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Case Number 309,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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I. THE DOORBELL CAMERA EVIDENCE WAS MATERIAL EVIDENCE SUBJECT TO DISCOVERY THAT HAD BEEN PLACED INTO THE POSSESSION THE POLICE, WHO LOST IT, AND RENDERED UNAVAILABLE FOR USE BY THE ACCUSED IN HIS DEFENSE.

Merits of Argument

The State answers Boulden with an assortment of arguments brought together in the service of its over-arching claim that the doorbell camera evidence made known and presented to the police was irrelevant and immaterial to the case against Boulden and the police had no duty to collect or preserve it. The State also denies Boulden's arguments by claiming the failure of the police to collect and preserve this evidence did not actually prejudice his defense. But the actions of the police in recording some part of this evidence[1] and then citing to it in support of probable cause to arrest Boulden belie the State's denial of materiality;[2] and their brief largely discounts the constitutional worth under Delaware due process[3] of preserving *potentially* helpful evidence as well as *the opportunity for an accused to have and test the meaning of material evidence* himself rather than rely upon prosecutorial or police representations of its relevance or irrelevance.[4] The State also faults Boulden

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[1] A107-108.
[2] A247.
[3] Del. Const. art 1, § 7.
[4] *Cf. Deberry v. State*, 457 A.2d 744, 753-754 (Del. 1983) ("The results of scientific tests performed on the clothes were clearly important to either the prosecution or defense of the crime, and the weight of substitute evidence, in effect only Deberry's

for not claiming, or being able to prove, a *Brady v. Maryland*[5] violation for the loss of favorable and verdict-changing evidence.[6] That federal due process limitation often poses a chicken-or-the-egg conundrum.[7] That is, the police (absent bad faith) are not required by the federal constitution to collect or keep this figurative evidential egg unless it is known to be viable with exculpatory evidence.[8] But the Delaware

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denial, might well have been less in the minds of the jurors than that of any scientific test.").

[5] 373 U.S. 83 (1963).

[6] Ans. Br. at 11-12.

[7] Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecutions*, 15 Ga. St. U. L. Rev. 601, 626-627 (1999) ("Defendants face the chicken-and-egg problem of establishing the materiality of documents with enough specificity when they have not reviewed them to know whether and how they are helpful to a defense. The key step is identifying one or more defenses that may be raised at trial, and then determining what types of documents relate to that potential defense. In *United States v. Lloyd*, [992 F.2d 348 (D.C. Cir. 1993),] the Government charged the defendant with aiding and abetting the preparation of false income tax returns. [*Id.* at 349.] The defendant sought copies of previous tax returns filed by the clients who he was accused of assisting in hiding income, arguing that the clients had misled him and, therefore, he did not have the requisite intent to aid in the filing of false tax returns. [*Id.* at 349-350.] The District of Columbia Circuit found sufficient (*627) indicia of the materiality of the requested records under Rule 16(a)(1)(C), even though the defendant was ignorant of their contents and could not show that they would in fact be material to the defense. [*Id.* at 351-352.] The concept of helpfulness for determining materiality refers to whether documents may assist in preparing the defense, not that the defendant demonstrate they actually provide a defense, because that showing is virtually impossible without access to the records." (internal footnotes included in text)).

[8] *Cf. Copeland v. United States*, 271 A.3d 213, 223 (D.C. App. 2022) (citing *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) ("When a defendant seeks the full sanction of dismissal for his case, . . . this court has held that Youngblood controls, [citation omitted], requiring a showing of bad faith on the part of the police." (internal quotations))

Constitution requires the police when they collect the egg to keep it.[9] That way, all parties in this intentionally adversarial system, act to keep it honest by seeing together if it hatches and what might spring forth proving either guilt or innocence.[10]

Citing *Coleman v. State*,[11] the State first argues that the due process requirements for evidence preservation and collection under the State Constitution do not apply to digital video and/or audio evidence embodied by the doorbell camera footage because such evidence should not be considered "tangible physical evidence" under *Deberry* and its progeny.[12] *Coleman*, however, did not involve failing to collect evidence at all. Rather, an officer while collecting two guns found in a backpack the defendant was seen carrying failed to record in a report which gun contained a magazine with one live round.[13] The Court simply declined to expand the due process requirement to create evidence by memorializing potentially exculpatory "observations of evidence-collecting law-enforcement officers."[14]

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[9] *Cf. Lolly v. State*, 611 A.2d 956, 957 (Del. 1992) ("We reaffirm our adherence to the more exacting standard based on Delaware constitutional norms and erred in instructing the jury on the effect to be accorded missing evidence in this case.")

[10] *Id.* at 959. ("In *Deberry*, this Court ruled that the State, including its police agencies, is obligated to preserve evidence which is material to a defendant's guilt or innocence as a matter of federal and state due process. . . . [W]e emphasized the need for the State and law enforcement to adopt procedures for the gathering and preserving of evidence that could be favorable to the defendant.")

[11] *Coleman v. State*, 289 A.3d 619 (Del. 2023).

[12] Ans. Br. at 11-12.

[13] *Coleman*, 289 A.3d at 621.

[14] *Coleman*, 289 A.3d at 627-628. ("Coleman's real complaint is not with the failure to collect or preserve evidence but is, rather, with the probation officer's evidence-

Boulden's case is different. The police knew that there existed a digital recording because the telephone device accessing that evidence was placed in their possession when they viewed two clips of it. This Court should not credit the State's claim that photographic and recorded audio of actions and words alleged by the State to constitute the commission of an indicted offense are not discoverable as material to the preparation of a defense under "Documents and tangible objects" section of Superior Court Criminal Rule 16[15] simply because they are in digital form. The holding of *Coleman* does not require that principle be adopted, and other courts have persuasively held otherwise under similar missing evidence doctrines finding a greater right under their respective state constitutions.[16]

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collection methods, that is, his failure to record the position of the two .40 caliber magazines vis-à-vis the .40 caliber weapon. Coleman cites no authority nor are we are of any, that would support this expansion of the doctrine. [. . .] [W]e decline to extend our *Lolly/Deberry* 'missing evidence doctrine to the circumstances presented here.") (internal quotation and citations omitted) The Court's observation that there was in fact no existing evidence that was not collected acted as the springboard for its subsequent *Brady* analysis.

[15] *See Coleman*, 289 A.3d at 626S; *see also* Del. Super. C. Crim. R. 16(b)(1) (E).

[16] *E.g.*, *Cook v. State*, 953 P.2d 712, 716 (Nev. 1998) (lost victim statements, lost defendant statements, and lost photographic evidence were material to the defense because of their potential "to support or refute the testimony of the involved parties.); *State v. Merriman*, 410 S.W.3d 779, 785, Note 3 (Tenn. 2013) (lost or destroyed dashcam video of DUI stop held discoverable and subject to Tennessee's due process requirement to preserve potentially exculpatory evidence) ("Although we cited with approval the standard enunciated in *California v. Trombetta,* [467 U.S. 479 (1984),] we did not adopt its materiality standard requiring the evidence to possess apparent exculpatory value. As noted, in most instances the true nature of the lost or destroyed evidence may never be known. In contrast, we used the terms "potentially"

The State claims that *McNair v. State*[17] dictates that the uncollected doorbell evidence be deemed immaterial by this Court because it is like the "blurry" and "poorly positioned" tape that did not capture the identity of the perpetrator because the clips shown to them by the neighbor did not capture any figures and because the police tried to capture the audio with their body-worn cameras.[18] But a deeper dive into that case shows the State's reliance to be mistaken. In *McNair*, the Court briefly noted its agreement with and reliance on the trial's finding that the unpreserved surveillance tape was "had no evidentiary value, and, therefore, was not material."[19] But that is precisely the opposite of what happened here where the police found the original material evidence and then just left it. Instead, they created their own "poor quality" and hard to hear stand-in with their body-worn cameras.[20] As noted above, the officer's citation to the uncollected and unpreserved doorbell camera footage in the affidavit of probable cause is indeed his sworn testimony to that evidence's materiality. As a result, the record in this appeal undermines the State's attempt to analogize Boulden's claim to the rejected claim in *McNair*. There the unpreserved evidence was not material, here it is.

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exculpatory evidence and "allegedly" exculpatory evidence in our analysis of the adopted factors to more appropriately describe such evidence. (citation omitted)."

[17] 990 A.2d 398 (Del. 2010).

[18] Ans. Br. at 14.

[19] *McNair*, 990 A.2d at 403-404.

[20] A107-108.

Boulden's opening brief argued that collecting the doorbell camera footage that was spontaneously served up to the police upon their arrival was both reasonable and necessary as a matter of law.[21] The State's answer derives from this Court's possible agreement with Boulden's claim an *ipso facto* birth of a new rule which would require the police to collect all the doorbell camera evidence everywhere on the block.[22] The State's argument is illogical because it ignores the salient fact that the police were not specifically directed to all those other recordings, if they existed, and that the police did not cite to them in the arrest warrant's affidavit of probable cause. The one the neighbor enthusiastically shared without being asked is different because this evidence was material and presented directly to them. The other recordings of the neighborhood were not.

The State's reliance on the two Superior Court cases of *State v. Wise*[23] and *DeLoach v. State*[24] is equally misplaced. Both cases reject a requirement that the State create evidence that never existed—something that is unreasonable in view of its impossibility. Here, Boulden would simply have the State collect and preserve material evidence that was literally handed over to the police so that he might use it

[21] Op. Br. at 21-23.
[22] Ans. Br. at 16.
[23] 2016 WL 7468058 (Del. Super. Ct. December 22, 2028).
[24] 2012 WL 2948188 (Del. Super. Ct. July 16, 2012).

for the preparation of his defense and/or for his use at trial as Criminal Rule 16 envisions.

The State says, no matter: Even if the doorbell evidence should have been collected, Boulden has not been prejudiced because the evidence would have been inculpatory, not exculpatory, and there was sufficient strong evidence presented at trial to support his conviction.[25]

Boulden has already argued the weakness/closeness of the State's case in his Opening Brief and will not repeat it here.[26] Of note, however, is this observation: In arguing the strength of its case against Boulden, the State inexplicably cites to a witness that the State did NOT call to testify at trial—namely, Boulden's wife, who according to the complaining witness, had witnessed Boulden with the gun and later called the police to report additional weapons in his residence.[27] The State, however, chose not to present her testimony to the jury. What she is alleged to have told the police or to have seen should not be considered in finding "overwhelming evidence" of guilt presented to a jury that would render error harmless. And any suggestion that it was Boulden's duty to fill in the gaps in the State's case by calling his wife to testify is equally unavailing. The burden was upon the State to establish guilt at

[25] Ans. Br. at 12, 16-17.
[26] Repetition of argument in Reply is not condoned by this Court's rules. See Del. Supr. Ct. R. 14(c)(i).
[27] Ans. Br. at 17.

trial.[28] On appeal where notwithstanding the State's claim to the contrary the record of evidence against Boulden reveals itself as far from overwhelming,[29] and as Justice Rutledge noted, "one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."[30] As such, Boulden's conviction should not stand.

[28] *In re Winship*, 397 U.S. 358 (1970).
[29] Op. Brief at 7-9, 29-31.
[30] *Kotteakos v. United States*, 328 U.S. 750, 765 (1946) (case and portion of this quotation cited with approval by *Ashley v. State*, 798 A.2d 1019, 1023, note 17 (Del. 2002).

CONCLUSION

For the reasons and upon the authorities cited in Appellant's Reply and Opening Briefs, the judgment of convictions should be reversed and the case dismissed, or, alternatively, if this Court so deems, remanded for a new trial with a missing evidence instruction provided to the jury.

Respectfully submitted,

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