

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

| | | |
|---------------------|---|----------------------|
| STATE OF DELAWARE |) | |
| |) | |
| v. |) | C.A. Nos. 1108013001 |
| |) | 1108006000 |
| QUINTIN T. MULDROW, |) | |
| |) | |
| Defendant. |) | |

OPINION

Date Submitted: July 2, 2012
Date Decided: August 9, 2012

Upon Defendant's Motion to Dismiss Indictment and/or Bar Retrial:
GRANTED.

Daniel B. McBride, Esquire, Deputy Attorney General, Department of Justice, 820 North French Street, Seventh Floor, Wilmington, DE 19801, Attorney for the State.

Ferris W. Wharton, Esquire, Assistant Public Defender, Public Defender of the State of Delaware, Carvel State Office Building, 820 North French Street, Third Floor, Wilmington, DE 19801, Attorney for the Defendant.

Jurden, J.

I. INTRODUCTION

Quinton Muldrow is charged with eight counts of Burglary Second Degree, eight counts of Theft (three counts of misdemeanor theft and five counts of felony theft), eight counts of Conspiracy Second Degree, and one count of Receiving Stolen Property. Following a mistrial declared by the Court on March 8, 2012, the Court allowed the State and Muldrow to submit their written positions analyzing the impact and ramifications of certain discovery violations by the State. Muldrow argues that the State's discovery violations violated his due process rights and preclude a retrial. The State argues that the mistrial was the appropriate remedy and retrial is permitted. For the reasons that follow, Muldrow's Motion to Dismiss Indictment and/or Bar Retrial is **GRANTED**.

II. BACKGROUND AND FACTS

On August 6, 2011, New Castle County Police ("NCCPD") discovered Muldrow and Blake Culp trying to break open a small safe. NCCPD determined that the safe had been stolen in a burglary the previous day and arrested Muldrow and Culp. Detective Dan Rogers of the NCCPD interviewed Blake Culp about a series of burglaries. Culp confessed to committing two of eight recent burglaries and implicated Muldrow in several more. Culp also implicated Lamar Goode who was arrested the next day. When Detective Rogers interviewed Goode, Goode confessed to committing four of the eight burglaries with Muldrow.

On the first day of trial, March 6, 2012, the State disclosed to the Court and Muldrow that one of the alleged victims, Lori Crawford, told the State the week before trial that she had previously identified a suspect out of a photographic line-up shown to her by the police. Up until this point, Muldrow had no knowledge that the police had shown a photographic line-up to Ms. Crawford, or that she had identified a suspect. The State promised to investigate the issue further, then proceeded with its case-in-chief, avoiding reference to the photographic line-up. During direct examination, the State elicited an in-court identification of Defendant by Ms. Crawford.¹

After the Court recessed for the day, the prosecutor's inquiry that evening revealed that Ms. Crawford had been shown *three* separate photographic line-ups by NCCPD on August 7, 2011.² Remarkably, prior to trial, the State produced no information whatsoever about these three line-ups, even though Muldrow propounded a discovery request on the State in August, 2011 specifically requesting, among other things, *Brady* material and "the date, time and location of any and all line-ups, photographic or show-up identifications (or attempted identifications) of the defendant(s) in connection with the above cases(s)."³ On

¹ Ms. Crawford identified Muldrow as the person who was in her home on the day of the alleged burglary.

² Ms. Crawford's testimony revealed that she believed NCCPD detectives showed her photographic line-ups on the morning of July 17, 2011. Detective Breslin testified that he believed he showed Ms. Crawford photographic line-ups on August 7, 2011.

³ Defendant's March 19, 2012 Letter to the Court ("Def. Lt.") at 4 (D.I. 4, 25).

March 8, 2012, the Court held an *in camera* hearing to address the State's failure to disclose the evidence of and relating to the photographic line-ups.

During that *in camera* hearing, Ms. Crawford testified that Detectives Breslin and Welch from the NCCPD showed her three photographic line-ups.⁴ She told the NCCPD detectives that she did not recognize anyone in the photographs. According to Ms. Crawford, the detectives then asked her to select the person that she thought most resembled the person she saw in her home that day. Ms. Crawford testified that she identified an individual, but did not mark the photograph she selected. Ms. Crawford does not recall if she selected the defendant or someone else.

Detectives Breslin and Welch testified as well during the *in camera* hearing. They both have a different recollection of Ms. Crawford's attempted identification, but have no notes and made no mention in any report that they showed photographic line-ups to Ms. Crawford. Both detectives testified that they were assigned to go to Ms. Crawford's home on August 7, 2011 to show her line-ups and that Ms. Crawford did not identify a suspect. Again, there is no documentation – no notes and no reference in the police reports – about this. Both detectives testified that they did not recall asking Ms. Crawford any follow-up questions after she could not identify a suspect. The State presented three photographic line-ups

⁴ According to the detectives, each photographic line-up (of six photos) included a photo of one of the suspects from the burglaries.

during Detective Breslin's testimony, but Detective Breslin could not say whether the line-ups presented were the line-ups shown to Ms. Crawford on August 7, 2011 or newly generated line-ups.

After taking testimony at the March 8, 2012 *in camera* hearing, the Court heard argument. During argument, the prosecutor informed the Court that he conducted an "intake interview" with Detective Rogers, the Chief Investigating Officer in this case. The prosecutor stated that he specifically asked Detective Rogers if photographic line-ups were used for identification purposes. According to the prosecutor, Detective Rogers responded in the negative. But Detective Breslin testified during the *in camera* hearing that he informed Detective Rogers about Ms. Crawford's failure to identify a suspect from the photographic line-ups shortly after NCCPD's meeting with Ms. Crawford.⁵ The prosecutor also informed the Court that it had received notice from a Department of Justice social worker on March 2, 2012, four days before trial, that Ms. Crawford claimed she had identified an individual out of a line-up.⁶

After considering the testimony elicited during the *in camera* hearing, arguments of counsel, and the relevant case law, the Court determined that the State's failure to produce this evidence prejudiced Defendant and deprived him of

⁵ Detective Welch testified that she did not take notes or report the failed identification to Detective Rogers because she believed that Detective Breslin would do so.

⁶ See March 8, 2012 Trial Transcript at p. 73 (D.I. 49)

his right to a fair trial.⁷ Accordingly, the Court declared a mistrial. Muldrow now urges the Court to dismiss the charges against him or bar retrial.

III. PARTIES' CONTENTIONS

Muldrow argues that the State's failure to disclose the photographic lineups and Ms. Crawford's response to them violates *Brady v. Maryland*.⁸ Muldrow also argues that if, as she claims, Ms. Crawford identified a suspect, the State's failure to preserve and disclose that selection violates his due process rights under the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of Delaware Constitution. According to Muldrow, it is "vitally important to the defense to know not just that Ms. Crawford made an identification, but also whom she identified."⁹ Muldrow asserts that it is "safe to assume that she did not identify the defendant, for if she had, there can be little doubt that such identification would have appeared in a police report."¹⁰ Muldrow argues that if Ms. Crawford selected someone other than Defendant or his co-defendants, "that selection significantly undermines her in-court identification" because she is the only *independent* witness that has implicated Defendant in any of the charged burglaries.¹¹ Muldrow further argues that the NCCPD detectives' failure to preserve Ms. Crawford's

⁷ The State does not dispute that granting a mistrial in light of its discovery violations was the appropriate remedy in this case. State's March 22, 2012 Letter to the Court ("St.'s Letter") at 3.

⁸ 373 U.S. 83 (1963).

⁹ Def. Lt. at 6.

¹⁰ *Id.* at 6, n. 9. It is noteworthy that Ms. Crawford did not identify the defendant previously (or even if she did identify him, she does not remember it), yet she made an in-court identification.

¹¹ *Id.* at 6.

identification severely impacts the testimony of Goode and Culp, Muldrow's co-defendants.¹²

The State disputes that its failure to disclose this evidence violates *Brady*, and maintains that the prejudice caused to Defendant "by the State's admitted violation of Superior Court Criminal Rule 16 was adequately remedied when the Court granted the defendant's request for a mistrial"¹³ The State further argues that because it did not "goad" Defendant into moving for a mistrial, double jeopardy has not attached, and thus a retrial is not barred.¹⁴

IV. DISCUSSION

A. The State Violated Brady v. Maryland.

The United States Supreme Court held in *Brady v. Maryland*¹⁵ that when the State suppresses evidence that is favorable to the accused and material to either guilt or punishment, the State violates the defendant's right to due process

¹² Ms. Crawford and co-defendant Lamar Goode are the only witnesses that place Muldrow in Ms. Crawford's residence on the day of the alleged burglary. Ms. Crawford's failure to identify Muldrow is obviously very favorable evidence for the defense. If Ms. Crawford identified Goode in the photographic line-ups, Goode's statement regarding Muldrow's alleged participation in the burglary is uncorroborated. If Ms. Crawford identified Culp, not only is Goode's statement uncorroborated, but it is impeachable as well. If Goode's statement to police is impeached, it severely undermines Culp's and Goode's statements that Muldrow participated in the eight burglaries. NCCPD arrested Culp on August 6 and Goode on August 7. According to Detective Breslin, he interviewed Ms. Crawford and showed her three photographic line-ups on August 7 (Ms. Crawford says this occurred on July 19, 2011. If Detective Breslin is correct, then at the time NCCPD showed the photographic line-ups to Ms. Crawford, they already suspected Goode, Culp, and Muldrow. If Ms. Crawford is correct, she identified a suspect from those line-ups, Muldrow suggests that the reason NCCPD failed to preserve her identification is because she identified Goode or Culp (who both confessed already), or someone else, but *not* Muldrow. It seems likely that if she had identified Muldrow, the police would have preserved that evidence.) It is unknown on what date this event actually occurred.

¹³ St.'s Lt. at 3.

¹⁴ *Id.* at 3.

¹⁵ 373 U.S. 83 (1963).

“irrespective of good faith or bad faith of the prosecution.”¹⁶ A *Brady* violation is comprised of three parts: “(1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) the evidence is suppressed by the State; and (3) the suppression prejudices the defendant.”¹⁷ The failure to produce evidence, however, will not, by itself, constitute a *Brady* violation.¹⁸ *Brady* requires the State to provide evidence to the defendant when “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”¹⁹

Determining whether the “proceeding would have been different” does not require the Court to find that the defendant would have been acquitted.²⁰ Those accused of crimes are afforded the right to a fair trial, which is understood to mean a trial with a “verdict worthy of confidence.”²¹ Consequently, the burden of showing a reasonable probability of a different result only requires the defendant to show that the suppressed evidence “undermines [the] confidence in the outcome of the trial.”²²

Here, Ms. Crawford’s failure to identify Muldrow or her inability to recall who she identified (depending on whose recollection is correct – the NCCPD

¹⁶ *Id.* at 87.

¹⁷ *Starling v. State*, 882 A.2d 747, 756 (Del. 2005) (citing *Strickler v. Greene*, 527 U.S. 263 (1999)).

¹⁸ *Starling*, 882 A.2d at 756.

¹⁹ *Id.* (quoting *Jackson v. State*, 770 A.2d 506, 516 (Del. 2001)).

²⁰ *Atkinson v. State*, 778 A.2d 1058, 1063 (Del. 2001) (citing *Kyles v. Whitley*, 514 U.S. 419 (1995)).

²¹ *Id.* (quoting *Kyles*, 514 U.S. at 434).

²² *Id.*

detectives' or hers) is evidence that: (1) is favorable to the accused; (2) was suppressed by the State; and (3) is prejudicial to the defendant. Ms. Crawford's inability to identify Muldrow in any of the photographic line-ups shortly after the burglary is exculpatory. This evidence is also critical impeachment evidence because Ms. Crawford is the only independent witness linking Muldrow to the burglary and she identified Muldrow at trial – a year after she failed to identify him in three photographic line-ups.²³ Muldrow argues that if Ms. Crawford identified Goode or Culp, it is exculpatory because it undermines their testimony as to Muldrow's alleged participation. Unfortunately, no one will ever know whether Ms. Crawford identified Goode or Culp because she cannot remember who she selected. While the NCCPD detectives maintain that she selected no one, they failed to document showing her any line-ups, failed to make any notes about her response, and cannot verify that the photographic line-ups they produced (after the trial started) are the same line-ups viewed by Ms. Crawford on August 7, 2011.

The Court finds that the State's failure to preserve and disclose this evidence violates *Brady*.²⁴ The Court must now determine whether the State's *Brady*

²³ The Court can well imagine the devastating cross examination Ms. Crawford would have been subjected to had Muldrow had this evidence at trial. The credibility of her in-court identification of Muldrow would have been seriously undermined when defense counsel elicited that she could not identify anyone from three photographic line-ups shown to her shortly after the alleged burglary occurred.

²⁴ As the Delaware Supreme Court in *Deberry v. State* noted, determining whether the photographic line-ups would have been discoverable under *Brady* is an "artificial exercise" since the photographic line-ups are not available for review. 457 A.2d 744, 751 n. 5 (Del. 1983). However, Ms. Crawford is the only independent witness that implicates the defendant in this case. Assuming she failed to identify defendant, or in the alternative, identified his co-defendants, the photographic line-ups would have been discoverable under *Brady*.

violation has prejudiced Muldrow to such an extent that he cannot receive a fair trial, or, put differently, a verdict worthy of confidence.

B. The State’s Failure to Preserve and Produce Evidence Warrants Dismissing Muldrow’s Charges and Bars a Retrial.

The State’s *Brady* violation (and admitted Superior Court Criminal Rule 16 Violation (“Rule 16”))²⁵ require the Court to consider “what should be done when the State takes possession of exculpatory (or potentially exculpatory) evidence and then loses or destroys it before or in response to the defendant’s discovery request.”²⁶ When the State fails to preserve evidence, the Court considers the following:

1. Would 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*?
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 the breach?²⁷

The Court’s analysis balances the nature of the State’s conduct against any prejudice to the defendant.²⁸ “The State must justify the conduct of the police or

²⁵ Pursuant to Superior Court Criminal Rule 16(b), the defendant may “inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, copies or portions thereof which are within the possession, custody or control of the state”

²⁶ *Deberry*, 457 A.2d at 749.

²⁷ *Id.* at 750 (other citations omitted).

²⁸ *Hammond v. State*, 569 A.2d 81, 87 (Del. 1989).

prosecutor, and the defendant must show how his defense was impaired by the loss of evidence.”²⁹

As the Court notes above, the photographic line-ups shown to Ms. Crawford are subject to disclosure under Rule 16, and her inability or failure to identify the defendant is subject to disclosure under *Brady*.

The State must preserve discoverable evidence because the failure to “take adequate steps to preserve evidence may deny a defendant due process and thereby jeopardize otherwise viable convictions.”³⁰ The Delaware Supreme Court has not prescribed the exact procedures law enforcement agencies should follow to preserve evidence,³¹ but has noted that agencies “should create rules for gathering and preserving evidence that are broad enough to include any material that could be favorable to a defendant.”³² Superior Court Criminal Rule 16(b) provides that a defendant only needs to show that an item “may be material to the preparation of his defense” to be discoverable.³³ Moreover, while the duty to preserve evidence is not explicitly set forth in *Brady* or Superior Court Criminal Rule 16, the State’s “duty to disclose evidence includes a duty to preserve it as well.”³⁴ And that

²⁹ *Deberry*, 457 A.2d at 752.

³⁰ *Deberry*, 457 A.2d at 751. (quoting *Gov’t of the Virgin Islands v. Testamark*, 570 F.2d 1162, 1165-66 & n. 7 (3d Cir. 1978)); see also *Hammond*, 569 A.2d at 85 (citing *Deberry*, 457 A.2d at 751-52) (“This Court has recognized that the ‘obligation to preserve evidence is rooted in the due process provisions of the fourteenth amendment to the United States Constitution and the Delaware Constitution, article I, section 7.’”).

³¹ *Deberry*, 457 at 752.

³² *Hammond*, 569 A.2d at 88.

³³ *Deberry*, 457 A.2d at 752 (other citations omitted).

³⁴ *Deberry*, 457 at 751.

obligation to preserve evidence is “rooted in the due process provisions of the Fourteenth Amendment to the United States Constitution and the Delaware Constitution, article I, section 7.”³⁵ This duty applies to the Delaware Department of Justice and all investigative agencies within this State.³⁶

With regard to the third inquiry noted above, the Court must engage in another three part-part analysis to determine whether the State breached its duty to preserve evidence, and the consequences of said breach.³⁷ The Court must consider: “(1) the degree of negligence or bad faith involved, (2) the importance of the lost evidence, and (3) the sufficiency of the other evidence adduced at the trial to sustain the conviction.”³⁸ This approach to the State’s failure to preserve evidence differs from that of the United States Supreme Court. In *Arizona v. Youngblood*,³⁹ the United States Supreme Court held:

The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have . . . exonerated defendant.... We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.⁴⁰

³⁵ *Hammond*, 569 A.2d at 85 (citing *Deberry*, 457 A.2d at 751-52).

³⁶ *Deberry*, 457 A.2d at 751-52. (citing *United States v. Bryant*, 439 F.2d 642, 650 (D.C. Cir. 1971)).

³⁷ *Deberry*, 457 A.2d at 752.

³⁸ *Id.* (other citations omitted).

³⁹ 488 U.S. 51 (1988).

⁴⁰ *Id.* at 57.

Thus, the United States Supreme Court adopted a “*hybrid approach*”⁴¹ to claims of denial of access to evidence, *i.e.*, the State’s culpability is irrelevant when it comes to *Brady* violations while “good faith principles” are applicable when it comes to *potentially* favorable evidence.⁴² In contrast, the Delaware Supreme Court in *Deberry v. State*⁴³ adopted a “*unitary approach*” when either claim is made⁴⁴ and “remain[s] convinced that fundamental fairness, as an element of due process, requires the State’s failure to preserve evidence that could be favorable to the defendant ‘[to] be evaluated in the context of the entire record.’”⁴⁵ Indeed, “[w]hen evidence has not been preserved, the conduct of the State’s agents is a relevant consideration, but *it is not determinative.*”⁴⁶

The Court is satisfied that the prosecutor here did not act deliberately in failing to timely disclose the photographic line-ups or Ms. Crawford’s response to them. At worst, the NCCPD detectives were negligent when they: (1) failed to disclose they showed three photographic line-ups to Ms. Crawford; (2) failed to preserve the three photographic line-ups they showed to Ms. Crawford; (3) failed to record who Ms. Crawford identified (if anyone at all); and (4) failed to take notes of what transpired during Ms. Crawford’s attempted identification.

⁴¹ *Hammond*, 569 A.2d at 87.

⁴² *Id.* (citing *Youngblood*, 488 U.S. at 57).

⁴³ 457 A.2d at 750.

⁴⁴ *Hammond*, 569 A.2d at 87 (citing *Deberry*, 457 A.2d at 750).

⁴⁵ *Id.* (citing *State v. Agurs*, 427 U.S. 97, 112 (1976); *Deberry*, 457 A.2d at 752; Del. Const. art. I, § 7).

⁴⁶ *Hammond*, 569 A.2d at 87.

Next, the Court considers the importance of the missing evidence. Evidence that Ms. Crawford failed to identify Muldrow, identified a co-defendant, or identified some other individual, from three photographic line-ups is very important evidence. If Ms. Crawford did not identify Muldrow in photographic line-ups shortly after the burglary, it impeaches her in-court identification a year later. And as discussed earlier, this evidence has the potential to impeach the testimony of Muldrow's co-defendants.⁴⁷

Last, the Court examines the sufficiency of the other evidence available to the State. Ms. Crawford is the only independent witness who implicates Muldrow. The only other witnesses who implicate the defendant are his two co-defendants (whose testimony a jury will be instructed to examine with more care and caution than the testimony of a witness who did not participate in the crime charged),⁴⁸ and the NCCPD officers who arrested Muldrow as he was attempting to break open a stolen safe.

Based upon the State's breach of its duty to preserve, the Court must determine what consequences, if any, should flow from the State's violation. The State argues that granting a mistrial in Defendant's first trial was the appropriate consequence after its Rule 16 violation came to light, and that nothing precludes a retrial on his current charges. The State notes that "a motion by the defendant for a

⁴⁷ See n. 11 *supra*.

⁴⁸ *Brooks v. State*, 40 A.3d 346, 350 (Del. 2012).

mistrial, which is granted, generally removes any barrier to reprosecution.”⁴⁹ Moreover, save for situations where the State “goads” the defendant into moving for a mistrial, double jeopardy usually does not attach, and a retrial is not barred.⁵⁰ Muldrow, on the other hand, argues that he has suffered irreparable harm as a result of the State’s *Brady* and Rule 16 violations, and thus, the Court should dismiss the charges against him.

While the Court here is satisfied that the prosecutor did not act deliberately in failing to timely disclose the photographic line-ups or Ms. Crawford’s response to them, the State’s conduct is not determinative.⁵¹ As a result of NCCPD’s failure to preserve evidence no one will ever know who, if anyone, Ms. Crawford identified. She is the only *independent* witness linking Muldrow to a burglary, and therefore, her identification is key evidence in the State’s case-in-chief (the State’s only other evidence against Muldrow is his prior record,⁵² the testimony of two co-defendants, and the fact that NCCPD arrested Muldrow as he attempted to open what turned out to be a stolen safe). Unlike *Hammond v. State*, where the “case against Hammond was strong,”⁵³ the State’s case here rests on significantly weaker

⁴⁹ State’s Letter to the Court at 3 (citing *State v. Bailey*, 521 A.2d 1069, 1075 (Del. 1987) (other citations omitted).

⁵⁰ *Oregon v. Kennedy*, 456 U.S. 667 (1982); *State v. Lloyd*, 2002 WL 971795 (Del. Super.); *State v. Lewis*, 2002 WL 1335304 (Del. Super.).

⁵¹ *Hammond*, 569 A.2d at 87.

⁵² According to the State, Muldrow was previously adjudicated delinquent or convicted for burglaries in 2006, 2007, 2008, and 2009. State’s Letter to the Court at 1.

⁵³ *Hammond*, 569 A.2d at 90. In *Hammond*, although the State failed to preserve a crash vehicle in a vehicular homicide case, the Delaware Supreme Court held that Hammond’s due process rights were not violated because he had admitted to witnesses that he was the driver of the car, contrary to his defense at trial.

evidence, *i.e.*, co-defendant testimony and testimony by NCCPD officers that they found Muldrow attempting to open a stolen safe. The failure to preserve the evidence of the photographic line-ups and Ms. Crawford's reaction to them is so fundamentally unfair that it has denied Muldrow due process under Article I, Section 7 of the Delaware Constitution. Muldrow's potential defense has been significantly impaired by the loss of this exculpatory evidence, and thus, Muldrow's prosecution should be barred.⁵⁴

V. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss Indictment and/or Bar Retrial is **GRANTED**.

IT IS SO ORDERED.

Jan R. Jurden, Judge

cc: Prothonotary

⁵⁴ *See Hammond*, 569 A.2d at 90. The Court notes that a *Deberry* instruction would normally suffice in a situation where the State has failed to preserve evidence. However, the Court finds that the prejudice in this case is far greater than the norm. Simply instructing a jury to consider missing evidence in this case as exculpatory is inadequate. If the witnesses linking Muldrow to the burglaries he allegedly committed were not his co-defendants, a *Deberry* instruction might have remedied any prejudice Muldrow might face. But Ms. Crawford's testimony is so inextricably entwined with Culp's and Goode's testimony that one cannot be considered without the other. Ms. Crawford maintains she identified someone when NCCPD detectives showed her three photographic line-ups. That she potentially identified a co-defendant or no one at all severely impacts Culp's and Goode's reliability. Because Muldrow's co-defendant's statements are heavily reliant upon Ms. Crawford's identification (or lack thereof) for corroboration, the loss of this information is so fundamentally unfair to Muldrow that it would make it impossible to have a fair trial, even with a *Deberry* instruction.