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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PAULRON CLARK, Defendant—Below, Appellant v. STATE OF DELAWARE Plaintiff—Below, Appellee.	)	No. 98, 2025

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

Anthony J. Capone, Esquire [#5315]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5140

Lauren N. Brown, Esquire [#6767]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5126

Attorneys for Appellant

DATE: November 19, 2025

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Counsel should first clarify that, contrary to the State's interpretation,[1] Argument I-b does not contend that the trial court "attempt[ed] to influence S.M. to testify to any particular facts."[2] To the extent that the relevant arguments in Clark's Opening Brief[3] were susceptible to that interpretation, Counsel regrets that imprecision.

The tension between attorneys' words or acts and how they are understood by others is often of pivotal importance in law.[4] Words or acts of good faith may nonetheless interfere with the fair administration of justice.[5]

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[1] Ans. Br. at 20.
[2] Ans. Br. at 20.
[3] Opening Br. at 19–21.
[4] *See, e.g.* DLRPC Preamble at [9], [13].
[5] *See, e.g. Lagola v. Thomas*, 867 A.2d 891, 897–98 (Del. 2005); *Price v. Blood Bank of Delaware, Inc.*, 790 A.2d 1203, 1210–11 (Del. 2004); *Spence v. State*, 129 A.3d 212, 224 (Del. 2015).

a. *The prosecutor's embrace of the witness.*

"A prosecuting attorney represents all the people, including the defendant who [is] being tried. It is his [or her] duty to see that the State's case is presented with earnestness and vigor, but it is equally his [or her] duty to see that justice be done by giving [the] defendant a fair and impartial trial."[6]

The State contends that the hug was not influential because it was not "threatening or coercive",[7] and "[t]o the contrary, if anything, it would convey to the minor that she was not in trouble and the prosecutor was not angry with her, despite her testimony that Clark had not abused her."[8]

If a jury may place "undue weight"[9] upon a prosecutor's words because of the prosecutor's special role in the justice system, then surely a child witness, with whom the prosecutor endorses a personal bond,[10] will be swayed by the prosecutor's words and deeds. The State envisions anger and coercion as the means of improper influence in this scenario, yet influence is exerted through shows of warmth and kindness, as well. The prosecutor's actions were a function of her personal relationship to the witness and called the witness's attention to it during a crucial stage of her testimony. This is the impropriety.

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[6] *Bennett v. State*, 164 A.2d 442, 446 (Del.1960).
[7] Ans. Br. at 16.
[8] Ans. Br. at 16.
[9] *Baker v. State*, 906 A.2d 139, 152 (Del. 2006).
[10] A359.

b. *The trial court's questioning of the witness.*

The State treats the trial court's good faith as the crux of the issue.[11] *Lawrence* is an inapt comparison, as it dealt with a claim that a judge's questions, in a bench trial, reflected actual bias.[12] Instead, the issue is the degree to which the tremendous influence of a judge on the bench vests their words with perceived import. "Although a trial judge may instruct the jury that he or she is impartial, the judge's conduct may suggest the contrary because the trial judge is a figure having overpowering influence upon the jury."[13] If an impartial jury may be swayed by this principle while simply observing proceedings, it must surely extend to a child witness on the stand.

c. *The victim services specialist disregarded the trial court's instructions.*

The State emphasizes the compassionate dimensions of Davis's work, which are influential towards the witness for similar reasons to those in Reply Argument I-a, eliding the fact that Davis asked more than one question[14] about "pressure" to elicit the answer that the State attempted to present as testimony through Davis.[15] Clark agrees that there was a permissible scope of interaction between Davis and the witness.[16] Davis exceeded it. The witness already spoke of "pressure" in testimony.[17]

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[11] Ans. Br. at 20.
[12] *Lawrence v. State*, 2007 WL 1329002 (Del. May 8, 2007).
[13] *Lagola v. Thomas*, 867 A.2d 891, 989 (Del. 2005).
[14] A541.
[15] A542–48.
[16] Ans. Br. at 22.
[17] A362.

With that record, repeated questions about "pressure" must be understood as questions about her testimony.

d. *Mistrial was the only appropriate remedy.*

The Answering Brief acknowledges *Hughes*[18] but offers nothing more substantive than an endorsement of the "appropriate steps"[19] taken by the trial court and a later contention that the events surrounding S.M.'s testimony and the intervening recess were so thoroughly proper that Clark's later decision to surface the events through cross examination were simply an ineffectual strategic gambit.[20] If the State's framing suggests that a better alternative would have been for Clark to not broach the issue before the jury, it is frankly unconscionable to think that a defense attorney could witness the events[21] at issue, producing a complete reversal of the critical witness's testimony, and find it advisable to pretend nothing happened.

> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony. We have recognized that the exposure of a witness' motivation in testifying is a proper and important

[18] *Hughes v. State*, 437 A.2d 559 (Del. 1981).
[19] Ans. Br. at 17.
[20] Ans. Br. at 23–24.
[21] Opening Br. at 4.

> function of the constitutionally protected right of cross-examination.[22]

Given the purported normalcy of these proceedings in the State's estimation, the logic of the Answering Brief raises an important question: would the Court be content to see these events recur in every trial of this nature?

[22] *Davis v. Alaska*, 415 U.S. 308, 316–17 (1974) (citations omitted). *See also* DRE 616.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING THE PROSECUTOR TO SHOW THE JURY AN UNFAIRLY PREJUDICIAL VIDEO OF CLARK'S EXPLICIT SEXUAL ACTIVITY WITH HIS PARTNER WHEN THE EXISTENCE OF THE VIDEO AS RELEVANT TO THE CASE WAS ALREADY STIPULATED.

The balancing of the video in question does not withstand scrutiny because a large portion of the probative value was uncritically ascribed to the video by the State[23] or circumstantially established by its existence,[24] rather than being found within the contents. To aid in the distinction, it is helpful to consider what the video is not. The video is not authenticated as the specific video that S.M. watched, which is understandable, but pertinent.[25] The video does not possess enough characteristics to be specifically authenticated, as the only relevant details that S.M. communicated were (1) she said Clark forced her to watch "a video", (2) "It was my mom touching his down-there area,"[26] and (3) her mother was touching his "down there area" with "[h]er hand and mouth."[27] The video depicting the act, without elaboration, is the

[23] Ans. Br. at 28–29 ("These videos were also the best evidence of the solicitation itself, so it was proper for the jury to view the very evidence that Clark forced his victim to view as an aid in reaching their verdict.").
[24] Ans. Br. at 28 ("But S.M. testified, *before anyone knew the content of Clark's cell phone*, that Clark had used that phone to show her a video of Moore performing fellatio on him.")
[25] A562.
[26] A642.
[27] A643.

only relevant intrinsic fact about it.[28] The only probative detail offered was the corroboration:

> Q. *What did the videos show?*
> A. *The videos showed Leandra Moore, Leandra Moore performing oral sex on what appeared to be a black male, heavy set.*
> Q. *What was the importance of these videos in this case?*
> A. *The importance of the videos, it corroborated what [S.M.] said on her initial interview, that she was shown videos that depicted that.*
> Q. *I'm going to show you State's Exhibit 4.*
> *(Pause.)*
> *(Playing video)*
> Q. *Sergeant Bozeman, was what we just watched one of the six videos that was collected?*
> A. *It was.*
> Q. *Thank you. No further questions.* A561–62.

Against this sparse backdrop, the State overstated the record, pluralizing in closing "[h]ow else would [S.M.] know about *those videos* unless the defendant showed *them* to her?"[29] Though the State disagrees with Clark's claim that the prosecutor's closing arguments weaponized jury disgust against Clark, the assertion that there is no evidence to support that claim requires strenuous misreading of the record on the subject.[30] The State's closing argument that "[t]his video was hard to watch. But since the defendant forced [S.M.] to watch it, we had to watch it too,"[31]

[28] A561.
[29] A643 (emphasis added).
[30] Ans. Br. at 34.
[31] A643.

validated a feeling of disgust in the jury and blamed Clark for the feeling. In asserting that the jury, by viewing the unpleasant video, has now shared the experience of being forced to watch it, like S.M. did, the State's closing also subtly approached a violation of the "golden rule" which prohibits placing the jury in the shoes of the victim (or defendant) and thus unfairly calling upon the jury's sympathy.[32] In service of this tactic, the State also willfully disregarded the basic fact that the video the jury watched was not known to be the video that S.M. allegedly watched,[33] and was overwhelmingly likely to *not* be the video.[34] "[T]he prosecutor must not misstate the evidence or mislead the jury as to the inferences it may draw."[35] In a close case, unfairly prejudicial video evidence opened the door for the State to leverage the unfair prejudice towards Clark and Moore.

While the *DeShields* factors[36] provide a framework for constructive balancing of probative value and unfair prejudice,[37] their specific application here is not suggested as a one-size-fits all solution or even requisite under these circumstances. The factors, by identifying many pertinent concerns and correctives involved in balancing, are offered to contrast with the trial court's handling of the issue. In a

[32] *Swan v. State,* 820 A.2d 342, 355-56 (Del. 2003).
[33] A562.
[34] A561 ("A total of six videos were collected ..."). One in six is a 16.67% chance.
[35] *Williams v. State,* 2014 WL 1515072 at *3 (Del. 2014).
[36] *Deshields v. State,* 706 A.2d 502, 506-07 (Del. 1998).
[37] D.R.E. 403.

close case characterized by sensitive issues, the balancing was assessed in a conclusory manner, hinging upon the trial court's finding that "there is also significant probative value, specifically to the charge of sexual solicitation and what has essentially been termed 'grooming' by the State by showing this video." A206.

The State supports the trial court's "grooming" analysis, citing *Owens v. State*,[38] which is distinguishable. *Owens* involved five pornographic pictures, featuring three specific characteristics: two pictures of a penis with a ring, one picture of a woman with ejaculate on her face, and other pictures showing a older man having oral and anal sex with a younger man.[39] Owens showed the photos to a minor victim on his computer and she recounted the array of details listed, so they were pertinent corroboration when discovered by police searching his computer.[40] In addition to the more specific corroboration establishing higher probative value at the outset, the photos held distinct probative value in that they were the basis for charges of Endangering the Welfare of a Child.[41] In that scenario, the ambiguity surrounding how the photos might be characterized, and the clear connection between their graphic character and the welfare of a child seeing one made the photos more straightforwardly relevant.

[38] Ans. Br. at 30 (citing *Owens v. State*, 2008 WL 4659801 (Del. 2008)).
[39] *Owens* at *1.
[40] *Owens* at *2.
[41] *Owens* at *1.

As the State argued to the jury, "[t]here's only one reason that a grown, adult man, would show a child"[42] the video of Clark and Moore's sexual encounter. While the question of *whether* the video was shown to S.M. was disputed,[43] the State's argument makes a valid point: the inferences drawn from a mother's boyfriend forcing her young daughter to watch a video of her mother fellating him are universally incriminating. Contrary to the State's argument, that renders the viewing experience itself *less* probative. Nothing about the video itself *proves* that S.M. watched it any more than the offered stipulation would have. The video itself is less probative in this scenario than *Owens*, but given that it featured Clark and Moore, it was far more unfairly prejudicial.

[42] A660.
[43] A678.

III. THE TRIAL COURT ERRONEOUSLY APPLIED THE INDEPENDENT SOURCE DOCTRINE TO A WARRANT WHICH WAS NOT INDEPENDENT FROM THE ILLEGALITY OF THE PRIOR WARRANT AND ALSO ERRONEUOSLY CONCLUDED THAT THE PRIOR WARRANT WAS NOT A GENERAL WARRANT.

The State contends that the nature of the first cellphone warrant is an ancillary issue that need not be reached if the Independent Source Doctrine applies. However, the distinction between whether the First Warrant was overbroad or a general warrant is a threshold issue here, as the Second Warrant is clearly the fruit of the seizure and extraction of the phone that occurred pursuant to the first warrant. Under *Terreros*, the fruits of a general warrant must be suppressed in their entirety.[44] "The State does not dispute that the Second Warrant was dependent on the First Warrant."[45] Should this Court find error in the decision that the First Warrant was merely overbroad, only application of the Independent Source Doctrine could save the Second Warrant.

General Warrant

The State claims "Warrant One was not a general warrant because it limited the information sought to information or data related to the Sexual Solicitation charge and dated within a specific time frame."[46] The claim that "identification of

[44] *Terreros v. State*, 312 A.3d 651, 671 (Del. 2024).
[45] Ans. Br. at 37.
[46] Ans. Br. at 38.

information sought" constrains the scope of the search is an incorrect premise not established by the State's citation.[47] Clark's Opening Brief provided pertinent authority that the "any other information/data pertinent to this investigation"[48] language within the warrant authorized law enforcement to explore all categories of data within the phone.[49] Underlining the majority in *Taylor*, Justice Vaughn issued a concurrence, which stated in its entirety: "I agree that the warrant here, which authorizes a seizure of 'any/all ... information pertinent to the investigation within said scope,' does not limit itself to the seizure of things which have been described with particularity. I concur in the judgment of the Court."[50]

The any/all language which permits review of all categories of data on the phone makes a search general, not overbroad. Nor does the reference to certain categories of data provide particularity when those categories encompass virtually every type of data on the phone:

> The Fourth Amendment demands a nexus between the probable cause articulated in the affidavit and each place to be searched. Even the State conceded that the affidavit does not provide facts sufficient to conclude that any evidence of the alleged crime would be found in Terreros's messages, messaging apps, photos, videos, or call logs. And although the State contends otherwise, there are no facts contained in the affidavit that set forth probable cause to believe that Terreros's GPS data would contain evidence

[47] Ans. Br. at. 38, fn.100.
[48] A34.
[49] Opening Br. at 31, fn. 23 (citing *Taylor v. State*, 260 A.3d 602, 616 (Del. 2021)
[50] *Taylor* at 619 (Vaughn, J., concurring).

> of a crime. Accordingly, the affidavit only contained a nexus between the crime and Terreros's internet history, but the warrant allowed police to search nearly every category of data on the cell phone. Our Constitution does not allow that type of "exploratory rummaging" through digital data.[51]

Terreros found that the warrant at issue was impermissibly general because "'the scope of the warrant so far outruns [the] probable cause finding—and is so lacking in particularity relative to that probable cause finding.' In essence, the warrant authorized the very type of unbounded fishing expedition that the particularity requirement is intended to prevent."[52] While recent Delaware caselaw has focused on the distinction between general and overbroad warrants, allowing redaction of unlawful sections of some overbroad warrants,[53] the distinction operates similarly to other jurisdictions' attempts to determine severability of lawful portions of a warrant.[54] The Tenth Circuit held under federal law that severance requires that the "valid portions ... make up the greater part of the warrant,"[55] and "[c]ommon sense indicates that we must also evaluate the relative scope and invasiveness of the valid and invalid parts of the warrant."[56]

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[51] *Terreros* at 667 (citations omitted).
[52] *Terreros* at 668 (quotation omitted).
[53] *See, e.g., Terreros* at 667 (citations omitted).
[54] *Compare Terreros* at 663 *with U.S. v. Sells*, 463 F.3d 1148, 1155–61 (10th Cir. 2006).
[55] *Sells* at 1158 (quoting *U.S. v. Naugle*, 997 F.2d 819, 822 (10th Cir. 1993).
[56] *Sells* at 1160 (citing *Voss v. Bergsgaard*, 774 F.2d 402, 406 (10th Cir. 1985) ("(declining to employ the severance doctrine where '[t]he bulk of the warrant's

Here, in pursuit of a single video file, the State obtained a warrant that permitted them to examine everything that had occurred on the phone or been stored in its memory for more than sixteen months. While the sixteen-month period may be broadly derived from the investigation, the failure to limit what types of data could be reviewed across a huge period of time ensured that every dimension of the phone's usage would be explored.[57] *Terreros* identified a warrant that was not particular as to categories as a general warrant *before* turning to the lack of temporal limitation as a *separate* reason that the warrant in that case was a general warrant.[58] A sixteen month window into the entire contents of a phone is a profound intrusion on privacy rights.

"[I]t is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate."[59] An indiscriminate search across all categories of phone data comprehensively invades the user's private life, probing details such as associations, locations, symptoms, emails, secrets, texts, and

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provisions ... simply allow[ed] for the seizure of evidence, whether or not related to tax fraud, and largely subsume[d] those provisions that would have been adequate standing alone')").

[57] *Aday v. Superior Court*, 362 P.2d 47, 52 (Cal. 1961) ("We recognize the danger that warrants might be obtained which are essentially general in character but as to minor items meet the requirements of particularity.... Such an abuse of the warrant procedure, of course, could not be tolerated.").

[58] *Terreros* at 668.

[59] *Riley v. California*, 573 U.S. 373, 395 (2014).

the thoughts that spill into an internet search.[60] Moreover, data can be cross-referenced across categories to develop even more invasive insights.[61]

Independent Source Doctrine

Attempting to meet its burden,[62] the State argues without substantiation that "[t]he narrowing did not depend in any way on information improperly obtained pursuant to warrant one."[63] But the prior search was clearly signaled by the statement in the Second Warrant that "the cellphone has remained in police custody and the warrant reapplication does not exclude any *evidence that was obtained* from the download of the cellular device at the time." A77 (emphasis added). The removal of "text messages" as a category from the Second Warrant[64] looms large, as the State denies that such narrowing relates to the prior search but offers no evidentiary support for that proposition.[65] The State also claims that "Clark did not assert the State had improperly obtained information relevant to his case."[66] That is incorrect.[67]

The trial court's use of a motion hearing on the four corners of the warrants, in the absence of a full evidentiary hearing, has created an imprecise record in which

[60] *Riley* at 395–96.
[61] *Id.*
[62] Opening Br. at 30, fn. 21.
[63] Ans. Br. at 37–38.
[64] Opening Br. at 29–30; A116—25; A140.
[65] Ans. Br. at 37–38.
[66] Ans. Br. at 38.
[67] Opening Br. at 30; A111; A139.

the applicability of the Independent Source Doctrine is not supported by any substantive evidence.[68] *Terreros*, fresh on the State's mind,[69] identified the extent to which an incorrect and insufficient record stymied analysis of the warrant's scope both by the trial court and on appeal,[70] but that lesson did not produce a clearer record here in support of the Doctrine.

The State suggests the relevant test under the Independent Source Doctrine is "could have obtained the subsequent warrant without knowledge of the materials it improperly received pursuant to the first warrant",[71] but that is a less accurate inquiry under the Doctrine than whether "no information gained from the illegal entry *affected either the law enforcement officers' decision to seek a warrant* or the magistrate's decision to grant it."[72] "The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the

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[68] If the Court finds the record insufficient to reach a decision on the relationship between the warrants, Clark notes as an alternative that evidence exists for a clearer record on remand, given the existence of a police report written by Bozeman in November of 2023, between the execution of the first warrant and the drafting of the second. The relevant page of the report, attached hereto as "Exhibit A", indicates that the sought-after video was discovered during the initial search of the phone, so its existence and location was known when the second warrant was drafted.

[69] Ans. Br. at 36.

[70] *Terreros* at 669–70, fn. 130 ("This Court does not ascribe to any of these statements an intent on the State's part to mislead the trial court. Nonetheless, the confusion created by the State's lack of clarity leaves the warrant impossible to uphold on this record.").

[71] Ans. Br. at 37. *See Utah v. Strieff*, 579 U.S. 232, 238 (2016) (mentioning Independent Source Doctrine in passing while discussing Attentuation Doctrine).

[72] *Murray v. U.S.*, 487 U.S. 533, 540 (1988) (emphasis added).

information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant *was prompted by what they had seen during the initial entry*, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant."[73]

The State argues that *Terreros* alerted the authorities to the need for a new warrant with greater particularity,[74] but *Terreros* merely joined a substantial line of precedent that has been hammering that point home for years: "Taken together, *Wheeler*, *Buckham*, and *Taylor* instruct that reviewing courts should consider whether the warrant's explicit language and its practical effect allow law enforcement to search categories of digitally stored information that lack a sufficient nexus to their investigation."[75]

The first warrant dates to March 16, 2023. A77. The Second Warrant dates to May 1, 2024, and reflects that the contents of the phone had already been extracted, producing evidence "that was obtained from the download of the cellular device at that time," and noting that the phone has remained in police custody. A77. Bozeman sought both warrants. A37; A77. It beggars belief to suggest that police, having already extracted and identified evidence on the phone, would have sought a Second

[73] *Murray* at 542 (emphasis added).
[74] Ans. Br. at 36.
[75] *Terreros* at 666.

Warrant to cure any legal deficiencies surrounding the First, *if not for the fact they knew the phone contained evidence they wanted to use*. The causal link is apparent.

If "the purpose of the federal exclusionary rule is to deter future unlawful police conduct and safeguard constitutional rights",[76] failure to suppress the evidence recovered under the First Warrant excused unlawful police conduct, rather than deterring it. Police disregarded ample authority from this Court to intrude upon Clark's reasonable expectations of privacy by reviewing everything on his phone from a period of over sixteen months.

Nor should the fact of the Second Warrant preceding Clark's Motion to Suppress carry any weight. Whereas the State commences prosecution possessing the documents necessary for litigating a suppression claim, defense counsel is dependent upon the discovery process to furnish the necessary documents. The State can always win the race to the courthouse doors in this scenario,[77] and incentivizing such conduct would also undermine judicial economy by discouraging transparent negotiations between the parties.

Excusing the police conduct here under the Independent Source Doctrine after the State conceded that "the Second Warrant was dependent on the First Warrant"[78]

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[76] *Lopez-Vazquez v. State*, 956 A.2d 1280, 1291 (Del. 2008).
[77] *Learning Network, Inc. v. Discovery Communications, Inc.*, 11 Fed.Appx. 297 (10th Cir. 2001) ("[T]here can be no race to the courthouse when only one party is running.").
[78] Ans. Br. at 37.

would warp the English language and the exclusionary rule beyond the point of usability. This Court should not incentivize law enforcement gamesmanship while permitting unlawful fishing expeditions into the enormous reservoir of deeply private data that people carry on their phones every day.

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW BY INTERPREING 11 *DEL. C.* § 3508 AS BARRING THE PRESENTATION OF RELEVANT EVIDENCE AND PROHIBITING RELEVANT CROSS-EXAMINATION OF THE COMPLAINING WITNESS, AND IN DOING SO, THE TRIAL COURT VIOLATED CLARK'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND CONFRONTATION OF THE WITNESS.

Inconsistent Application of § 3508

Although the trial court ruled that S.M.'s "undated conversations with a peer" regarding terms she had learned from the Internet were not a "sexual encounter" for the purposes of 11 *Del. C.* § 3508, it considered the sufficiency of the defense offer of proof in so finding. A242-43 The trial court found that the text messages did not "demonstrate sexual conduct" but also that they "did not meet the threshold required for 3508." A248. This ruling filtered out evidence under 3508 when 3508 was not applicable.[79]

Moreover, the trial court erred in (a) failing to consider the admissibility of the evidence under D.R.E. 403[80] and (b) prohibiting evidence attacking S.M.'s credibility.

[79] *See Scott v. State*, 642 A.2d 767, 771 (Del. 1994) ("[T]he statute was not written to require the 3508 filtering process whenever evidence of prior sexual conduct is introduced for a legitimate reason other than attacking the victim's credibility.").
[80] A252.

Rather than conducting the balancing test required by D.R.E. 403, the trial court ruled that defense counsel could not use the messages as independent evidence. A252. Clark argued that the evidence would be "more probative than prejudicial" when assessing S.M.'s credibility. A252. The trial court, without further explanation or inquiry, limited cross-examination to questions that would "determine whether or not she understood the words that she was using." A252.

While the trial court found that Clark's offer of proof was insufficient to warrant an *in camera* hearing on the subject of S.M.'s sexual knowledge, it failed to consider the probative value of such evidence against the danger of unfair prejudice to S.M.[81] Failure to exercise discretion and conduct the requisite balancing test has been deemed error by this Court.[82]

Furthermore, the trial court erred when it did not permit trial counsel to ask about the content of the messages or juxtapose them with S.M.'s answers in her CAC interview. The State argues this ruling was correct pursuant to D.R.E. 608(b).[83]

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[81] *See State v. Massey*, 2024 WL 3443572, at *5 (Del. Super. 2024) (*aff'd by Massey v. State*, 2025 WL 2536692 (Del. 2025) (citing *Bryant v. State*, 1999 WL 507300 (Del. 1999) ("Circumstances such as those in *Bryant* rightfully require some relief from § 3508 under a 'cry wolf' theory.").

[82] *See Jewell v. State*, 340 A.3d 562, 577 (Del. 2025) ("[T]his is not a close call: the trial court's failure to conduct the required balancing of probative value and prejudicial effect of the challenged evidence under D.R.E. 403, an exercise the necessity of which was firmly established under our law, was an abuse of—or perhaps more accurately, a failure to exercise—its discretion.").

[83] Ans. Br. at 43.

However, this interpretation improperly narrows the Rule's scope. The Superior Court, in *State v. Watson*, clarified that the maxim embodied by D.R.E. 608(b), "counsel must take the answer of the witness", does not necessarily mean that counsel may not ask follow-up questions to "overcome an initial denial of past misconduct."[84] *Watson* emphasized that counsel may use and openly refer to documents when phrasing questions, even when the documents may be inadmissible.[85] Although specific instances of past misconduct may not be admissible to establish the witness's character for truthfulness, trial counsel's efforts to attack the witness's credibility *vis a vis* her purported sexual knowledge (or lack thereof) should have been permissible under *Watson*, but were hamstrung by the trial court's ruling.

A broad interpretation of D.R.E. 608 lends itself to the conclusion that trial counsel's proposed line of cross-examination does not implicate the Rule at all. Trial counsel stressed the "pivotal" nature of the credibility of S.M.'s CAC interview, and the Court agreed. A251. The State's argument conflates S.M.'s credibility with regards to her CAC interview and her testimony regarding sexual knowledge with her character for truthfulness.

Evidence of Falsity

[84] *See State v. Watson*, 846 A.2d 249, 254 (Del. Super. 2002).
[85] *See id.*

An *in camera* hearing was held on one specific text message, alleging that a boy at school had touched S.M. inappropriately. A318. The trial court found "conflicting testimony" regarding the allegation, that S.M. had credibly testified that the incident happened, and that S.M.'s mother's testimony regarding whether S.M. had told her "you can't believe anything I say" was "equivocal". A346-47. The trial court's ruling is contrary to precedent analyzing prior false allegations of sexual assault under 3508.

In *Massey v. State*, this Court noted that "most state rape shield statutes are silent about whether prior false allegations of sexual assault can be used at trial to attack a witness's credibility"[86], and was "reluctant" to announce a definitive rule, noting "it is unclear whether the General Assembly intended to include prior false sexual abuse allegations within the statutory definition of sexual conduct."[87]

While the proponent of the evidence in *Massey* did not offer any evidence of falsity, Moore's testimony provided evidence that the allegation may have been fabricated. A339. Moore testified that she learned about the allegation, and S.M. responded to her questioning about the incident with "you can't believe anything I say". A339. Moore further testified that she attempted to learn the boy's name, but that S.M. repeatedly said that she did not remember it. A339. At the very least,

[86] *See Massey v. State*, 2025 WL 2536692, at *8 (Del. 2025).
[87] *See id.*

S.M.'s mother's testimony casts doubt on S.M.'s prior allegation, and the trial court prevented trial counsel from fairly exploring the issue.

The trial court erred in holding that the evidence was inadmissible to challenge S.M.'s credibility under D.R.E. 403. A348. As with the Instagram messages analyzed *supra*, the Court failed to exercise its discretion to conduct a balancing test.

V. THE TRIAL COURT PLAINLY ERRED BY ALLOWING THE PROSECUTOR TO VOUCH FOR HER CASE DURING HER REBUTTAL, WHICH VIOLATED CLARK'S RIGHT TO A FAIR TRIAL.

The State has fairly taken issue with an incomplete quotation, citing *Kurzmann v. State*,[88] but it has nonetheless identified that, in addition to the "I hugged her then and I would hug her again", "Clark argues the prosecutor vouched for S.M. during rebuttal by making an argument similar to saying that the prosecutorial acts of the State are undertaken carefully and thus are evidence of guilt."[89] This was encompassed within the statement, quoted by the State, that "[n]othing at this trial from the State has been done to put on a show."[90]

The prosecutor echoed that inappropriate phrasing shortly thereafter: "The State would never put a 13-year-old kid, who is terrified of being here, on the witness stand for a show. The State would never show a video like that for a show."[91] Since the State has responded to the substance of the allegation, Clark's claims are fairly presented for review in the interests of justice, should the Court elect to review the claim.[92]

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[88] *Kurzmann v. State*, 903 A.2d 702, 710 (Del. 2006).
[89] Ans. Br. at 47 (*see* fn. 134, citing Opening Br. at 38–39).
[90] Ans. Br. at 48 (quoting A706).
[91] A706–07 (*see* Opening Br. at 38).
[92] Sup. Ct. R. 8.

This claim need not be reached if Clark can prevail on his first claim, asserting the failure to grant a mistrial was error. In fairness to trial counsel on both sides, the "manifest necessity"[93] of a mistrial had, in the absence of relief, curdled into a series of untenable strategic dilemmas by the time the trial reached closing arguments.

[93] *U.S. v. Perez*, 22 U.S. 579, 580 (1824).

CONCLUSION

For the reasons and upon the authorities cited herein, Defendant's aforesaid convictions should be vacated.

Respectfully submitted,

/s/ Anthony J. Capone
Anthony J. Capone [#5315]
Office of Public Defender
Carvel State Building
820 North French Street
Wilmington, DE 19801

/s/ Lauren N. Brown
Lauren N. Brown [#6767]
Office of Public Defender
Carvel State Building
820 North French Street
Wilmington, DE 19801

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