1996) (quoting *Davis v. Alaska*, 415 U.S. 308, 316, (1974) (internal quotations omitted).

<sup>68</sup>Whether the lost evidence would be discoverable *Brady* material is impossible to determine. See. *Johnson*, 27 A.3d at 546 (opining that determining whether a defendant’s missing clothes would have been discoverable under *Brady* would be a “fruitless exercise since they are no longer available for examination or testing”) The same holds true for Boulden.

<sup>69</sup> *Deberry*, 457 A.2d at 751 (Del. 1983) (quoting *United States v. Bryant*, 439 F.2d 642, 651 (D.C. Cir. 1971), *abrogation recognized by In re Sealed Cases*, 99 F.3d 1175, 1178 (D.C. Cir. 1996)) (emphasis added). While *Bryant* was later abrogated by *Arizona v. Youngblood*, 488 U.S. 51 (1988), the Delaware Supreme Court later explained that “When the State has failed to preserve evidence that *could* be favorable to the defendant, the analysis which a court must follow is set forth in *Deberry* and *Bailey*.” *Hammond v. State*, 569 A.2d 81, 87 (Del. 1989). Therefore, the quotation from *Bryant* is still applicable law under the Delaware Constitution.

The police in this case failed to fulfill their duty to collect “material that *could be favorable* to a defense”<sup>70</sup> because they did not take care to preserve the evidence that was willingly presented to them and placed in their possession when they arrived at the scene.

As noted below and is raised for *de novo* review on appeal in this Court,<sup>71</sup> any doorbell camera footage in existence at the time clips were brought to the police’s attention could have captured the events in question or failed to capture events it should have based on the account and testimony of the complainant and the placement of the doorbell camera. As such, it would have been crucial and objective evidence of the occurrence or non-occurrence of events, conduct, and the verbal interchange forming the basis of Boulden’s arrest, indictment, and prosecution at trial. Police noted it, replayed the clips shown to them, and referenced the latter in the arrest warrant probable cause affidavit.<sup>72</sup> But the police took no action to obtain the footage and preserve it, and after listening to it twice, simply walked away.<sup>73</sup>

What could the police have reasonably done to satisfy their duty rather than breach it? The answer is, “Quite a bit.” First, as Boulden’s counsel below told the Trial Court, they could have just asked the neighbor to make a copy or for further

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<sup>70</sup> *Johnson*, 27 A.3d at 547 (italics added).

<sup>71</sup> *Lunnon*, 710 A.2d at 199.

<sup>72</sup> A247.

<sup>73</sup> A260 (thumb-drive attached to Boulden’s Motion in Limine at A248).

access to his doorbell camera account.<sup>74</sup> Given the neighbor's cooperative nature, that would likely have been fruitful.<sup>75</sup> What else? Once they ascertained what carrier was responsible for the doorbell camera footage, they could have issued a subpoena<sup>76</sup> or they could have sought search warrant.<sup>77</sup> They certainly had a reasonable basis for the former and probable cause for the latter. The police could have taken these actions concurrently as they sought search warrants to seize the weapon allegedly used to commit the crimes charged. Why would it not have been just as reasonable to *re*-collect and preserve the video evidence they knew had captured aspects of incident they were investigating? The answer, of course, is that it would have been reasonable, and they could and should have done so.

Instead of obtaining and preserving this evidence, police viewed the video themselves, listened to the audio, and subsequently arrested Mr. Boulden. Underscoring this failure is the fact that on BWC footage, a police officer is seen holding the phone which was playing the fragment of footage up to the other officer,

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<sup>74</sup> A20-21; Op. Br. at 5-6 (from Statement of Facts).

<sup>75</sup> A71; Op. Br. at 10 (from Statement of Facts).

<sup>76</sup> See 29 Del. C. § 2504(4) ("The State Department of Justice and the Attorney General shall have the following powers, duties and authority: [...] (4) To investigate matters involving the public peace, safety and justice and to subpoena witnesses and evidence in connection therewith; provided, however, that nothing in this subdivision shall restrict the general powers of the General Assembly to investigate matters involving the public peace, safety and justice and to subpoena witnesses and evidence in connection therewith[.]")

<sup>77</sup> E.g., *Price v. Superior Court*, 93 Cal.App.5th 13 (Cal. App. 5th 2023) (example of warrant to search and seize evidence from uncharged third party).

so that they each could listen to it for detail and clarity.<sup>78</sup> In contrast, the only surviving evidence of the footage given to Mr. Boulden's defense is a recording of a fraction of a recording which is difficult to hear. Further, the video content of the footage is not able to be seen from the BWC footage.<sup>79</sup> As a result, Boulden was left unable to determine how much more the doorbell camera might have captured of the incident beyond the unpreserved excerpt. All Boulden had was Officer Davis's representations and opinion which both highlighted the importance of the lost evidence and the significant degree of negligence on the part of police in failing to gather and preserve the doorbell camera footage.

Because the police's failure to exert any effort to retain this evidence was an unreasonable and negligent under Delaware's "more exacting" standard of the process due an accused in criminal cases, they breached their duty and violated Boulden's rights.<sup>80</sup>

**D. The State's breach of duty required a sanction because it involved a significant degree of negligence, the missing evidence was probative and important when compared to the reliability of the substitute evidence, and the remaining evidence introduced at trial to sustain the convictions was minimal.**

Having established that (1) the full surveillance footage would have been

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<sup>78</sup> A260 (thumb-drive attached to Boulden's Motion in Limine at A248).

<sup>79</sup> *Id.*

<sup>80</sup> *Cf. Lolly*, 611 A.2d at 957.

discoverable under Rule 16, (2) the government had a duty to preserve the full surveillance footage, and (3) that duty was breached, the focus turns to what consequences should flow from the breach.

To determine the appropriate remedy, the Court must next examine: (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction.<sup>81</sup>

**E. Because the now lost evidence was known to the police, was at hand and available to them through reasonable procedures, and was material to the case, the State's failure to preserve it was highly negligent.**

While the police likely did not act in bad faith in failing to collect or preserve the doorbell camera video, they did act with a high degree of negligence. In determining whether the State has been negligent, the United States Supreme Court recommended the following considerations:

“[T]he court should inquire whether the evidence was lost or destroyed while in [the State's] custody, whether the [State] acted in disregard for the interests of the accused, whether [the State] was negligent in failing to adhere to established and reasonable standards of care for police and prosecutorial functions, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification ... It is also relevant to inquire whether the government attorneys prosecuting the case have

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<sup>81</sup> *Johnson*, 27 A.3d at 546.

participated in the events leading to loss or destruction of the evidence, for prosecutorial evidence may bear upon existence of a motive to harm the accused.”<sup>82</sup>

The Delaware Supreme Court has “faulted the State for failing to gather evidence that it knew of and had ready access to during an investigation, like blood observed at a crime scene, cigarette butts lying near a victim's body, or clothing concealing firearms,” but “not when the evidence in question was further afield, like surveillance videos in the hands of private parties or information from a victim's social media account.”<sup>83</sup>

Here, the evidence was not far afield. While it was surveillance footage, it was quite literally placed in the hands of police officers by the neighbor at the scene. New Castle City police officers held the phone containing the video to try to listen to it.<sup>84</sup> Unlike video footage which the police may or may not have known of or been able to view at a crime scene, this footage was known and available to the police to gather and preserve. Gathering surveillance video is an act routinely done by police officers. Therefore, the New Castle City Police Department had the ability, and this case, the duty to preserve the full surveillance footage but negligently failed

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<sup>82</sup> *Deberry*, 457 A.2d at 752 (Del. 1983) (citing *United States v. Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir. 1979) (Kennedy, J., concurring)).

<sup>83</sup> *Schaffer v. State*, 2018 WL 1747793, at \*5 (April 10, 2018) (citing *Lolly*, 611 A.2d at 960-61; *Hughes v. State*, 569 A.2d 81, 88 (Del. 1989); *Johnson*, 27 A.3d at 547; and *Williams v. State*, 2014 WL 4179121, at \*3 (Del. August 21, 2014)).

<sup>84</sup> A260 (thumb-drive attached to Boulden's Motion in Limine at A248).

to do so.

**F. The doorbell camera evidence would have been important, and the substitute body-worn camera clip was a poor and unreliable substitute.**

The Court must determine the importance of the missing evidence to the case and weigh it against the reliability of any secondary or substitute evidence.<sup>85</sup>

The doorbell camera footage was clearly significant evidence since an account of a clip from it is cited by the police in the arrest warrant.<sup>86</sup> The only evidence that was arguably “substitute” or “secondary” evidence was the police body-worn camera clip of the police watching and listening to two clips presented to them upon their arrival at the crime scene. But video of the doorbell camera excerpts was not captured at all and the audio only poorly.<sup>87</sup> As such, it was a very poor substitute for the excerpts shown to the police and no substitute at all for what could have been captured on the full doorbell camera that the police should have collected and preserved. The State’s negligence, therefore, transformed Boulden’s trial from one where an incident was contemporaneously recorded into one where the State’s

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<sup>85</sup> See *Johnson*, 27 A.3d at 547; see also *Deberry*, 457 A.2d at 752-753, quoting *Loud Hawk*, 628 F.2d at 1152 (Kennedy, J., concurring) (“[T]he court should consider ‘the centrality of the evidence to the case and its importance in establishing the elements of the crime. . .; the probative value and reliability of secondary or substitute evidence; the nature and probable weight of factual inferences or other demonstrations and kinds of proof allegedly lost to the accused; [and] the probable effect on the jury from the absence of the evidence. . . .’”)

<sup>86</sup> A247.

<sup>87</sup> A107.

evidence consisted entirely of the alleged victim's testimony. Without an adequate substitute, Boulden's defense was impaired because he was unable to use it to confront that person's account of what had been said and done.

In *Hendricks v. State*,<sup>88</sup> the Court found the police's negligent destruction of a digital scale and plastic bags in the mistaken belief that the case had been resolved was unimportant in a drug paraphernalia possession trial because the scale and bags were found in a hotel room rented by the accused along with his papers and the accused was arrested with a large amount of cash and the hotel room keys in his pocket.<sup>89</sup> Hendricks claimed that if the bags and scale had not been destroyed, they could have been tested and if his prints were not present, it would have shown he was innocent.<sup>90</sup> The Court disagreed, finding that even if his prints had not been on the now destroyed items, it would have mattered little (evidence unimportant so no substitute or secondary evidence was necessary) and there was plenty of other evidence against him to sustain a conviction (sufficient evidence).<sup>91</sup>

Boulden's case is different. Whether considering just the clips of the doorbell camera shown to the police and not preserved or all of the doorbell camera footage that the police failed to collect, the evidence could have been significant to

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<sup>88</sup> 871 A.2d 1118 (Del. 2005).

<sup>89</sup> *Hendricks*, 871 A.2d at 1125-1126.

<sup>90</sup> *Id.*

<sup>91</sup> Cf. *Hendricks*, 871 A.2d at 1125-1126.

Boulden's trial preparation and conduct in various ways. Just to name a few, Boulden would have been able to compare the complainant's description of the reasonable tone he set when speaking with Boulden's granddaughter at the front door.<sup>92</sup> He would have been able to explore the complaining witness's description of where he said he was standing—in the neighbor's driveway<sup>93</sup>—with what should have been captured on the neighbor's doorbell camera. If no person was shown in the excerpts (as the police said), Boulden would have been able to ask why not, since the complainant said he was in front of the neighbor's house where the doorbell camera was installed. Boulden's counsel would have been able to see how the camera was directed and what it should have captured. He would have been able to ask, if the camera is motion activated, why did the complainant's stepping into the neighbor's driveway or stepping across the field of the camera not activate it. He would have been able determine whether there was a verbal threat captured on audio, and, if not, why. These were important questions the answers to which cannot be ascertained because some of the evidence was given back, and the rest was simply ignored. There exists no substitute or secondary evidence that could take the place of the doorbell camera video in answering any of these questions material to the case against Boulden.

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<sup>92</sup> A100.

<sup>93</sup> A99.

**G. The State's remaining evidence was uncorroborated and insufficient.**

The final factor that the Court must consider in determining what consequences should be imposed for the State's failure to preserve the doorbell camera footage is the sufficiency of the State's other evidence.<sup>94</sup> The secondary evidence presented at the trial below was scant. Without the doorbell camera footage, the State's case hinged on the credibility of the uncorroborated testimony of the complainant. That credibility was tenuous because when he first spoke to police, he neglected to tell them of his claim that Boulden's conduct had been accompanied by a verbal threat to kill him.<sup>95</sup> The State failed to preserve the sole objective recording of the events alleged by the complainant.

Given the similarities, it is helpful to examine the application of the missing evidence analysis as applied by this Court in *Lolly*.<sup>96</sup>

*Lolly* involved a burglary where the defendant was apprehended near the crime scene with his hand bleeding profusely.<sup>97</sup> Blood was found throughout the victim's apartment, including near the window where the burglar had entered, and also led away from the residence to the place where the victim encountered the

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<sup>94</sup> *Johnson*, 27 A.3d at 548.

<sup>95</sup> A115-117; Op. Br. at 9 (from Statement of Facts).

<sup>96</sup> 611 A.2d 956.

<sup>97</sup> *Lolly*, 611 A.2d at 958.

defendant outside.<sup>98</sup> Despite the importance of the blood as evidence, the police failed to collect any blood samples.<sup>99</sup> The Trial Court in *Lolly* concluded that police had been negligent in failing to preserve the blood samples, which were important evidence that connected the defendant to the burglary.<sup>100</sup> The Supreme Court held that once the Trial Court determined that the police were negligent, and that the missing evidence was material, the defendant was entitled to a jury instruction that “accord[ed] him a favorable inference based on the missing evidence.”<sup>101</sup>

Like *Lolly*, this case involves a failure by police to gather the evidence *ab initio*.<sup>102</sup> Also like *Lolly*, the instant case involves police negligently failing to collect and preserve material evidence which could have reasonably served to prove or disprove the State’s core account of events. Here, the State failed to obtain and preserve the doorbell camera video which could have captured the altercation that led to the charges against Boulden. The full video was material to Boulden’s ability to rebut the State’s case against him, and without it, he was prejudiced.

Here, unlike in *Lolly* where the State had sufficient additional evidence, and the failure to preserve the blood samples only warranted a *Lolly* instruction, the State’s case against Boulden had no comparable or sufficient substitute evidence,

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 959.

<sup>101</sup> *Id.* at 962.

<sup>102</sup> *Id.* at 960.

making dismissal appropriate. This Court has observed that “[t]he failure to gather and/or preserve case dispositive evidence will completely preclude a prosecution.”<sup>103</sup> However, if this Court finds that dismissal was not warranted, Boulden also moved the Trial Court to give a *Lolly* Instruction to the jury that the surveillance video would have been exculpatory. This, at the very least, the Trial Court should have done.

**H. The Trial Court’s error in not giving the jury a *Lolly* Instruction was not harmless beyond a reasonable doubt.**

When error at trial is based on the Delaware Constitution, the State bears the burden on appeal of establishing it to have been harmless beyond a reasonable doubt.<sup>104</sup> In this case, given minimal other evidence against Boulden, the Trial Court’s error in failing to give a *Lolly* Instruction to the jury was not harmless beyond a reasonable doubt.

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<sup>103</sup> *Johnson*, 27 A.3d at 548.

<sup>104</sup> *Van Arsdall*, 524 A.2d at 11; *Johnson*, 27 A.3d at 549.

## CONCLUSION

For the reasons and upon the authorities cited herein, the convictions of the Appellant Ronald Boulden should be reversed and the case dismissed, or, alternatively, remanded for a new trial where the jury would be charged with an appropriate *Lolly* instruction.

Respectfully submitted,

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