EFiled: Apr 09 2015 11:27AM EDT
Filing ID 57051940
Case Number 64,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellant,	)	No. 64, 2015
	)	
v.	)	On Appeal from the
	)	Superior Court of the
JERMAINE WRIGHT,	)	State of Delaware in and
	)	for New Castle County
Defendant-Below,	)	
Appellee.	)	

STATE'S CORRECTED OPENING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

Elizabeth R. McFarlan
Chief of Appeals
Bar ID No. 3759

Steven P. Wood
Deputy Attorney General
Bar ID No. 2309

820 N. French Street
Carvel State Building, 7th Floor
Wilmington, DE 19801
(302) 577-8500

DATE: April 9, 2015

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

STATUTES AND RULES

OTHER AUTHORITIES

NATURE AND STAGE OF PROCEEDINGS

On January 30, 1991, Wilmington Police and Delaware State Police arrested Jermaine M. Wright. On April 29, 1991, a New Castle County grand jury indicted Wright on the following charges: murder in the first degree (intentional murder) (11 *Del. C.* § 636(a)(1)); murder in the first degree (felony murder) (11 *Del. C.* § 636(a)(6)); robbery in the first degree (11 *Del. C.* § 832); conspiracy in the first degree (11 *Del. C.* § 513); and three counts of possession of a deadly weapon during the commission of a felony ("PDWDCF") (11 *Del. C.* § 1447). DI 1.[1] Wright moved to suppress his videotaped confession, for which Superior Court held an evidentiary hearing on September 30, 1991. DI 23. On October 30, 1991, Superior Court denied the motion.[2] Wright filed another motion to suppress his confession on June 25, 1992. DI 58. Superior Court held another evidentiary hearing on July 30, 1992. DI 61. Superior Court denied that second motion to suppress on August 6, 1992.[3]

In August 1992, a jury convicted Wright of all charges except conspiracy and the related PDWDCF. DI 70. Following a penalty hearing, the jury found that a statutory aggravating circumstance existed and recommended a sentence of

[1] "DI__" refers to Superior Court Criminal Docket item numbers in *State v. Jermaine Wright*, ID No. 91004136DI. A1-89.

[2] *State v. Wright*, Del. Super., ID No. 91004136DI, Del Pesco, J. (Oct. 30, 1991) (Letter Order) (Ex. A) (also found without pagination at 1991 WL 11766247).

[3] *State v. Wright*, 1992 WL 207255 (Del. Super. Ct. Aug. 6, 1992).

death. DI 74. In October 1992, Superior Court sentenced Wright to death. DI 83. On November 17, 1993, this Court affirmed Wright's convictions and sentence.[4]

On January 24, 1994, Wright filed his first motion for postconviction relief. DI 132. On August 12, 1994, the original Superior Court judge granted Wright's motion for postconviction relief as to his claim of ineffective assistance of counsel in the penalty phase and vacated his sentence of death.[5] Following a re-trial of the penalty phase in January 1995, the jury again recommended death. DI 193. On February 8, 1995, Superior Court re-imposed a death sentence. DI 199. On January 26, 1996, this Court affirmed Superior Court's denial of Wright's motion for postconviction relief as to his guilt-phase claims, and affirmed the re-imposition of his death sentence.[6]

Thereafter, Wright filed his second motion for postconviction relief in January 1997, which the Superior Court denied in September 1998.[7] And, in January 2000, this Court affirmed that decision.[8] Wright docketed his third postconviction motion in October 2003. DI 332. And, on June 19, 2008, without the third motion having been resolved, Wright filed his fourth motion for postconviction relief. DI 335. In December 2008, Wright filed an amendment to

[4] *Wright v. State*, 633 A.2d 329 (Del. 1993).

[5] *State v. Wright*, 653 A.2d 288 (Del. Super. Ct. 1994).

[6] *Wright v. State*, 671 A.2d 1353 (Del.), *cert. denied*, 517 U.S. 1249 (1996).

[7] *State v. Wright*, 1998 WL 734771 (Del. Super. Ct. Sept. 28, 1998).

[8] *Wright v. State*, 2000 WL 139974 (Del. Jan. 18, 2000).

the motion (DI 345), and, in May 2009, he filed a "consolidated successor petition" (DI 367). Beginning on September 14, 2009, Superior Court held five days of evidentiary hearings. DI 384. On September 28, 2009, Wright filed another amendment to his motion to add a claim that "the admission of Mr. Wright's alleged confession violated Miranda." DI 387. The Superior Court held two additional days of evidentiary hearings on October 7 and 8, 2009. DI 389.

On January 3, 2012, Superior Court issued a memorandum opinion and order granting Wright postconviction relief on a *Miranda* claim and a *Brady* claim, denying Wright's other claims, and vacating Wright's convictions and sentence. DI 419, 420, 421. The State appealed, and this Court reversed.[9] Following the re-instatement of his convictions and sentence, Wright appealed the rulings adverse to him from the Superior Court's grant of his fourth motion for postconviction relief, and this Court reversed Wright's convictions on the basis of a *Brady* violation.[10]

In anticipation of re-trial, on July 14, 2014, the State filed a motion for recusal of the judge who presided over the case since Wright filed his fourth motion for postconviction relief. DI 496. On August 29, 2014, Wright moved to suppress his confession. DI 505. On October 2, 2014, Superior Court held a hearing on the motion for recusal and on December 16, 2014 Superior Court

[9] *State v. Wright*, 67 A.3d 319 (Del. 2013).

[10] *Wright v. State*, 91 A.3d 972 (Del. 2014).

denied the motion.[11] DI 508, 516. In a written opinion, on January 30, 2015, Superior Court granted Wright's motion to suppress.[12] That same day, the State certified that evidence of Wright's confession was essential to the prosecution of the case, and Superior Court entered an order dismissing the indictment pursuant to 10 *Del. C.* § 9902(b). DI 518, 519.

The State docketed a timely appeal pursuant to 10 *Del. C.* § 9902. This is the State's opening brief.

[11] *State v. Wright*, 2014 WL 7465795 (Del. Super. Ct. Dec. 16, 2014).

[12] Superior Court issued a corrected opinion regarding its grant of Wright's motion to suppress on February 2, 2015. *State v. Wright*, 2015 WL 475847 (Del. Super. Ct. Feb. 2, 2015).

SUMMARY OF ARGUMENT

I. Superior Court abused its discretion by suppressing Wright's confession. Superior Court, after raising the claim *sua sponte* during the course of the proceedings in Wright's fourth motion for postconviction relief, found that Wright had not received adequate *Miranda* warnings prior to confessing to the shooting of Philip Seifert at the Hi-Way Inn liquor store in January 1991. This Court found that there was no basis for Superior Court to reconsider the admissibility of Wright's confession, because he had offered no basis to overcome the procedural bar of Criminal Rule 61(i)(4). Nevertheless, Superior Court again considered the admissibility of Wright's statement in the re-trial after remand by this Court. Reconsideration is barred by the law of the case doctrine, and Superior Court abused its discretion by ignoring the findings of the prior judge in this case, where those findings were and remain supported by the record.

II. Because of Superior Court's failure to accept this Court's prior findings of fact and conclusions of law in this case, a different judge should be assigned to Wright's new trial. Contrary to the record and his own admissions, the Superior Court judge denied this Court's determination that he *sua sponte* raised the adequacy of Wright's Miranda warnings. The Superior Court judge then revisited the admissibility of Wright's confession in contravention of this Court's ruling that he had no basis to do so, and suppressed Wright's confession. The

Superior Court judge initially stated he wanted to issue that decision on the anniversary of the "momentous date" that he first granted Wright's fourth motion for postconviction relief. The Superior Court judge's actions "display a deep-seated favoritism that would make his fair judgment in this case impossible."

STATEMENT OF FACTS[13]

The essential facts underlying Wright's conviction are not in serious dispute. On the evening of January 14, 1991, Debra Milner was working at the bar of the Hi–Way Inn, a combination bar and liquor store located on Governor Printz Boulevard near Wilmington. Philip Seifert was working in the adjacent liquor store. At around 9:20 p.m., Milner observed a black man in his mid-twenties enter the bar, look around, and leave without making a purchase. At about 10:20 p.m., the liquor store door bell rang, indicating that someone had entered. Seifert went to wait on the customer while Milner answered the telephone.

While she was on the telephone, Milner heard the bell ring again and assumed that the customer had left the liquor store. She then heard the bell ring a third time followed by a noise that she thought sounded like a firecracker. Assuming someone was playing a prank, Milner walked toward the passageway to the liquor store to investigate. Through the passageway, she saw Seifert slumped across the counter. She could not see the customer area of the liquor store from her vantage point. She then heard a gunshot and upon a closer view saw blood around Seifert. Fearing for her safety, Milner ran and hid in a room near the kitchen. Later, she ran back through the bar and out its front door where she saw a customer she recognized, George Hummell, making a telephone call.

[13] These facts are taken verbatim from this Court's opinion on direct appeal from the original trial. *Wright v. State*, 633 A.2d 329, 331-32 (Del. 1993) (footnotes omitted).

Hummell, a machinist inspector employed by Amtrak, was on his way to work and intended to stop at the Hi–Way Inn to cash a check. He was a regular customer and knew both Milner and Seifert. As he was waiting to make a left turn into the parking lot, he saw two men leave the liquor store. Hummell observed one of the men, the shorter of the two, return to the store while the other ran across the parking lot. After a short interval, the man who had re-entered the liquor store came back outside, ran across the road and entered a black Volkswagen in a parking lot across the street. The other man ran down the sidewalk and disappeared into the night. According to Hummell, the man who returned to the store and then left again was black, about 5' 8" tall, while the other man was also black and about 6' tall.

Suspicious of what he had observed, Hummell walked into the bar area, which was empty. He called out the names of several employees of the Hi–Way Inn, but there was no response. Hummell walked out of the bar and into the liquor store. He then saw Seifert with his head on the counter and bleeding from a head wound. Hummell immediately walked to the vestibule and dialed 911.

Sergeant Gary Kresge, the first police officer to arrive at the scene, saw Seifert lying on his back on the floor behind the counter. The cash register drawer was open and approximately $30 had been stolen. Later Seifert was pronounced

dead as a result of gunshot wounds. He had been shot three times, once in the neck and twice in the head.

Detective Edward Mayfield of the Delaware State Police was assigned to investigate Seifert's murder and robbery. Through an employee of the Hi–Way Inn, which had offered a reward for information leading to an arrest for the crimes, Mayfield received a tip that the perpetrators were "Marlo," an alleged drug dealer who lived on East 28th Street in Wilmington, and another man, "Tee." With the help of Wilmington police, Mayfield learned that "Marlo" was Jermaine Marlo Wright, while "Tee" was the "street name" of Lorinzo Dixon. On the basis of this tip and Hummell's description of the men he saw leaving the scene, Wright was developed as a suspect in the Hi–Way Inn murder/robbery. However, police did not have probable cause to arrest him for those crimes at that time.

In addition to the Hi–Way Inn murder/robbery, Wright was a suspect in two random shootings under investigation by Wilmington police. One shooting, being investigated by Detective Robert Merrill, involved a young boy, Emil Watson, who had been shot in the foot while riding his bicycle. The other, being investigated by Detective Robert Moser, involved the shooting of a young girl in a nearby park. Merrill obtained a warrant to arrest Wright for the Watson shooting and a warrant to search Wright's residence for guns and ammunition.

On January 30, 1991, at approximately 6:00 a.m., the warrants were executed. Because of a belief that Wright was heavily armed, a SWAT team entered and secured the premises and its occupants. Detectives Mayfield, Merrill, and Moser were among those executing the warrants. Wright was arrested for assault and transported to the Wilmington Police Department between 8:00 and 9:00 a.m. He was then processed while the detectives were involved in a number of activities including a SWAT team debriefing, securing evidence that had been seized, interviewing another person who had been arrested at the Wright residence, and attending strategy sessions.

At approximately 12:00 p.m., Wright was first interviewed. After reading Wright the *Miranda* warnings, Detective Merrill questioned him for about 45 minutes regarding the Emil Watson shooting. Detective Moser then entered the room to interview Wright about the park shooting. After again receiving his *Miranda* warnings, Wright talked with Moser about that shooting for about 45 minutes. The interview then turned to other subjects, with Wright volunteering information regarding other criminal activity about which he had knowledge. Except for a few short breaks, during which Wright was provided with sodas, a sandwich, and opportunities to use the restroom, Moser was alone with Wright from the time the interview started until approximately 7:30 p.m. Detective

Mayfield was listening to the conversation in an adjoining room through a speaker system and conferred with Moser during breaks in the questioning.

Most of this six hour discussion focused on the Hi–Way Inn murder/robbery. Eventually, Wright implicated himself in the crimes. At that point, about 7:00 p.m., Mayfield came to the interview room and told Wright he wanted to take a videotaped statement from him concerning what he had told Moser. Mayfield conducted the videotaped interview from 7:35 to 8:20 p.m., at the beginning of which Wright was again given *Miranda* warnings.

In his statement to police, Wright claimed that on the night of the murder Dixon came to him and told him he knew of a place where someone was working alone. They drove to the Hi–Way Inn in a stolen black Volkswagen Jetta. Seifert refused to cooperate when they demanded money, and Dixon told Wright to shoot Seifert or he (Dixon) would kill Wright. Wright then shot Seifert once in the back of the head and then fled. Following his videotaped statement, Wright was arrested for the Hi-Way Inn killing and taken to Municipal Court where bail was set on the assault charge and then to Justice of the Peace Court No. 11 for presentment on the Hi-Way Inn charges.

I. SUPERIOR COURT ABUSED ITS DISCRETION BY SUPPRESSING WRIGHT'S CONFESSION ON THE BASIS OF DEFECTIVE *MIRANDA* WARNINGS.

Question Presented

Whether the Superior Court abused its discretion in granting Wright's motion to suppress his confession based on a failure to provide adequate *Miranda*[14] warnings prior to his videotaped statement.[15]

Standard and Scope of Review

This Court reviews the grant or denial of a motion to suppress for an abuse of discretion. The Court examines the trial judge's legal determinations *de novo* for errors in formulating or applying legal precepts. To the extent the trial judge's decision is based on factual findings, the Court reviews for whether the trial judge abused his discretion in determining whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous.[16]

Merits of Argument

Jermaine Wright's confession remains the single most litigated issue in this case. Both the trial judge and this Court have found Wright's confession voluntary, knowing and intelligent. Nothing about Wright's confession or the facts surrounding it has changed over time; nor has the law regarding recitation of

[14] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[15] *State v. Wright*, 2015 WL 475847, at *28-29 (Del. Super. Ct. Feb. 2, 2015).

[16] *Lopez-Vazquez v. State*, 956 A.2d 1280, 1284-85 (Del. 2008) (citations omitted).

Miranda warnings. Consequently, Superior Court, having *sua sponte* raised a claim that the third rendition of the *Miranda* warnings provided to Wright on January 30, 1991 was inadequate during the fourth postconviction proceedings, was and is precluded from re-visiting the issue. Moreover, to the extent the claim regarding the adequacy of the *Miranda* warnings has not been previously litigated or decided, the claim is without merit.

The Law of the Case Doctrine

Under the "law of the case" doctrine, "issues resolved by this Court on appeal bind the trial court on remand, and tend to bind this Court should the case return on appeal after remand."[17] "The 'law of the case' is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of litigation."[18] "The law of the case doctrine is founded on principles of stability and respect for court process and precedent."[19] "The law of the case doctrine requires that there must be some closure to matters already decided in a given case by the highest court of a

[17] *Hoskins v. State*, 102 A.3d 724, 729 (Del. 2014) (quoting *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1198 (Del. 2000)).

[18] *Id.* (quoting *Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990)).

[19] *Hudak v. Procek*, 806 A.2d 140, 154 (Del. 2002); *Gannett*, 750 A.2d at 1181.

particular jurisdiction, particularly when (with a different composition of jurists) that same court is considering matters in a later phase of the same litigation."[20]

Although the law of the case provides reliability and finality in the judicial process, the "doctrine is not intended to preserve error or injustice."[21] "[U]nlike *res judicata*, it is not an *absolute* bar to reconsideration of a prior decision that is clearly wrong, produces an injustice or should be revisited because of changed circumstances.[22] "[T]he law of the case doctrine does not apply when the previous ruling was clearly in error or there has been an important change in circumstances, in particular, the factual basis for the issues previously posed."[23] And, "the equitable concern of preventing injustice may trump the 'law of the case' doctrine."[24]

Application of the Doctrine

Prior to Wright's first trial, Superior Court considered two separate motions to suppress his confession. The first motion was premised in relevant part on an argument that Wright's "statement was made while he was intoxicated on heroin

[20] *Gannett*, 750 A.2d at 1181.

[21] *Hamilton v. State*, 831 A.2d 881, 887 (Del. 2003).

[22] *Gannett*, 750 A.2d at 1181-82 (citing *Brittingham v. State*, 705 A.2d 577, 579 (Del. 1998); *Zirn v. VLI Corp.*, 681 A.2d 1050, 1062 n.7 (Del. 1996)).

[23] *Hamilton*, 831 A.2d at 887 (citing *Kenton*, 571 A.2d at 784).

[24] *Id.* (citing *Brittingham*, 705 A.2d at 579).

and therefore the statement should be suppressed."[25] Wright argued that due to his heroin consumption "he was unable to validly waive his rights under *Miranda v. Arizona*, ... and that his confession was involuntarily given."[26] The trial court held a two-day evidentiary hearing and the parties submitted post-hearing legal memoranda. Thereafter, on October 30, 1991, Superior Court made the following finding of fact: "In this case, the interrogation began with a recitation of the *Miranda* rights."[27] The court specifically found that Wright "knowingly and intelligently waived his *Miranda* rights."[28] The court discussed the voluntariness issue and found Wright's "confession was voluntarily made."[29] The trial court's finding was based upon exactly the same set of facts relied upon by the successor Superior Court judge in postconviction to reach a contrary conclusion.

By finding Wright had received *Miranda* warnings that he "knowingly and intelligently" waived, Superior Court must have found the warnings sufficient to inform him of the rights he was waiving. To find the waiver knowingly made, the court had to find that the defendant's waiver was made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision

[25] *See State v. Wright*, Del. Super., ID No. 91004136DI, Del Pesco, J., Letter Order at 1 (Oct. 30, 1991) (Ex. A).

[26] *Id.* at 19.

[27] *Id.* at 16.

[28] *Id.* at 17.

[29] *Id.* at 20.

to abandon it."[30] Superior Court could not have concluded that Wright voluntarily, knowingly and intelligently waived his Fifth Amendment privilege without having found an adequate recitation of the *Miranda* warnings. That implicit finding is supported by the record and thus provides the law of the case.

At the September 1991 suppression hearing, Detective Robert Merrill of the Wilmington Police testified that he was the first police officer to interview Wright on January 30, 1991. A115. Det. Merrill stated that he advised Wright of his constitutional rights as follows:

> He had the right to remain silent. Anything he said can and would be used against him in a court of law. He had the right to an attorney. If he couldn't afford the attorney, the State would supply an attorney for him. He also had the right to stop answering questions at anytime during the interview.

A116. Wright then waived his rights, and Det. Merrill spent at least 45 minutes interviewing Wright about the Emil Watson shooting, to which Wright confessed. A135; 153-54; 163. Based on Det. Merrill's testimony at the 2009 evidentiary hearings where the now retired officer failed to correctly recite the *Miranda* warnings from memory, Superior Court apparently ignored or discounted Merrill's 1991 testimony and found it questionable whether he correctly gave *Miranda*

[30] *Marine v. State,* 607 A.2d 1185, 1195 (Del. 1992) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (internal quotations omitted)). "In order to be able to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to such questioning of his right to remain silent and of his right to have counsel, retained or appointed, present during interrogation." *Id.* (quoting *Fare v. Michael C.*, 442 U.S. 707, 717 (1979) (internal quotes omitted)).

warnings to Wright in 1991.

Detective Robert Moser of the Wilmington Police was the next officer to interview Wright that day. At the September 1991 suppression hearing, Det. Moser testified that even though Det. Merrill informed him that he had already advised Wright of his constitutional rights, Det. Moser nevertheless again gave *Miranda* warnings to Wright prior to questioning him. A117-18. Det. Moser stated that he "read them off the card." A118. When asked what rights were on the card, he responded:

> He had the right to remain silent. Anything he said could and would be used against him in a court of law. He had a right to have an attorney present at any time during questioning. If he could not afford one, the State would provide one for him. If he wished to stop at any time, he could do so. And then I asked him if he understood each and every one of his rights and he stated that he did.

A118.

During Det. Moser's lengthy interview, Wright denied any knowledge about the shooting of a young girl, the crime Det. Moser was investigating, but confessed to shooting Philip Seifert two weeks earlier on January 14, 1991. *See* A136-37; 148. After he had confessed, Det. Moser brought Delaware State Police Detective Edward Mayfield, the chief investigating officer in the Hi-Way Inn case, into the room to talk with Wright. A149. It was at this point that Det. Mayfield provided Wright with the *Miranda* warnings with which Superior Court, in 2012, took issue. Det. Mayfield's warnings can be heard on the videotaped confession reviewed by

Superior Court both pre-trial and in postconviction, by the jury at trial, and by this Court on appeal:

> What I'll first do is I'll read your rights to you, okay? Basically, you have the right to remain silent. Anything that you say can and will be used against you in a court of law. You have the right, right now, at any time, to have an attorney present with you, if you so desire. Can't afford to hire one, if the state feels that you're diligent and needs one, they'll appoint one for you. You also have the right at any time while we're talking not to answer. Okay? And at the same time, during the interview here, I will advise you, I am a, ah, member of the Delaware State Police. And I am investigating the Highway Inn, the robbery/homicide there. Okay? Do you understand what I've asked you today? Okay. Do you also understand that what we're going to be taking is a formal statement and that this statement's going to be video taped? Okay? Are you willing to give a statement in regards to this incident? Say yes or no.

A92.

In 2012, Superior Court[31] found, contrary to the trial judge and this Court, that Det. Moser "did not administer *Miranda* rights to Wright."[32] Superior Court based that finding upon Det. Moser's 1992 trial testimony:

> [Defense Counsel]: ... you didn't say anything about Miranda warnings. Did you give Miranda Warnings?
>
> [Det. Moser]: He had already been Mirandized.
>
> [Defense Counsel]: All right.
>
> [Det. Moser]: By the other detectives.

[31] The current Superior Court judge took over the case in 2008 after the original trial judge had retired. *See* A59.

[32] *State v. Wright*, 2012 WL 1400932, at *41 (Del. Super. Ct. Jan. 3, 2012).

> [Defense Counsel]: Who Mirandized him?
>
> [Det. Moser]: I believe Detective Merrill and Detective Burke.
>
> [Defense Counsel]: Officer, are you telling us that you questioned him about another criminal offense that you were investigating –
>
> * * *
>
> [Defense Counsel (at sidebar)]: ...I mean, we have gone through two suppression hearings. I was certainly under the impression that he be [*sic*] Mirandized each time. ... **I just want to ask him if he gave him Miranda Warnings**. I'm not going to pursue it further.
>
> The Court: You have asked him, he's answered, and so I would suggest that there's no appropriate further questioning.
>
> [Defense Counsel]: Can I re-emphasize that he did not give him his warnings?
>
> The Court: No.

A151-52 (emphasis added). Superior Court's explanation for this contrary finding is: "The court believes that his testimony at Wright's trial is likely to be the most accurate rendition of what actually occurred during Wright's interrogation. The obvious point is that his testimony at trial was far closer in time than his testimony at the instant Rule 61 hearing."[33] The court, with no explanation, disregarded Det. Moser's testimony from the September 1991 suppression hearing, which is the

[33] *Wright*, 2012 WL 1400932, at *41.

most close in time to Wright's interrogation.[34] In addition, the court inexplicably found it significant that the State did not ask Det. Moser any questions regarding *Miranda* during re-direct at the 1992 trial.[35] But the State had objected to any questioning by defense counsel on the point, arguing that the issue had been decided at the suppression hearings. A151-52. The prosecutor was certainly not going to open a door he had just successfully closed. Moreover, Det. Moser's trial testimony was not a "denial that he administered *Miranda* warnings to Wright" as found by Superior Court in 2012.[36] Det. Moser's testimony, having been cut short, cannot now be transformed into more that it was at the time. At no point did Det. Moser say that he had *not* provided Wright with *Miranda* warnings. To the extent that Det. Moser's truncated trial testimony could support an inference that he did not provide *Miranda* warnings, such an inference is unreasonable when Det. Moser's testimony from the 1991 suppression hearing and the 2009 suppression hearing are considered. At the 2009 postconviction hearings, Det. Moser testified that he had given Wright *Miranda* warnings, "even though I knew that he had been read them by all the previous detectives, it is just a safe precaution that I always do." A160.

---

[34] The court also discounted the trial judge's decision after the second suppression hearing that specifically found that Det. Moser had informed Wright of his *Miranda* rights. *See Wright*, 2012 1400932, at *41 n.131 (citing *State v. Wright*, 1992 WL 207255 (Del. Super. Ct. Aug. 6, 1992)).

[35] *Id.* at *41.

[36] *Id.* at *41 n.131.

On direct appeal from Wright's 1992 convictions and sentence, this Court specifically found:

> Wright was arrested shortly after the 6:00 a.m. raid on his residence. After administrative matters were concluded, questioning of him began around noon. For the next eight and one-half hours, he willingly spoke with detectives concerning various crimes about which he had knowledge, **waiving his *Miranda* rights three times.**[37]

This decision (plainly coming *after* Det. Moser's trial testimony) again implicitly found that Wright's *Miranda* warnings were adequate – whether individually or as a group.[38]

More recently, in reversing the grant of Wright's fourth postconviction motion, this Court addressed the issue under the heading: "***There was no basis for the Superior Court to reconsider the admissibility of Wright's confession***."[39] This Court explained in relevant part:

> The Superior Court decided to address the adequacy of Wright's *Miranda* warnings *sua sponte*. It listened to the same videotaped confession that was the subject of a motion to suppress before trial; a claim of error on direct appeal; the second Rule 61 motion; and the appeal of that motion. **Each challenge was rejected after addressing Wright's understanding of his *Miranda* rights. In deciding Wright's fourth postconviction motion, the Superior**

[37] *Wright v. State*, 633 A.2d 329, 335 (Del. 1993) (emphasis added).

[38] *See Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 40-41 (Del. 2005) ("We find no evidence in the record to show that these findings of the Court ... in 1991 were clearly wrong, or that they produce an injustice. The only circumstance that has changed since 1991 was the remand for a new trial. This was not a basis to change matters already decided and not appealed. Because there was no available exception to the law of the case doctrine, these findings ... were binding upon the Court ....").

[39] *State v. Wright*, 67 A.3d 319, 323 (Del. 2013).

> **Court did not have any new evidence upon which to conclude that Wright's *Miranda* warnings were defective**.[40]

And, at a subsequent oral argument on the State's motion for recusal, Superior Court agreed:

> [Prosecutor]: Your Honor, with all due respect, I think in the end, there is a dispute between the State and the Court about whether Your Honor should have been allowing further litigation over the adequacy of the defendant's Miranda warnings.
>
> The Court: I agree with you. And I agree that you win that dispute in light of what the Supreme Court did. No question about it.

A337-38. Nevertheless, in granting Wright's motion to suppress his statement, Superior Court has now found that: 1) it is questionable whether Det. Merrill gave accurate *Miranda* warnings; 2) Det. Moser did not give any warnings; and 3) Det. Mayfield's rendition of the *Miranda* warnings was not sufficient to adequately convey his Fifth Amendment constitutional rights to Wright. And in so doing, Superior Court has elected to ignore or discount the findings of the trial judge who necessarily and implicitly found that the two prior administrations of the *Miranda* warnings were adequate, both the trial court and this Court's factual determination that Wright had waived his *Miranda* rights three times, and this Court's holding that reconsideration of the admissibility of Wright's confession was not warranted in the interest of justice.[41]

---

[40] *Id.* (emphasis added).

[41] *Id.* at 323.

Superior Court Criminal Rule 61's procedural bar to formerly adjudicated claims may not be the precise equivalent of the law of the case doctrine precluding reconsideration of an issue pre-trial in the context of a re-trial. Nevertheless, the rule is premised on the law of the case doctrine and the same analysis applies – once an issue has been decided, unless new evidence or law requires reconsideration of a claim, the prior ruling in the case should stand.[42] Thus, this Court's finding that Superior Court should not have revisited the admissibility of Wright's confession in postconviction proceedings supports the State's argument that the law of the case precludes revisiting the same issue at the re-trial.

Superior Court's Ruling on the Adequacy of the Miranda warnings

Even though the trial court found that Det. Merrill's recitation of *Miranda* warnings at the September 1991 suppression hearing was adequate, the Superior court nonetheless revisited the issue, after raising it *sua sponte*, and found that based on the retired police officer's recollection 18 years after the fact, that Det. Merrill's *Miranda* warnings may have been misstated because he recited them

[42] *Weedon v. State*, 750 A.2d 521, 527-28 (Del. 2000) ("In our view, Rule 61(i)(4)'s bar on previously litigated claims is based on the 'law of the case' doctrine. In determining the scope of the 'interest of justice' exception, we recognize two exceptions to the law of the case doctrine. First, the doctrine does not apply when the previous ruling was clearly in error or there has been an important change in circumstances, in particular, the factual basis for issues previously posed. *See Kenton v. Kenton,* Del. Supr., 571 A.2d 778, 784 (1990) ("The 'law of the case' is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation."). Second, the equitable concern of preventing injustice may trump the 'law of the case' doctrine. *See Brittingham v. State,* Del. Supr., 705 A.2d 577, 579 (1998).").

from memory.[43] There is no evidence in the record upon which the court could reasonably have based this supposition. The court also found, contrary to the evidence presented at the 1991 suppression hearing, that Det. Moser did not give Wright any warnings.[44] The court then found Det. Mayfield's rendition of the *Miranda* warnings to be constitutionally deficient.[45] Having found the first warning at risk of having been misstated (without any basis for that finding), the second warning not to have been given at all (contrary to the record evidence), and the third warning to be defective, the court concluded that Wright was never properly informed of his constitutional rights and, therefore, could not have knowingly waived them.[46] The factual underpinning of the court's analysis is not supported by the record and the legal analysis is flawed. Wright received adequate warnings of his constitutional rights and, as this Court has already found, he knowingly, intelligently and voluntarily waived those rights.

Wright's Three Miranda Warnings

Wright received his first *Miranda* warnings from Det. Merrill at

---

[43] *See Wright*, 2015 WL 475847, at *2 & n.4.

[44] *See Wright*, 2012 WL 1400932, at *41. Superior Court based its decision on its clearly erroneous finding that Det. Moser testified at trial that he "did not give any warnings because Wright had already been "*Mirandized.*" *Id.* (compare with A151-52). The court found this was supported by Det. Moser's 2009 postconviction testimony that he had given the warnings and obtained a written waiver, because no waiver was produced at the hearing. *See Wright*, 2015 WL 475847, at *3.

[45] *See Wright*, 2015 WL 475847, at *19.

[46] *See Wright*, 2012 WL 1400932, at *45.

approximately noon on the day he was arrested.[47] Those original warnings were proper and there is no evidence to the contrary. Wright waived his rights and discussed the Emil Watson shooting with Det. Merrill, confessing that he was responsible for that shooting.

Det. Moser next administered *Miranda* warnings approximately 45 minutes to an hour later. There is nothing in the record to indicate that those warnings were defective. Wright again waived his rights and informed Det. Moser that he knew nothing about the shooting of a young girl in the park. A136. Wright then discussed various criminal activities about which he did have knowledge. A138. Eventually, about six hours later, Wright brought up the shooting at the Hi-Way Inn. A119; 140-43. After some discussion, Wright confessed to Det. Moser that he had shot Philip Seifert because he was afraid that Lorinzo Dixon would kill him if he did not. A145-48. It was only after Wright had confessed that Det. Mayfield was brought into the interview. A149.

Det. Moser introduced Det. Mayfield to Wright and asked if Wright would be willing to repeat his statement concerning the Hi-Way Inn on videotape. Wright agreed. A149. After spending about a half an hour getting a room set up with video equipment, Wright and both detectives moved into that room to begin the interview at approximately 7:30 p.m. A92; 150. By the time Det. Mayfield

[47] *Wright*, 633 A.2d at 332.

administered the allegedly defective *Miranda* warnings, Wright had been given *Miranda* warnings twice that day, confessed to the Watson shooting, denied the shooting of the girl in the park, and confessed to the Hi-Way Inn robbery/shooting. Det. Mayfield's warnings were sufficient, but in any case, Wright had already confessed to shooting Philip Seifert to Det. Moser after twice validly waiving his Fifth Amendment rights.

Det. Mayfield's Miranda *warnings were not required*

First, the State asserts that, because the police administered Miranda warnings to Wright on two prior occasions that evening, Det. Mayfield was not required to give Wright a fresh set of *Miranda* warnings. The State consistently argued that Wright had been provided with three sets of *Miranda* warnings, thus providing no reason for anyone to challenge the adequacy of Det. Mayfield's rendition and thus, has not waived that issue below. A386. The State met its burden of proving that proper warnings were given at the suppression hearing in September 1991. Wright did not challenge the witnesses on that point, nor did he make any argument that the State had failed to meet its burden. It is only 18 years later, when memories have faded, that Wright (after being prompted by the court) decided to raise this claim.

In *Ledda v. State*,[48] this Court adopted a five-part list of factors for a court to consider in determining whether police are obligated to repeat once-administered *Miranda* warnings:

> (1) the time lapse between the last *Miranda* warnings and the accused's statements;
> (2) interruptions in the continuity of the interrogation;
> (3) whether there was a change of location between the place where the last *Miranda* warnings were given and the place where the accused's statement was made;
> (4) whether the same officer who gave the warnings is also conducting the interrogation resulting in the accused's statement; and
> (5) whether there is a significant difference between statement elicited during the interrogation being challenged and other preceding statements.[49]

Applying those factors to this case, Superior Court found that Det. Mayfield was required to re-administer *Miranda* warnings.[50] Superior Court is mistaken.

At approximately 7:00 p.m., Wright actually confessed to Det. Moser that he had shot Philip Seifert. A147-48. Wright thus confessed approximately 5-6 hours after having received *Miranda* warnings from Det. Moser, to the same police officer, while sitting in the same room. Thereafter, there was a gap of approximately a half an hour while the video equipment was set up before Det. Mayfield, *with Det. Moser*, continued the interview, albeit in a different room that accommodated the video equipment. Wright gave substantially identical

[48] 564 A.2d 1125 (Del. 1989).

[49] *DeJesus v. State*, 655 A.2d 1180, 1195 (Del. 1995) (citing *Ledda*, 564 A.2d at 1130).

[50] *See Wright*, 2012 WL 1400932, at *43-44.

admissions to Det. Mayfield as he had to Det. Moser. This Court in *Ledda* cited approvingly to courts having found time lapses of more than 4 hours – significantly more than the half hour at issue here - not to require re-administration of Miranda warnings.[51] Courts have found that even a more significant time lapse between interviews does not require re-administration of *Miranda*.[52]

Here, Wright was not faced with a new interrogator in a new setting discussing a new topic. To the contrary, Wright had been willingly talking with Det. Moser on a variety of topics for several hours. Wright brought up the Hi-Way Inn incident on his own initiative. He admitted to the shooting to the same officer to whom he had been speaking for hours. That officer stayed with Wright while he was repeating his confession to Det. Mayfield. Wright had not invoked at any point during the day. Wright had clearly denied any knowledge of the shooting of

---

[51] *See Ledda*, 564 A.2d at 1130 (citing *Comm. of Pa. v. Smith*, 387 A.2d 491 (Pa. Super. Ct. 1978) (7 hours); *Smith v. State*, 318 A.2d 568 (Md. 1974), *cert. denied*, 420 U.S. 909 (1975) (4 and ½ hours); *State v. Ruybal*, 398 A.2d 407 (Me. 1979) (4 hours)).

[52] *See, e.g., Miles v. State*, 2009 WL 4114385, at *2 (Del. Nov. 23, 2009) (5 hour time lapse did not require re-administration of *Miranda* where no change in location (but left alone in another location during the lapse), same officer, but slightly different statement); *State v. Johnson*, 2000 WL 33113922, at *4 (Del. Super. Ct. Oct. 31, 2000) (murder suspect handcuffed to chair for 12 hours, 4.5 hour lapse, same location, same topic, same officer, slightly changed statement did not require re-administration); *State v. Chapman*, 2000 WL 305343, at *1 (Del. Super. Ct. Jan. 28, 2000) (4.5 hour lapse, different location, same officer, no significant difference in statements did not require re-administration), *aff'd*, 2002 WL 243369 (Del. Feb. 13, 2002). *See also United States v. Clay*, 408 F.3d 214 (5th Cir. 2005) (finding 2 day lapse did not require re-administration of *Miranda*) (collecting cases); *United States v. Rodriguez*, 399 F.3d 1118, 1129 (9th Cir. 2005) (re-administration not required for second day of questioning after 16 hour time lapse, different officer, change of location; and citing with approval the totality of the circumstances approach in *Wyrick v. Fields*, 459 U.S. 42, 48-49 (1982) (*per curium*).

the young girl, demonstrating his ability to accept or reject police propositions arising during the interviews. The totality of the factors did not require re-administration of *Miranda* by Det. Mayfield. The issue can be decided on this basis alone.

Adequacy of Det. Mayfield's Miranda *warnings*

Even if this Court finds that Det. Mayfield was required to re-administer *Miranda* warnings prior to the videotaped interview, the warnings provided were adequate to apprise Wright of his Fifth Amendment rights.

In *Miranda,* the Supreme Court held that when a defendant is taken into custody, "[p]rior to any questioning, [the defendant] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[53] However, the Supreme Court "has never indicated that the 'rigidity' of *Miranda* extends to the precise formulation of the warnings given a criminal defendant."[54] "*Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures."[55] Rather, *Miranda* is satisfied if "the warnings reasonably

[53] 384 U.S. at 444.

[54] *California v. Prysock*, 453 U.S. 355, 359 (1981) (citing *United States v. Lamia*, 429 F.2d 373, 375-76 (2d Cir. 1970)). *See also Rhode Island v. Innis*, 446 U.S. 291, 297 (1980) (safeguards against self-incrimination include "*Miranda* warnings ... or their equivalent").

[55] *Id.*

'conve[y] to [a suspect] his rights as required by *Miranda*.'"[56]

In *Powell v. Florida*, the Supreme Court held that a warning informing the suspect that he has the right to talk to a lawyer before answering any questions, and that he could invoke at any time, satisfied *Miranda*.[57] In finding the warnings police gave Powell constitutionally adequate, the Supreme Court reviewed the warnings in their entirety, not looking at any one phrase in isolation.[58] The *Powell* Court cited the standard warnings used by the Federal Bureau of Investigation as "exemplary," but expressly declined to declare that any such precise formulation is necessary to satisfy *Miranda*.[59]

Here, the Superior Court focused on the following line from Det. Mayfield's warnings: "[If you] can't afford to hire one, if the state feels that you're diligent and needs one, they'll appoint one for you." Those words do not negate either the two prior warnings, or the balance of the warning Det. Mayfield provided. Det. Mayfield had also advised Wright: "Basically, you have the right to remain silent. Anything that you say can and will be used against you in a court of law. **You have the right, right now, at any time, to have an attorney present with you, if you so desire**." A92 (emphasis added).

---

[56] *Powell v. Florida*, 559 U.S. 50, 60 (2010) (quoting *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989)).

[57] 559 U.S. at 53.

[58] *Id*. at 63.

[59] *Id.* at 64.

Both the Supreme Court and Third Circuit have found defendants' statements that were preceded by equally "misleading" or conditional *Miranda* recitations to be admissible at trial. In *Duckworth*, the Supreme Court concluded that language that an attorney would be provided "if and when you go to court" did not undermine the totality of the warnings that the police provided.[60] The Supreme Court found that *Miranda* did not compel suppression of Duckworth's statement because the initial warnings described his right to have counsel present before the police asked him questions and informed him of his right to stop answering questions at any time until he spoke with a lawyer.[61]

As in *Duckworth*, Det. Mayfield's warning "touched all of the bases required by *Miranda*."[62] Det. Mayfield told Wright that he had the right to remain silent, anything he said could be used against him in court, he had the right to an attorney, and if he could not afford an attorney one would be appointed for him. Det. Mayfield's reference to the State finding that Wright was "diligent" before appointing a lawyer for him was clearly an inadvertent misstatement. Given Wright's familiarity with the criminal justice system and Det. Mayfield's statement that he had the right to an attorney, Wright was not misled into believing that he

[60] 492 U.S. at 203-04.

[61] *Id*. at 205.

[62] *Id.* at 203.

had to meet some additional requirement before he was entitled to the assistance of an appointed attorney.[63]

In *United States v. Warren*,[64] the Third Circuit held that the lack of an express reference to the right to counsel during interrogation did not undermine the validity of the given *Miranda* warning. In *Warren*, the warning, spoken from memory, recited the four *Miranda* components, but did not inform the defendant that he could have an attorney after questioning had commenced.[65] In light of *Powell*, the Third Circuit found no error in the trial court's denial of the defendant's motion to suppress.[66] Although the Third Circuit did not find the warnings to be the "clearest possible," under the totality of circumstances on direct review of the conviction, the court concluded that the warning did not restrict counsel's presence upon questioning.[67] Here, Det. Mayfield told Wright: "You have the right, right now, at any time, to have an attorney present with you, if you

[63] *Cf. Turner v. State*, 957 A.2d 565, 574 (Del. 2008) ("Turner's 'ample experience in the criminal justice system' indicates that he understood the nature of the right that he was forfeiting.").

[64] 642 F.3d 182 (3d Cir. 2011).

[65] *Id*. at 184.

[66] *Id.* at 186.

[67] *Id*. at 187.

so desire." Det. Mayfield's follow-up statement did not invalidate his own and the other detectives' warnings.[68]

Superior Court found that Det. Mayfield's statement could have been interpreted to mean that the State would only appoint an attorney if Wright was diligent in some way. In effect, the court found that Det. Mayfield's statement nullified the rest of his warnings (and the earlier 2 warnings) by placing an artificial barrier to appointment of counsel. This case is easily differentiated from the Maryland case relied upon which Superior Court relied. In *Luckett*,[69] a police officer explained to the defendant: "Okay, if we discuss any matters outside of the case, you don't need a lawyer present at all period, okay."[70] Prior to the officer's statement, the defendant had asked if he would be "setting myself up?"[71] And afterward, the defendant tried to clarify by saying, "So I won't be hurting myself" to which the officer repeated, "If we talk about anything but the case, okay."[72] The Maryland courts found the officer's explanations nullified what might otherwise have been acceptable *Miranda* warnings. In contrast, Det. Mayfield's clear

[68] *See United States v. Cruz*, 910 F.2d 1072, 1078-79 (3d Cir. 1990) (follow-up statement that defendant had the right to answer questions without a lawyer's presence was not so misleading as to dilute the substance of the preceding warnings).

[69] *State v. Luckett*, 993 A.2d 25 (Md. 2010).

[70] *Id.* at 31.

[71] *Id.*at 30.

[72] *Id.* at 31.

misstatement, made only once and without any request for clarification, did not mislead Wright or nullify the remainder of the warnings.

Superior Court also relied upon the Ninth Circuit's 1989 decision in *United States v. Connell*[73] in finding Det. Mayfield's warnings constitutionally infirm. However, *Connell* was decided prior to the Supreme Court's decisions in *Powell* and *Duckworth.* The Ninth Circuit later clarified *Connell*, explaining:

> We thus read *Connell* as holding that, **because of the confusion engendered by the inconsistent warnings**, the defendant could not readily infer the substance of his right to appointed counsel.
>
> Our understanding of *Connell* is consistent with the Supreme Court's subsequent ruling in *Duckworth* ..., where the Court held that it has "never insisted that *Miranda* warnings be given in the exact form described in [*Miranda v. Arizona*, 384 U.S. 436 (1966)]." *Duckworth* pointed out that the Court has held that "'the "rigidity" of *Miranda* [does not] exten[d] to the precise formulation of the warnings given a criminal defendant' and that 'no talismanic incantation [is] required to satisfy its strictures.'" *Id.* 492 U.S. at 202-03 (quoting *California v. Prysock*, 453 U.S. 355, 359 (1981) (per curiam)). *Duckworth* involved two different warnings read to a suspect from printed forms within a span of 29 hours. *Id.* 492 U.S. at 197-99. The challenged language appeared in the first warnings and stated that the suspect had the right to appointed counsel "if and when you go to court." A divided panel of the Seventh Circuit found the language defective because it denied the accused "a clear and unequivocal warning of the right to appointed counsel before any interrogation." *Eagan v. Duckworth*, 843 F.2d 1554, 1557 (7th Cir. 1988). The Supreme Court reversed. In holding that the initial warnings satisfied *Miranda*, it reasoned that, because the warnings are merely a prophylactic method of safeguarding a suspect's fifth amendment right against self-incrimination, rather than reflecting an independent constitutional right, "[r]eviewing courts ... need not examine *Miranda* warnings as if

[73] 869 F.2d 1349 (9th Cir. 1989).

> construing a will or defining the terms of an easement." 492 U.S. at 203. Instead of focusing on one sentence in isolation, the court looked to the warnings as a whole and found that they fully informed the suspect of his rights under *Miranda*. *Id.* at 205.[74]

Thus, Det. Mayfield's *Miranda* warning should be considered as a whole and his malapropism should be considered in context.

Based on the complete rendition of his rights, it is evident that Wright understood that he did not need to make a statement. He understood that the topic was the Hi-Way Inn robbery/homicide, and that he could stop at any time. He knew that he was entitled to have an attorney with him during the questioning. Given that Wright had not invoked at any time earlier that day after twice waiving *Miranda*, any understanding of a prerequisite of some sort for appointment of counsel did not impact his decision to give a statement. Wright had been fully informed that he did not need to speak without a lawyer and that anything he did say could be used against him. Under the facts of this case, that was sufficient to ensure that Wright could knowingly and intelligently waive his Fifth Amendment rights. And he did.

Wright has waived any claim as to the voluntariness of his waiver of Miranda

At the December 16, 2014 hearing, Superior Court gave Wright the option

[74] *United States v. Miguel*, 952 F.2d 285, 288 (9th Cir. 1991) (internal citations condensed) ("It was in the context of these clear *Miranda* warnings that Miguel was told he 'may' have an attorney appointed if he could not afford or otherwise obtain one. When we evaluate the totality of the warnings given, we believe that Miguel would be able to grasp the substance of what he was told—that he had the right to appointed counsel if he could not afford a lawyer.").

of having the court issue an order suppressing his statement based on inadequate *Miranda* warnings only, or to wait for the court to decide Wright's additional claim that his waiver was not voluntary. After the hearing, Wright expressly requested the court to issue its decision without addressing the voluntariness claim.[75] *See* A484. That claim is therefore waived.[76]

To the extent the Court decides that Wright's waiver of *Miranda* rights has not been fully litigated or does not fall squarely under the law of the case, the State submits that Wright knowingly, intelligently and voluntarily waived his Fifth Amendment rights and his videotaped confession is admissible against him at his re-trial.[77] To be valid, a waiver must be knowing, voluntary and intelligent.[78] Based on the totality of the circumstances, the court must be satisfied that the waiver was "the product of a free and deliberate choice rather than intimidation, coercion or deception."[79] In other words, "[t]he question in each case is whether the defendant's will was overborne by official coercion when a statement was

[75] *See* Letter from Eugene J. Maurer, Jr. to Judge Parkins dated Dec. 17, 2014 ("Specifically, the defense would withdraw its previous request that the opinion deal with both issues at the same time...."). A484.

[76] Del. Supr. Ct. R. 8.

[77] The State contends that this issue is also controlled by the law of the case, however, because the Superior Court judge stated at the December 16, 2014 hearing that he was prepared to decide the issue, but did not, the State is addressing it only in an abundance of caution.

[78] *Colorado v. Spring*, 479 U.S. 564, 573 (1987).

[79] *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (defining the voluntariness test).

made."[80] In reviewing whether a defendant has voluntarily waived his *Miranda* rights, courts must review those events under a totality of the circumstances approach.[81]

This Court has adopted a two-part test to determine whether a waiver of *Miranda* is voluntary.[82] First, the waiver must be voluntary in that it was the "product of a free and deliberate choice rather than intimidation, coercion or deception."[83] The first part of the voluntary waiver test hinges on whether the defendant's will was overborne by the State's coercion or overreaching.[84] This inquiry is not concerned with moral or psychological pressures emanating from sources other than official coercion.[85] Wright's drug use and alleged suggestibility were sources other than official coercion, and Superior Court should not have considered them in its analysis.[86] Second, the waiver must have been made with a

---

[80] *Marine v. State*, 607 A.2d 1185, 1197 (1992) (internal quotations and citations omitted).

[81] *Hubbard v. State*, 16 A.3d 912, 917 (Del. 2011); *Turner v. State*, 957 A.2d 565, 570 & n.1 (Del. 2008) (collecting cases); *Marine*, 607 A.2d at 1199.

[82] *Hubbard*, 16 A.3d at 917; *Bennett v. State*, 2010 WL 987025, at *3 (Del. Mar. 18, 2010) (citing *Marine*, 607 A.2d at 1195-96).

[83] *Hubbard*, 16 A.3d at 917 (citing *Moran v. Burbine*, 475 U.S. 412, 421 (1986)).

[84] *Id.*

[85] *DeJesus v. State*, 655 A.2d 1180, 1192-93 (Del. 1995).

[86] The defendant's mental and physical conditions at the time of the confession are relevant "only to the extent that the police exploit such characteristics to elicit incriminating statements." *DeJesus*, 655 A.2d at 1197. When intoxication is added into the "voluntariness calculus," the result remains unchanged, and Wright's statement was voluntary. This Court has held that voluntary intoxication does not render a confession involuntary *per se*. *Hubbard*, 16 A.3d at 919; *Howard v. State*, 458 A.2d 1180, 1183 (Del. 1983). As with other mental and physical

full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.[87] Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.[88]

When evaluating the voluntariness of a confession, the reviewing court should evaluate the "specific tactics used by the police in eliciting the statements, the details of the interrogation, and the characteristics of the defendant."[89] And when the police tactics and details of the interrogation show an *absence* of police overreaching, a statement may *not* be considered involuntary.[90] The key inquiry in determining police overreaching is "whether the defendant's will was overborne when the statement was elicited."[91] If the defendant's will was not overborne by police activity, the statement cannot be involuntary for due process purposes.[92]

---

conditions, the fact that a defendant is intoxicated during a confession is relevant only to the extent that the police exploit this intoxication to elicit the incriminating statements. *DeJesus*, 655 A.2d at 1197. The record supports no finding of such exploitation in this case as the detectives did not believe that Wright was intoxicated. *State v. Wright*, Del. Super., ID No. 91004136DI, Del Pesco, J., Letter Order at 19 (Oct. 30, 1991).

[87] *Hubbard*, 16 A.3d at 917.

[88] *Id.* (citing *Moran*, 475 U.S. at 421).

[89] *Baynard v. State*, 518 A.2d 682, 690 (Del. 1986).

[90] *DeJesus*, 655 A.2d at 1196 (citing *Colorado v. Connelly*, 479 U.S. 157, 163 (1986) (emphasis added)).

[91] *Shipley v. State*, 570 A.2d 1159, 1168 (Del. 1990).

[92] *Brown v. State*, 548 A.2d 778 (Del. 1988).

A statement will be found involuntary only if "the totality of the circumstances" demonstrates that the "defendant's will was overborne when he confessed."[93] This did not happen here. During the recorded portion of the interview, Wright sat, unshackled and not handcuffed, in a chair, in an interview room at the Wilmington Police Station. *See* A91. Det. Mayfield began the interview by reciting *Miranda* warnings to Wright. *See* A91; 92. Wright initially nodded his head up-and-down when Det. Mayfield asked him if he understood his rights. *See* A91. Wright said "Yes," when Det. Mayfield asked him if he was willing to give a statement. *See* A91; 92. By his conduct, Wright waived his right to remain silent.

Wright provided police with details of the crime that were not previously provided to him and were corroborated by eye-witness testimony, including a lengthy narrative explanation of his involvement in the Hi-Way Inn robbery-murder. Det. Merrill and Det. Moser testified that they did not provide Wright with details of the murder prior to Wright's interview.[94] At the 2009 postconviction hearings, Det. Merrill testified that he did not tell Wright anything

[93] *E.g.*, *Baynard*, 518 A.2d at 690.

[94] Specifically, Wright stated that there was only one shot fired, while the victim had been shot three times. Wright also stated that the shot was fired by the .38 caliber gun Dixon had provided to him, while police found two 9mm casings. *See generally* A425. Wright's "mistakes" are consistent with his desire to minimize his culpability and easily explained if Dixon fired the two other shots after Wright had run from the Hi-Way Inn. In any case, Wright's "mistakes" are inconsistent with Superior Court's "new "evidence" that Det. Moser fed Wright information about the crime.

about the Hi-Way Inn murder. He stated, "believe me, I had my own case – I had a ton of my own cases to take care of. I had an Assault I that was my pressing case, and that was my issue to take care of. ... That's their problem and their case." A164. Det. Moser testified he did not provide information to defendants because "I wouldn't want the suspect, or, really, anybody else outside of an investigator to know any of the details" (A162), and "I hold those cards so I know when someone is telling me the truth and not telling me the truth." A161.

Wright described how his co-defendant, Lorinzo Dixon (also known as Tammell Smith or "Tee") had sized up the business earlier that day and determined that a clerk was working the store alone. A108; 144. That statement was corroborated by Debra Milner, the barmaid who testified that she had seen a black male in his mid-twenties in the Hi-Way Inn around 9:20 p.m. that night who looked around for a few minutes and left.[95] A122-25. Wright described Seifert as a white "old guy," with gray, balding hair. A105. Philip Seifert was a white male, 65 years old, with gray hair. A130. Wright described how Dixon told him to "go along with the program" as the two drove from Riverside to Governor Printz Boulevard. A93; 94. Wright told police that the clerk asked Dixon, "What are you doing back here?" A95. Wright explained to police that Dixon gave him the gun,

[95] Nothing about this was reported in the homicide pass-on or newspaper reports. The homicide pass-on was a flyer that the Delaware State Police generated and distributed to other police agencies seeking information on the Hi-Way Inn robbery/homicide. *See* A90.

and that when the clerk "did not cooperate" but instead turned and reached under the counter, that he, Jermaine Wright, pulled the gun from his jacket pocket and shot the man in the back of the head. A94-95; 106; 108-09. The victim had been shot behind his right ear, consistent with Wright's statement that the victim turned and was reaching when Wright pulled the trigger. A96; 128-29. Wright also described how he fled the store, Dixon came later, and they drove away in a stolen black Volkswagon Jetta. A110-12. Wright's description of the car (black VW), where the car was parked (across the street near Pepsi plant), and the direction they fled (toward the city) was consistent with the testimony of the eyewitness, George Hummell, who saw the robbers fleeing, first one followed shortly thereafter by the other, across the parking lot. A104; 110-11; 126-27.

It is clear, from Wright's confession that he understood the *Miranda* warnings. *See* A91. Wright affirmatively waived his right to remain silent both by shaking his head and verbally responding "Yes" to Det. Mayfield's question of whether he was willing to give a statement.

Superior Court erred in suppressing Wright's confession

In sum, Superior Court's decision to grant Wright's motion to suppress his confession flies in the face of this Court's 2013 opinion that merits repeating:

> The Superior Court decided to address the adequacy of Wright's *Miranda* warnings *sua sponte.* It listened to the same videotaped confession that was the subject of a motion to suppress before trial; a claim of error on direct appeal; the second Rule 61

motion; and the appeal of that motion. Each challenge was rejected after addressing Wright's understanding of his *Miranda* rights. In deciding Wright's fourth postconviction motion, the Superior Court did not have any new evidence upon which to conclude that Wright's *Miranda* warnings were defective. "[A] defendant is not entitled to have a court re-examine an issue that has been previously resolved 'simply because the claim is refined or restated.'" Wright did not ask for that relief, but if he had, there would be no basis on which to find that he overcame the procedural bar of Rule 61(i)(4). Reconsideration is not warranted in the interest of justice.[96]

[96] *Wright*, 67 A.3d at 323-24.

II. A DIFFERENT TRIAL JUDGE SHOULD BE ASSIGNED TO WRIGHT'S NEW TRIAL.

Question Presented

Whether, in light of Superior Court's failure to accept this Court's prior findings of fact and conclusions of law in this case, a different judge should be assigned to Wright's new trial to ensure the public's confidence in the administration of justice.[97]

Standard and Scope of Review

This Court reviews the Superior Court judge's decision whether or not to recuse himself for an abuse of discretion.[98]

Merits of Argument

On July 14, 2014, the State filed a Motion for Recusal of the trial judge arguing that recusal was necessary because of the trial judge's: 1) prior representation of and friendship with a State's witness; 2) *sua sponte* raising of the sufficiency of Wright's *Miranda* warnings; and 3) repetitive and public comments stating in effect that he believed Wright was innocent. DI 496 (A168-233).

After receiving Wright's response objecting to recusal, the Superior Court judge held argument on October 2, 2014. DI 508. The State contended that, among other things, the judge's comments at the end of the January 3, 2012

[97] *See State's Motion for Recusal*, A168-233; *see also State v. Wright*, 2015 WL 475847 (Del. Super. Ct. Feb. 2, 2015); *State v. Wright*, 2014 WL 7465795 (Del. Super. Ct. Dec. 16, 2014).

[98] *Butler v. State*, 95 A.3d 21, 31 (Del. 2014) (citations omitted).

hearing, wherein he granted Wright's fourth motion for postconviction relief necessitated his recusal. On January 3, in *sua sponte* deciding to revisit bail, the judge stated, "I have grave concerns over the sufficiency of the evidence that was to convict Mr. Wright. In fact, I have virtually no confidence in that evidence." A165.

At the recusal hearing, the Superior Court judge reviewed with the State the facts underlying the State's motion. The judge then asked what procedures the Department of Justice employed in deciding whether to file a motion to recuse and whether the State's motion constituted its "best work." A307-08. The judge went through the motion, critiquing it for errors. Upon pointing out errors, which included a typographical mistake regarding the judge's middle initial, the judge repeatedly asked the State if it had put forth its "best effort." A311-12; 316-17.

The Superior Court judge denied the State's substantiated recollection that he *sua sponte* created and ultimately provided Wright relief on a *Miranda* postconviction claim and stated that this Court's 2013 ruling on the issue was "misinformed." A333. The judge attempted unsuccessfully to make the State agree that this Court was mistaken, but the State insisted that this Court's factual determination that the judge had *sua sponte* raised the issue was correct, notwithstanding Wright's incorporation of the issue in an amended pleading after the court had raised the claim. A323-33.

The Superior Court judge and the State discussed the extent of this Court's holding regarding Wright's confession. The State maintained that this Court's holding that the litigation of Wright's understanding of his *Miranda* rights included the adequacy of the warnings themselves. A337. The State disputed "whether the judge should have been allowing further litigation over the adequacy of the defendant's Miranda warnings." A337. The trial judge responded "I agree with you. And I agree that you win that dispute in light of what the Supreme Court did. No question about it." A337-38.

The Superior Court judge also discussed the State's concern about his relationship with Captain Browne, noting the State's initial waiver on the issue.[99] However, because Captain Browne would now be a *Brady* witness for Wright in his murder re-trial, as opposed to what was initially thought to be a peripheral witness in his postconviction case, the State argued that the judge should recuse himelf to avoid the possibility of having to resolve issues regarding Browne's credibility at trial.[100] A355-58. The Superior Court judge reserved decision on the State's recusal motion.

[99] Captain Browne was the chief investigating officer in the Brandywine Village Liquor Store ("BVLS") robbery, evidence of which this Court found, in accumulation with other evidence, to be exculpatory *Brady* material requiring reversal of Wright's conviction. *Wright v. State*, 91 A.3d 972, 986-94 (Del. 2014).

[100] Captain Browne is presumably the sole witness regarding the BVLS attempted robbery.

On December 16, 2014, the Superior Court issued its Opinion denying the State's Motion for Recusal.[101] Prior to his analysis, the judge acknowledged that the State agreed with him as to the proper standard for review, but nevertheless criticized the State for not adequately researching the issue.[102]

The judge stated that he found that he had previously ruled Wright's confession was taken in violation of *Miranda* and, based upon his interpretation of the record, which included his own comments to the contrary, maintained that he did "not invent [that] argument for Wright."[103] The judge notably emphasized that the objective portion of the recusal analysis requires the objective observer to be "a reasonable person [who] *knows and understands all the relevant facts*."[104]

The judge defended his comments regarding his lack of confidence in the sufficiency of the evidence to convict Wright, stating that all of his statements arose either as "a judicial ruling or a reference to one of my judicial rulings,"[105] that the State failed to establish that his alleged bias or prejudice stemmed from an "extrajudicial source" or that he had a "deep-seated and unequivocal antagonism

---

[101] *State v. Wright*, 2014 WL 7465795 (Del. Super. Ct. Dec. 16, 2014).

[102] *Id.* at *4, n.21.

[103] *Id.* at *5.

[104] *Id.* at *4 (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988) (emphasis added in the original)). But here, the judge made findings of fact contrary to the record.

[105] *Id.* at *9.

that would render fair judgment impossible."[106] The judge did not view his *sua sponte* decision to revisit and thereafter grant bail in a capital case as problematic to his analysis.[107] Nor did he see his relationship with Captain Browne to be an issue.[108] The judge concluded his analysis by stating that an informed observer could easily conclude that the State was "judge shopping" and declining to recuse himself because "[g]ranting Plaintiff's Recusal Motion under these circumstances would not only be wrong, but it would also undermine public confidence in the judiciary, for the judiciary would appear easily manipulated by any litigant who is prepared to claim that a court is biased, no matter how speculative and fanciful the allegations."[109]

On December 16, 2014, the judge held a status hearing wherein he stated he would soon be issuing an order suppressing Wright's confession because he determined that Det. Mayfield's *Miranda* warnings were insufficient. A155. He stated that he hoped to issue the formal opinion by January 3, 2015 because that "the 3rd of January is a momentous date in this particular case."[110] A482.

---

[106] *Id.* at *11; *Liteky v. United States*, 510 U.S. 540, 556 (1994).

[107] *State v. Wright*, 2014 WL 7465795 at *13.

[108] *Id.* at *13-15.

[109] *Id.* at *21, *23.

[110] January 3rd is a "momentous date" because on that date in 2012, this trial judge granted Wright's fourth motion for postconviction relief and vacated his convictions. *See State v. Wright*, 2012 WL 1400932 (Del. Super. Ct. Jan. 3, 2012).

Ultimately, the judge issued the formal corrected opinion suppressing Wright's confession on February 2, 2015.[111]

Delaware Judges' Code of Judicial Conduct Rule 2.11 states, in relevant part:

> (A) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
> (1) The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.[112]

This Court has set forth a two-step analysis that a trial judge must undertake on the record when confronted with a motion to recuse.[113] First, the judge must be subjectively satisfied that he can proceed to hear the cause free of bias or prejudice concerning the moving party.[114] Second, even if the judge is satisfied that he can proceed to hear the matter free of bias or prejudice, the judge must examine objectively whether the circumstances require recusal because of an appearance of bias sufficient to cause doubt as to the judge's impartiality.[115] "If a judge's

[111] *State v. Wright*, 2015 WL 475847 (Del. Super. Ct. Feb. 2, 2015).

[112] Del. Judges' Code of Judicial Conduct R. 2.11(A)(1).

[113] *Fritzinger v. State*, 10 A.3d 603, 611 (Del. 2010); *Gattis v. State*, 955 A.2d 1276, 1285 (Del. 2008); *Los v. Los*, 595 A.2d 381, 384 (Del. 1991).

[114] *Gattis*, at 1276, 1285 (Del. 2008).

[115] *Id.*

demeanor or actions would lead an objective observer to conclude that a fair and impartial hearing is unlikely, the judge should recuse himself."[116]

The Superior Court judge's actions regarding the issue of Wright's confession lead an objective observer to question his impartiality. The Superior Court judge has insisted that he did not *sua sponte* raise the adequacy of the Wright's *Miranda* warnings. To the contrary, the record is unmistakably clear that on September 16, 2009, the Superior Court judge took a break in the proceeding, asked to speak with counsel, and questioned whether Wright had made a claim that the *Miranda* warning Det. Mayfield had given him was defective. A155. While defense counsel stated that they had made the claim, based upon further questioning by the court, it was clear they had not. On the record, the Superior Court judge questioned not only the wording of the warnings but whether Wright was told he could stop the interrogation at any time. A155-56. Defense counsel were not adequately prepared to answer the court's questions. The State answered:

> [State]: Your Honor, on the very first page of Defendant's Exhibit 5 in the middle of the paragraph where Detective Mayfield says, you also have the right any time while we're talking not to answer. Okay? Does that answer your question?
>
> [Defense Counsel]: Where is that?

[116] *Id*. A number of other jurisdictions refer judge disqualification motions to another judge for resolution. *Cf.*, Alaska Stat. § 22.20.020(c) (2014) (another judge immediately reviews judge's denial of motion to recuse); Ga. Unif. Sup. Ct. R. 25.3 (2014); Kan. Stat. Ann. § 20-311d (2014); Ky Rev. Stat. Ann. § 26A.020; La. Code Crim. Proc. Ann. art. 674 (2014).

> The Court: Is that the only time that he was told he had the right to terminate the interrogation?
>
> [State]: On tape, Your Honor. I believe that Detectives Merrill and Moser testified previously, and we can examine that when we call them as our witness that he was read Miranda two prior times.
>
> The Court: Two prior times, yeah, I remember that.

A156. Because Wright had not, in fact, raised the claim of the adequacy of his *Miranda* warnings in briefing, the State clarified the record:

> [State]: Your Honor, I need to make a point—from my understanding, this is not an issue that has been raised in this motion for post-conviction relief. We responded to what was raised, and the voluntariness of the confession related to his heroin intoxication; that was the claim. And, now, we're having the claim of the *Miranda* warning wasn't good enough.
>
> [The Court]: **No, I raised this, not them**.
>
> ---
>
> [The Court]: [A]s I sit here and look at this, and frankly, I didn't understand – and I thought I read your briefing pretty carefully, I didn't understand you to contend that the Miranda warnings given to Mr. Wright were defective.
>
> [Defense Counsel]: We have on page 63, when we say, "The jury never learned the following information relative to Mr. Wright's level of heroin intoxication at the time of his alleged confession. Mr. Wright's altered mental state at the time of the interrogation and confession would have significantly diminished his capacity for a knowing, intelligent, and voluntary waiver of his Miranda rights because it severely impaired judgment and diminished capacity for higher reasoning. So to the extent that the pleading isn't clear, we would certainly ask to conform our pleading to fit the evidence that's been presented.
>
> ---

. . . .

> The Court: Okay, What I'm saying to you is I don't know if you are raising it or not.
>
> [Defense Counsel]: Well, we are raising it.
>
> The Court: As of now for sure, right?

A156-57. The State objected to additional amendments to the pleadings, arguing that it was impossible to litigate Wright's postconviction motion when the issues were constantly changing. While the Superior Court judge appeared sympathetic to the State's argument, he nevertheless allowed Wright to amend his pleading.

Approximately two weeks later, on September 28, 2009, Wright filed an amendment to his consolidated motion for postconviction relief to include the claim that Wright's confession should not have been admitted because his *Miranda* warnings were inadequate. DI 386 & 387. Thereafter, in granting Wright's fourth motion for postconviction relief in 2012, the Superior Court judge candidly acknowledged: "as the court first raised *sua sponte*, the *Miranda* warnings given to Wright prior to his only recorded interrogation not only failed to adequately convey to Defendant his right to counsel, but may have misled him into believing he had a right to appointed counsel only if the state felt he needed one."[117]

[117] *Wright*, 2012 WL 1400932, at *5.

In reversing, this Court found: "The Superior Court decided to address the adequacy of Wright's *Miranda* warnings *sua sponte*."[118] The Superior Court judge addressed this Court's determination when it decided the State's motion for recusal on December 16, 2014, stating that this Court was "apparently laboring under a misapprehension about what is contained in this voluminous record."[119] But this Court did not misapprehend the record. The Superior Court judge himself raised the issue of the adequacy of Wright's *Miranda* warnings, and acknowledged such both at the evidentiary hearings and in his Supplemental Opinion granting Wright's fourth motion for postconviction relief. It is only now that his impartiality is being questioned that the Superior Court judge denies these questionable actions.[120]

Moreover, following this Court's May 2014 opinion vacating Wright's convictions based on cumulative *Brady* violations, on July 2, 2014, the Superior Court judge issued a letter order setting forth the agenda for an upcoming scheduling conference regarding the re-trial. The Superior Court judge, again *sua sponte*, raised the issue of whether Wright's confession would be admissible: "Schedule for resolving whether the defendant may seek to suppress the statement from him, and if so, whether any such motion should be granted. (Note: we will

[118] *Wright*, 67 A.3d at 323.

[119] *Wright*, 2014 WL 7465795, at *6.

[120] *Wright*, 2012 WL 1400932, at *5.

discuss the schedule only, not the merits at the conference)." A166-67. In his opinion on recusal, the Superior Court judge described this letter order as "simply anticipating the obvious when I told counsel I wanted to promptly schedule the inevitable challenge to Wright's confession."[121] But, based upon this Court's prior rulings, such a challenge was not inevitable nor should it have been considered. As the Superior Court judge acknowledged at the recusal hearing, the State and he disagreed whether he should have been allowed to hear such a challenge, stating: "I agree with you. And I agree that you win that dispute in light of what the Supreme Court did. No question about it." A337-38. Given the Superior Court judge's understanding of the posture of the case, it is curious that he not only "anticipated" and offered the possibility that Wright's confession could be challenged, but even more remarkable that he granted the motion to suppress. Most troubling perhaps is the judge's original intent, as he stated on the record, to issue the order suppressing the confession on the the anniversary of the date that he first granted Wright's fourth motion for postconviction relief and vacated his convictions and sentence. A482-83. "If a judge's demeanor or actions would lead an objective observer to conclude that a fair and impartial hearing is unlikely, the judge should recuse himself or herself."[122]

[121] *Wright*, 2014 WL 7465795, at *6 n.33.

[122] *Gattis*, 955 A.2d at 1285.

In *Stevenson v. State*, this Court stated:

> Any inquiry into the question of whether a judge's impartiality might reasonably be questioned is case specific. Where the claim of appearance of impropriety is based on the risk that the judge has evidenced a personal interest in the outcome of the case, the extent of the judge's personal involvement in the outcome of the proceedings is an important factor. The risk that injustice might result from a judge's participation in a proceeding despite the appearance of partiality is particularly acute in a capital murder prosecution where the ultimate fixing of the sentence is in the hands of the trial judge.[123]

The Court's words in *Stevenson* are equally relevant here. An objective observer can discern from the Superior Court judge's statements and actions just how personally invested he had become in Wright's case. He has "display[ed] a deep-seated favoritism or antagonism that would make fair judgment impossible."[124]

[123] *Stevenson v. State*, 782 A.2d 249, 258 (Del. 2001).

[124] *Litkey*, 510 U.S. at 555.

CONCLUSION

The judgment of the Superior Court suppressing Wright's confession should be reversed. The matter should be remanded and a different Superior Court judge assigned to preside over future proceedings.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/Elizabeth R. McFarlan
Bar ID No. 3759

/s/Steven P. Wood
Bar ID No. 2309

Deputy Attorneys General
820 North French Street
Carvel State Building, 7th Floor
Wilmington, DE 19801
(302) 577-8500

Dated: March 30, 2015

NOV 04 1991

SUPERIOR COURT
OF THE
STATE OF DELAWARE

SUSAN C. DEL PESCO
JUDGE

COURT HOUSE
WILMINGTON, DE. 19801

Submitted: October 9, 1991
Decided: October 30, 1991

Ferris W. Wharton, Esquire
Steven P. Wood, Esquire
Deputy Attorneys General
Department of Justice
820 N. French Street
Wilmington, DE 19801

John M. Willard, Esquire
803 Shipley Street
Wilmington, DE 19801

Re: *State of Delaware v. Jermaine M. Wright*
I.D. #91004136; Cr. A. No. IN 91-04-1947 thru 1953

Gentlemen:

The Defendant has moved to suppress his videotaped statement and the fruits of the search of his home on January 30, 1991. In his motions, the Defendant asserts the following:

> (1) the search of his home was authorized by a daytime warrant but was executed prior to 6:00 a.m.;
>
> (2) the warrant was invalid on its face as the affidavit did not sufficiently show the reliability of the confidential informants upon whom the police relied; and
>
> (3) the Defendant made his statement to the police while he was intoxicated on heroin and therefore the statement should be suppressed.

During the suppression hearing held on September 30 and October 1, 1991, witnesses testified regarding the above-mentioned issues. The State and the Defendant submitted legal memoranda after the hearing.

Ex. A

Detective Robert Merrill of the Wilmington Police Department described the police activity preceding the execution of the search warrant and his interview with the Defendant after his arrest. He stated that the police officers involved in the execution of the warrant, including a federal Alcohol, Tobacco and Firearms agent, met for briefings at the Wilmington Police Department at 5:00 a.m., and then split into two groups. One group, including Detective Merrill, went to a fire station on 30th Street near Riverside, where the Wright's residence was located; the other group, the SWAT team, drove to a position near the Defendant's residence to wait in their van. He testified that they went into the home after 6:00 a.m. Detective Merrill was investigating the shooting of Emil Watson, and was one of the of the affiants on the search warrant. He was the first officer to speak with the Defendant at the police station. He testified that he read the Defendant his rights and explained to the Defendant why he was arrested, and then spoke with the Defendant for between 45 minutes and one hour. The Defendant seemed to Detective Merrill to understand and did not seem to be drunk or on drugs. Detective Merrill also testified that he was not knowledgeable about the symptoms of cocaine or heroin intoxication.

The next witness was Detective Robert Moser, a member of the Wilmington Police Department's SWAT team. Detective Moser testified that after the briefing, the SWAT team got dressed, drove their van to a location near the Wright residence, parked, and waited for the signal from headquarters authorizing them to proceed. He stated that the typical practice in the early morning execution of search warrants was for someone at headquarters to wait until a few minutes after 6:00 a.m. and then to give the signal, and that he knew that this practice was

carried out on January 30 because he was looking at his watch frequently to ascertain the time. Detective Moser was the second officer to speak with the Defendant later that day, at approximately 12:00 or 12:30. He testified that he was familiar with the signs of heroin use and explained that when high, the typical user's pupils are dilated, eyes are sometimes glassy, and depending on the person and the degree of intoxication, the person may sniff a lot or nod his or her head. A person coming off of a heroin high will typically seem tired, antsy, or jittery. He read the Defendant his *Miranda*[1] rights and stated that there was no indication that the Defendant was intoxicated or did not understand, and that the Defendant was not threatened or coerced into making a statement. Detective Moser spent 6 hours with the Defendant. During the interview he left the room a few times, including twice to get sodas for the Defendant, and once to accompany the Defendant to an empty cell to use the bathroom. The Defendant was also given a submarine sandwich during the interview. Detective Moser spoke with the Defendant about the shooting of a woman in the Riverside area, and then the Defendant volunteered information about other crimes, including the existence in his neighborhood of a stolen VW Jetta, and the sale of a 38 caliber gun and stolen liquor. Detective Moser testified that at times the Defendant expressed concern that his statements were being recorded and that Lorinzo Dixon and Lester Mathis might hear what he was saying to Detective Moser. The concern arose because he saw a microphone on the wall. Detective Moser assured him that the microphone was for a listening device in the Lieutenant's office, but the Defendant did not believe him. As a result of this fear, the Defendant occasionally wrote facts on pieces of paper and then ate the

---

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

paper. Eventually, Defendant began to give Detective Moser details about the shooting of Phillip Seifert at the Hi-Way Inn liquor store, first speaking in the third person and then confessing that he was involved. At that point Detective Moser asked the Defendant if he would be willing to make a videotaped statement and brought Detective Mayfield into the room.

Detective Mayfield is a Delaware State Police homicide detective who was responsible for investigating the Hi-Way Inn murder. He was involved in the execution of the search warrant and testified that the search had been executed after 6:00 a.m. He listened to the other detectives' interviews of the Defendant in the Lieutenant's office all day. Detective Mayfield testified that he was not knowledgeable about the effects of heroin intoxication, but that the Defendant did not seem impaired. He also testified that when he took the Defendant to Gander Hill after the statement was made, the prison official who strip searched the Defendant found a plastic bag in the Defendant's underwear containing several plastic bags containing a white powder residue inside. The bags were turned over to Detective Mayfield, who sent them to be analyzed. The report on the contents of those bags was not available at the hearing.

Mr. LaFon, the correctional officer from Gander Hill who performed the strip search, testified that he did not remember if drugs were found that night, although he did remember finding drugs in someone's shoe at some point. He testified that he always makes out an official report when drugs are found on an incoming inmate, and that a report relating to Jermaine Marlo Wright cannot be found.

Next, two of the Wrights' neighbors, Linda Terrell and Ronald Deaton, testified as to the time the search was executed. Linda Terrell lives two doors down the street from the

Wrights on the same side of the street. She testified that she always gets up at 5:30 a.m. and watches the morning news on Channel 6 before waking her children for school at 6:00 a.m. She stated that on the morning of January 30, 1991, she was up watching the news when she heard a loud bang, and upon opening her back door was told by a police officer to get inside. She then went to her front door, from which she could see several police officers and people going in and out of the Wrights' house. She estimated that she heard the bang around 5:45. In addition, Ms. Terrell testified that Delores Wright had asked her on Friday, September 27 to speak to Mr. Willard, the Defendant's attorney, if she knew anything about what had happened that day, and that she had not spoken to anyone about what time the search had occurred.

Mr. Deaton lives next door to the Wrights. He stated that his alarm clock was set for 6:00 a.m., and that he was awakened by a loud noise and shouting before his alarm went off. Mr. Deaton was not able to tell the prosecution how he could be sure that his alarm clock was accurate. He testified that he went to his back door and was told by a police officer to stay inside, so he went to his front door to see what was going on. It was dark at the time. He saw police officers going in and out of the Wrights' front door. Although it was dark outside and Mr. Deaton could not see clearly enough to recognize faces, Mr. Deaton testified that he knew the people outside were police officers because they were white. He also stated that he had been asked by Delores Wright to speak to Mr. Willard if he knew anything, and that he had not discussed the time of the search with anyone.

Tammy Wright, the Defendant's sister, testified about the time of the search and described her brother's behavior under the influence of heroin. According to Tammy, she was

awake in bed with Lester Mathis when the police entered the house. She stated that her mother typically left for work between 5:30 and 5:40 a.m., that her mother left shortly before the police came, and that "T" (Lorinzo Dixon) and Fatty (James Cephas) left the house shortly after her mother left. Tammy stated that after entering her room, the police instructed her to wrap herself in a sheet and directed her to the living room, where she sat across from the entertainment center. Shortly after arriving there she saw that the clock on the entertainment center said 5:54. Tammy testified that the week before the hearing she had asked some neighbors, including Ronald Deaton and Linda Terrell, if they remembered what time the police entered the house, and after learning that they thought the event had occurred before 6:00 a.m., asked them to speak to Mr. Willard. Her testimony thus conflicted with the testimony of Ms. Terrell and Mr. Deaton.

Tammy Wright also testified that, in her opinion, Marlo (Jermaine Marlo Wright, the Defendant) was "high as a kite" at the time the videotaped confession was filmed. She stated that she could tell because Marlo was scratching, nodding, and talking slowly. She also stated that Marlo could be convinced to say anything when he was high, and that the police made him lie on the videotape and say that he used crack, a drug which Tammy stated Marlo never used. Tammy also testified that she had seen Marlo using heroin the afternoon before his arrest, and knew that he, Lorinzo Dixon, and Garnett Bell had been up all night getting high.

Garnett Bell testified that he was living with the Wrights, and that he was there when the police came. Mr. Bell testified that he, the Defendant, Lorinzo Dixon, Lester Mathis and James Cephas had been using heroin that night, that he and the Defendant had taken heroin about 20

minutes before the police arrived and had used at least 5 bags that night, and that upon being directed to the living room by the police he had looked at the clock and had seen that it said five fifty-something. In addition, Mr. Bell testified that after their arrest Marlo asked the guard for permission to use the bathroom in the city lock-up, which was located in Mr. Bell's cell, and left Mr. Bell some bags of heroin in the bathroom. Mr. Bell also testified that he had never seen anyone talk Marlo into doing anything or plant ideas in Marlo's head when Marlo was high.

Delores Wright testified that she woke up at 5:00 a.m. and left for work between 5:30 and 5:40 a.m. She stated that on the morning of January 30, 1991, she noticed a man in a dark suit with a flashlight walking around the side of the house next door to hers when she was leaving for work. Ms. Wright stated that Marlo had been using drugs for years. She knew that Marlo and his friends had been using heroin the night before the search, and stated that she checked on Marlo that morning before leaving for work and saw that he was high. She also testified that she knew Marlo was high on the videotape, because he lied, was scratching, sniffing, slurring his words, and just wasn't himself. In addition, she stated that Marlo was yawning in the videotape was because he was tired from being up most of the night and using heroin.

Jermaine Marlo Wright, the Defendant, testified that he was unaware of the time when the police executed the search warrant and arrested him. He described getting high on heroin, stating that his vision and hearing go in and out like waves, and that he is in his own world when he is high. He also stated that when he is high, he scratches a lot and nods (falls asleep),

and that since he does not care about anything when he is high he has loaned his cars to people and given away money, and would probably have to be dragged out by someone else if he were in a burning building because he would not care. He testified that he came home that morning at 4:00 a.m. and got high with Garnett Bell, then went to sleep shortly before the police arrived. He claimed that he remembered being arrested, and that he remembered the officers reading him his rights, but that they did not mean anything to him because he was high. He also stated that he had used heroin every chance he had during the interrogation when the officers left him alone in the room, and that Detective Moser told him details of the shooting at the Hi-Way Inn. He admitted to having been arrested several times, having been read his rights, and understanding the right to remain silent. He admitted to having been arrested previously in Delaware as a juvenile and in New Jersey as an adult, but explained that he did not understand the right to an attorney because in the Family Court proceedings he had spoken to a man without representation, and in New Jersey he was bailed out and never needed an attorney. He testified that he knew someone who was arrested for selling drugs, that the case had been thrown out, and that his brother had also been arrested for selling drugs. The Defendant testified that he did not remember confessing to Detective Moser that he committed the Hi-Way Inn murder and that he did not remember having his rights read to him by Detective Mayfield or being asked by Detective Mayfield if he was willing to have his statement recorded on videotape. He stated that he lied about having a new leather jacket and about using crack in the videotaped confession, that he does not remember admitting to the killing, and that he only said what he did because he wanted to be left alone to enjoy his high. Finally, the Defendant stated that Correctional

Officer LaFon found drugs in his shoe and in the coin pocket of his pants upon his admission to Gander Hill, and that he begged Officer LaFon not to tell anyone because he was afraid of getting charged.

I. Was the search warrant executed after 6:00 a.m.?

Under 11 *Del. C.* § 2308, a search warrant shall not authorize the entry of a dwelling house between the hours of 10:00 p.m. and 6:00 a.m. unless the judge, justice of the peace or magistrate is satisfied that nighttime entry is necessary to prevent the escape or removal of the person or things being searched for. If this standard is met, authority for nighttime entry must be expressly provided in the warrant. The search warrant which was executed on January 30, 1991 on the home of Jermaine Wright at 1319 E. 28th St., Wilmington, Delaware was a daytime warrant. The Defendant asserts that the police entered his home before 6:00 a.m., and therefore the fruits of that search and all evidence leading from it should be suppressed.

Detectives Merrill, Moser, and Mayfield testified that the search was carried out shortly after 6:00 a.m. Detective Moser explained that some of the police officers involved in the execution of the warrant were in constant contact with the police station, that they followed the standard procedure of waiting for a signal from headquarters, and that by his watch they were not given the signal to enter the house until a few minutes after 6:00, at which time all the officers involved were given a signal to go ahead and the search was executed. The Defendant woke up when the police entered the house and did not know what time it happened. Linda Terrell and Ronald Deaton, testified that they heard a loud bang (presumably the Wrights' door being broken in), before 6:00 in the morning. Tammy Wright testified that when she was

brought into the living room by the police the clock read 5:54, and Garnett Bell stated that the same clock read five fifty-something when he was brought into the room. Ms. Terrell's testimony that she knew it was before 6:00 because she always gets up at 5:30 and watches the morning news on Channel 6, and that she was watching the news when she heard the bang, actually bolsters the police officers' assertions. According to local television listings, none of the major television channels has a news program starting earlier than 6:00, including Channel 6.[2] Mr. Deaton testified that the bang occurred before his alarm clock, which is set for 6:00, sounded. The accuracy of clocks differs, however, and Mr. Deaton did not confirm the accuracy of his clock. In addition, Mr. Deaton's testimony that he had not spoken with anyone about the time of the execution of the warrant conflicted with that of Tammy Wright, who testified that she had spoken to Mr. Deaton about the time the police had entered her family's home before asking Mr. Deaton to speak with Mr. Willard. Based on the testimony, this Court concludes that the search warrant was properly executed after 6:00 in the morning. The Defendant's motion to suppress the evidence leading from the allegedly improper execution of the daytime warrant is DENIED.

II. Was the search warrant valid?

The warrant authorizing the search of the Wrights' home was based upon the affidavit of January 29, 1991 by Detectives Patrick Burke and Robert Merrill of the Wilmington Police Department. It reads as follows:

---

[2] I take judicial notice of "The TV Book" for January 27 - February 2, 1991 from the Sunday News Journal, which shows a program called "Good Morning" on Channel 6 from 5:30 to 6:00 a.m. with the news following at 6:00 a.m. (copy attached)

1- That your affiants can state that a shooting was reported in the 1300 block E. 27th ST, at approximately 1545 hours on 15 NOV 90 where the victim Emil Watson was shot one time in the right foot. This case is currently being investigated and has Wilmington Police case number 90-115216.

2- That Watson was riding his bicycle in the 1300 block E. 27th St when he felt a sharp pain coming from his right foot.

3- That Watson then went to his sister's house located at 2700 Bowers st. where He took his shoe off and saw that he was shot and bleeding.

4- That a Lakisha Watson was interviewed where she stated that an unknown black male approached her telling her that her brother got shot but not to make a big deal of it as it was an accident. Watson asked this black male what happened. This black male told her that, "A guy on the corner was shooting a gun, when a bullet hit a wall and ricocheted hitting her brother."

5- That your affiants can state that on 28 JAN 91 we spoke to a Confidential Informant who stated that He/She was present and witnessed the shooting that occurred on 15 NOV 90. The CI further stated that a subject named "Marlo", Later identified as Jermaine Marlo Wright and another black male were firing a handgun at a vacant house when "Pee Wee", also known as Emil Watson, rode his bike down the 1300 block E. 27th St past the alley where he was shot.

6- That your affiants can state that this confidential informant also stated that "Marlo" has paid "Pee Wee", also known as Emil Watson, $500.00 in USC and has given him clothing as compensation for being shot in the foot.

7- That your affiants can state that this confidential informant also advised that "Marlo" rides a white motorized mini-bike and that he parks same behind his house.

8- That your affiants can state that on 28 JAN 91 your affiants located said Mini-bike chained to a post in the rear of 1319 E. 28th ST.

9- That your affiants can state that upon checking with Wilmington Police arrest records, it was learned that Jermaine Marlo Wright gave an address of 1319 E. 28th St at the time of his last arrest.

10- That your affiants can state we have tried to locate the Emil Watson mentioned in section #1 of this probable cause however it was determined that he provided a fictitious address to Patrol officers at the time of the shooting, and that during the interview with Watson at the time of the shooting he was very uncooperative and would not speak to your affiants.

11- That your affiants can state that the confidential informant also stated that "Marlo", "T" and a subject known as Patrick Campbell all stay at 1319 E. 28th St. That this confidential informant also advised that there is an array of weapons in this dwelling from small caliber to assault weapons.

12- That your affiants can state that another past proven reliable confidential informant stated that "Marlo" is one Jermaine Marlo Wright and the CI positively identified him from a Wilmington Police ident photo.

That this confidential informant stated that Wright is known to carry a gun at all times and that he frequently shoots these guns in the Riverside area.

This past proven confidential informant also advised that Wright is responsible for two shootings in the Riverside area. The first shooting is the CI was aware of was one in which a subject was shot in the buttocks in the 1300 block E. 28th ST in the rear court yards. This case was reported under Wilmington Police case number 90-120091 and is currently under investigation.

The second shooting the CI is aware of is the shooting of Emil Watson. The CI advised that this shooting occurred in the 1300 block E. 27th St and he stated that he was a witness to this incident. This incident is reported under Wilmington Police case number 90-115216 and is currently under investigation.

The CI further advised that Wright has given Watson large amounts of USC, purchased clothing for him, and has taken him to a Philadelphia 76er's basketball game as compensation for shooting him in the foot and for his being uncooperative with the police.

> 13- That your affiants can state that on 29 JAN 91 we checked with Delmarva Power and learned that the utilities at 1319 E. 28th ST are in the name of Delores Wright since 6-23-89.

Affidavit and Application of Jan. 29, 1991 to search 1319 E. 28th St., Wilmington, DE. State's Exhibit 1.

The Defendant contends that the confidential informants' tips linking him with the shooting of Emil Watson were not established as reliable and the information they gave was not sufficiently corroborated to find the probable cause which is required for the issuance of a warrant.

> "Probable cause" is not capable of fixed definition. Rather, it is a flexible, fluid concept, the foundations of which lie "somewhere between suspicion and sufficient evidence to convict". *State v. Sheppard*, Del. Super., Cr. A. No. 89-10-0022, Steele, Judge (April 9, 1990) at 5. The standard requires only the probability, and not a prima facie showing of criminal activity. *State v. Davis*, Del. Super., Cr. A. No. 87-03-1241, Stiftel, Judge (June 3, 1988).

State v. Sweet, CR. A. Nos. IN90-07-0962 thru 0964, Toliver, J. (August 21, 1991), at 3.

The totality of the circumstances are examined to determine whether a confidential informant's tip establishes the probable cause necessary for the issuance of a search warrant. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Tatman v. State*, Del. Supr., 494 A.2d 1249 (1985); *Gardner v. State*, Del. Supr., 567 A.2d 404 (1989); *Henry v. State*, Del. Supr., No. 14, 1990, Christie, C.J. (January 15, 1991)(ORDER). The *Gates* decision modified the standard previously set forth in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). *Aguilar* required courts to engage in a two step analysis in determining whether an informant's tip created sufficient probable cause for the issuance of a

search warrant. First, the affidavit must have included information showing that the informant had gotten the information in a reliable manner, and second, the affidavit must have contained sufficient reasons for believing that the informant was credible. The United States Supreme Court replaced the *Aguilar* standard with the totality of the circumstances approach in *Gates*, stating that the informant's reliability, basis of knowledge and veracity "should be understood simply as closely intertwined issues that may usefully illuminate the common sense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." *Gates*, 103 S.Ct. at 2328.

In the case at hand, the totality of the circumstances show that there was sufficient probable cause to justify the search of the Wright residence at 1319 East 28th Street in Wilmington. After getting a tip from a confidential informant who witnessed the shooting of Emil Watson that Marlo Wright and another black male were shooting at a vacant house when Emil Watson was shot, the police verified the information by speaking with another informant who had proven reliable in the past. *See Taman*, 494 A.2d at 1252 (Detective corroborated informant's tip by consulting with other informants who had been reliable in the past.) The second informant had also been a witness to the shooting. This witness verified that the Defendant was involved in the shooting and positively identified the Defendant from a Wilmington Police photo. In addition, the police officers verified that the white mini-bike described by the first informant was chained to a post at 1319 East 28th Street as the informant said it would be, that the Defendant gave that address provided by the informants at the time of his last arrest, and that the utilities at that address have been in the name of Delores Wright

since June, 1989.

The totality of the circumstances recited in the affidavit constitutes sufficient probable cause to support the issuance of the warrant to search the Defendant's residence. Therefore, the Defendant's motion to suppress the evidence leading from the execution of the warrant is DENIED.

III. May the Defendant's statement be suppressed due to his alleged intoxication?

The Defendant alleges that due to being under the influence of heroin, he was unable to validly waive his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966),778 and that his confession was involuntarily given.

Testimony in the suppression hearing supported Defendant's allegations that he was intoxicated during the taping of his videotaped confession. The Defendant's mother, Delores Wright, and his sister, Tammy Wright, testified that the Defendant had been up all night, had been using heroin with his friends, and had just gone to bed shortly before his arrest. They had seen the videotape and testified that the Defendant was high on the tape. In addition, the Defendant's friend, Garnett Bell, testified that he and the Defendant got high together the day and night prior to their arrest and in the municipal lock-up after their arrest. The Defendant testified to these facts, as well as alleging that he had sniffed more heroin during his interrogation when he was left alone in the room. When Detective Mayfield brought the Defendant to Gander Hill prison small plastic bags containing a white powdery residue were found on the Defendant's body when he was strip searched.

Detective Moser and Delores, Tammy, and Jermaine Wright all testified about the

symptoms of heroin use, Detective Moser in a general sense and the Wrights as to the specific effects of heroin on Jermaine. Detectives Merrill and Mayfield testified that they were not knowledgeable about heroin use and its symptoms. Subsequent to the presentation of testimony the Court reviewed the videotape *in camera*. Although the symptoms of heroin use were not as pronounced as expected after hearing the Wrights' testimony, the Defendant was sniffing and scratching, and his mannerisms were different from those exhibited at the suppression hearing on and off the stand. Particularly, in the suppression hearing the Defendant sat at the edge of his chair, rocked back and forth energetically, and spoke rapidly when answering questions. On the videotape, the Defendant seemed very relaxed, slumped back in his chair, and spoke slowly. Based on the testimony of the Defendant, Delores and Tammy Wright, and Detective Moser and the videotaped confession I conclude that the Defendant was intoxicated at the time the tape was made.

The fact that the Defendant was intoxicated when he made a videotaped statement to the police "does not *per se* invalidate an otherwise proper waiver of rights . . . Instead, the question is whether [the Defendant] had sufficient capacity to know what he was saying and to have voluntarily intended to say it." *Howard v. State*, Del. Supr., 458 A.2d 1180, 1183 (1983); *Dorsey v. State*, Del. Supr., No. 172, 1983, Moore, J. (December 16, 1983) (ORDER). In *Howard*, the Court determined that the Defendant had knowingly and intelligently waived his rights, asserting that the Defendant's detailed statement and his recollection of his arrest belied that he was mentally incapacitated when he was questioned. *Id.* In this case, the interrogation began with a recitation of the *Miranda* rights. Thereafter, the Defendant gave a lengthy

narrative chronologically describing the events before, during and after the robbery and murder at the Hi-Way Inn. He answered Detective Mayfield's questions consistently and coherently throughout the interview, which lasted approximately 45 minutes. Although he seemed tired and yawned occasionally, he responded appropriately to the questions put to him. There was nothing in the videotaped confession indicating police coercion. I conclude that the defendant knowingly and intelligently waived his *Miranda* rights.

The State must prove by a preponderance of the evidence that the challenged confession was voluntary. *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972). In determining whether the Defendant knowingly and intelligently waived his privilege against self-incrimination and his right to counsel, the Court must look at "the totality of the circumstances including the behavior of the interrogators, the conduct of the defendant, his age, his intellect, his experience, and all other pertinent factors." *Whalen v. State*, Del. Supr., 434 A.2d 1346, 1351 (1981).

As the concern of the Fifth Amendment is to prevent governmental coercion, the focus of cases regarding the voluntariness of confessions is on the element of police overreaching. *State v. Brotman*, Del. Super., CR.A. Nos. IN90-12-1622 & 1623, Barron, J. (July 11, 1991), at 21. "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Colorado v. Connelly*, 479 U.S. 157, 163, 107 S.Ct. 515, 520, 93 L.Ed.2d 473 (1986).[3] *See,*

---

[3] *Colorado v. Connelly*, 479 U.S. at 163, N. 1, gives several examples of police action causally related to confessions:

E.g., *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) (Statement suppressed where police doctor, without advising defendant of its effects, administered drug having the effect of a truth serum to alleviate defendant's withdrawal symptoms during questioning.)

In *Colorado v. Connelly*, the defendant, who had been hospitalized on several occasions for chronic schizophrenia, traveled from Boston to Denver, found a police officer on the street, and confessed to killing a young woman several months earlier. The defendant was given *Miranda* warnings by that officer as well as by a homicide detective who was called to the scene and later taken by the defendant to the site where the murder took place. Neither officer

---

Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (defendant subjected to 4-hour interrogation while incapacitated and sedated in intensive-care unit); *Greenwald v. Wisconsin*, 390 U.S. 519, 88 S.Ct. 1152, 20 L.Ed.2d 77 (1968) (defendant, on medication, interrogated for over 18 hours without food or sleep); *Beecher v. Alabama*, 389 U.S. 35, 88 S.Ct. 189, 19 L.Ed.2d 35 (1967) (police officers held gun to the head of wounded confessant to extract confession); *Davis v. North Carolina*, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966) (16 days of incommunicado interrogation in closed cell without windows, limited food, and coercive tactics); *Reck v. Pate*, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961) (defendant held for four days with inadequate food and medical attention until confession obtained); *Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961) (defendant held for five days of repeated questioning during which police employed coercive tactics); *Payne v. Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958) (defendant held incommunicado for three days with little food; confession obtained when officers informed defendant that Chief of Police was preparing to admit lynch mob into jail); *Asheraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944) (defendant questioned by relays of officers for 36 hours without an opportunity for sleep).

recognized that the defendant was mentally ill. The next day, the defendant became disoriented and stated that the voice of God had told him to go to Denver and confess or to commit suicide. The Supreme Court determined that the defendant had confessed voluntarily, and that since there was an absence of police coercion, the statement was admissible evidence. The fact that the confession was forced by voices created by the defendant's psychotic state was determined to be irrelevant for Fifth Amendment purposes, since the purpose of that amendment is to protect defendants from surrendering their rights as a result of governmental coercion. *Colorado v. Connelly*, 107 S.Ct. at 523.

Defendant alleges that his confession was involuntary for a number of reasons including his intoxication, lack of sleep, youth and inexperience with police interrogation, his incarceration and subjection to repeated and prolonged questioning, and his limited intelligence and education.

There is no evidence of police coercion related to the Defendant's confession. At the suppression hearing, the officers involved testified that they were unaware of the Defendant's intoxicated state. *See Brotman*, at 23 (statements held to be voluntary where Defendant, "[w]hile to some extent under the influence of intoxicants . . . nevertheless was viewed as oriented by both the paramedic and the police.") Although the Defendant was 18 years old at the time of his arrest and had an eighth grade education, there was testimony in the suppression hearing that the Defendant had been arrested previously and had been informed of his rights on those occasions. The Defendant testified at the hearing that he understood the right to remain silent. The fact that the Defendant had barely slept the night before his arrest does not indicate police coercion, as the police had not forced him to stay up all night, and there is no evidence

that the Defendant asked to be allowed to sleep before resuming questioning. The Defendant's assertions that the lengthy interrogation caused his will to be overborne are likewise without merit. The facts of this case do not approach the extreme circumstances in which statements have been held inadmissible due to the overbearing influence of a lengthy interrogation. *See, E.g., Colorado v. Connelly*, 479 U.S. 157, at note 1. Although the interrogation was lengthy, there were intermittent breaks and the Defendant was brought a submarine sandwich and two sodas during questioning.

The Defendant has not provided the Court with any evidence of police misconduct related to his interrogation except for his testimony that Detective Moser fed him the facts of the Hi-Way Inn Murder, a contention which I reject because Moser is a member of the Wilmington Police Department. There is no evidence to suggest that he would be aware of facts regarding the murder so as to "feed" them to the Defendant since the murder investigation was not being handled by his agency but rather Detective Merrill of the New Castle County Police who interrogated the Defendant only on videotape. Nor has the Defendant provided the Court with any proof that he did not understand the importance of his *Miranda* rights. The State has met its burden of proof by a preponderance of the evidence that the Defendant's waiver of his *Miranda* rights was voluntary, knowing and intelligent, and that his confession was voluntarily made.

The Defendant's motion to suppress the videotaped confession is DENIED.

IT IS SO ORDERED.

Very truly yours,

Susan C. Del Pesco

SDP/msg
Attachment

Original to Prothonotary
xc: Dallas Winslow, Jr., Esquire, Assistant Public Defender[4]

[4]Attorney for co-defendant Lorinzo Dixon (ID# 91002702).

2015 WL 475847
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

State of Delaware,
v.
Jermaine Wright, Defendant.

ID No. 91004136DI | February 2, 2015

CORRECTED OPINION

John A. Parkins, Jr., Superior Court Judge

***1** In 1991 Defendant **Wright** made a videotaped statement to police in which he admitted a role in the murder of Philip Seifert. His confession was used at his trial, and he was convicted of murder and associated offenses. He was sentenced to death. A complex procedural history followed, and **Wright** was eventually granted a new trial. Presently before the Court is **Wright's** motion to suppress his confession in which he contends, among other arguments, [1] that it should be suppressed because the *Miranda* warnings administered to him before his confession were insufficient. The State responds that the Court should not consider **Wright's** argument because it is foreclosed by the doctrine of the law of the case. Alternatively, the State argues the warnings given to **Wright** satisfied *Miranda*.

The threshold question here is whether **Wright's** claims are barred by the law of the case doctrine. Although the Delaware Supreme Court previously held that these claims were procedurally barred by Superior Court Criminal Rule 61, that rule does not apply to these proceedings. The law of the case doctrine differs from the procedural bars of Rule 61 in that the law of the case doctrine extends only to issues which were actually decided. **Wright's** *Miranda* claims were never presented to the Delaware Supreme Court, much less decided by that Court. Likewise, those claims were never presented to, or decided by, this Court. Consequently, his argument is not barred by the law of the case.

Turning to the merits, the law does not require any specific language be used when administering the warnings so long as they reasonably convey all four of the so-called *Miranda* rights. Importantly, any warning which suggests a limitation on one of those rights renders those warnings invalid. The warnings given in this case contain such a limitation. The interrogating detective told **Wright** he had a right to appointed counsel if "the State feels you're diligent and needs one," thus incorrectly suggesting to **Wright** that he was entitled to appointed counsel only if the State felt he needed one. Accordingly, the ensuing statement may not be used by the State as part of its case-in-chief in **Wright's** retrial.

Facts

Philip Seifert was murdered in January 1991 while working as a clerk at his brother's liquor store, known as the HiWay Inn, which was located just outside the Wilmington city limits on Governor Printz Boulevard. Since the HiWay Inn was located outside the city the Delaware State Police had responsibility for investigating this crime. The police had little evidence to go on when the investigation began—there were no eye witnesses to the shooting, the murder weapon was never recovered, no shell casings were found, and there were no fingerprints at the scene other than those of the store owner. In an effort to develop a lead, State Police Detective Edward Mayfield, the chief investigating officer, walked the local neighborhoods at night offering twenty dollar bills in exchange for information. Little or no information was forthcoming until an anonymous note appeared at the HiWay Inn stating that someone named "Marlo" was involved in the killing. Police knew that **Wright's** street name was "Marlow," and they quickly identified him as a possible suspect. They lacked sufficient evidence to obtain a warrant for **Wright's** arrest for the HiWay Inn murder, but they did have enough to arrest him for two unrelated crimes which had taken place within the Wilmington city limits. The Wilmington Police obtained a warrant to arrest him for these unrelated crimes and a daytime warrant to search his home.

***2** **Wright's** home was located within the city, so shortly after six a.m. on January 30, 1991 a Wilmington police S.W.A.T. team executed the arrest warrant and assisted other officers in searching **Wright's** home. **Wright** was immediately taken to Wilmington Police Department's central headquarters where he was searched and booked. He was then placed in an interrogation room where he was shackled to a chair. By design, the room, which measured seven feet by seven feet, had no windows or clock. It contained only a chair for the suspect, a small table, and a chair for the interrogator.

There was also a camera mounted on the ceiling which could be used to make video and audio recordings of interviews taking place in the room. The police also had the capability of transmitting the audio of interviews from the interrogation room to nearby detective offices where others could listen in.

Wright's first interrogation was conducted by Detective Merrill of the Wilmington Police Department, who questioned him about one of the unrelated crimes. The detective later testified that he advised Wright of his *Miranda* rights prior to questioning. By 1991 *Miranda* was 25 years old, and police had considerable experience with it. Most, if not all, police agencies had developed standard routines in order to avoid the "litigation risk of experimenting with novel *Miranda* formulations."[2] One such tool was the use of cards from which to read the *Miranda* warnings. Indeed, Delaware judicial opinions written prior to Wright's interrogation often refer to the use of a "Miranda card" by officers administering those warnings.[3] Nonetheless, in the instant case Detective Merrill did not use a Miranda card, but instead recited the warnings from memory.

The risk, even for seasoned detectives, of not using a Miranda card is illustrated by testimony elicited in 2009 from Detective Merrill by the State during the Rule 61 hearing. The Deputy Attorney General asked Detective Merrill:

> Q. (By State): Do you recall, sitting here, what rights you recited to him?
>
> A. Yes.
>
> Q. And can you tell the Court what they were?
>
> A. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to have an attorney present during this questioning, and you can terminate the questioning at any time.

These warnings omitted the right to appointed counsel. The Court does not believe that eighteen years later Detective Merrill could remember the precise warnings he gave Wright, even though the State asked him and he said he remembered them.[4] It does underscore the risk, however, of misstating the *Miranda* rights when giving them from memory.

*3 The next detective to question Wright was Wilmington Detective Robert Moser. At various times throughout this prolonged litigation Detective Moser offered conflicting testimony about whether he administered *Miranda* warnings to Wright. At a pretrial suppression hearing he testified he gave such warnings, but a few months later at Wright's trial he testified he did not give any warnings because Wright had already been "*Mirandized.*" In a 2009 evidentiary hearing Detective Moser again testified that he gave those warnings, but this time he added he obtained a written acknowledgement of those warnings from Wright. Contemporaneous judicial opinions from the period often refer to the use of written *Miranda* waivers,[5] and Detective Moser stated that it was standard procedure in 1991 to obtain written acknowledgements and waivers before questioning a suspect. No written waiver form from any of the three interrogations of Wright, however, has ever been produced.

Detective Moser's unrecorded interrogation began with a discussion about the second unrelated Wilmington crime. According to the detective, the atmosphere during his interrogation was relaxed–he stated he leaned back in his chair and listened to Wright, who seemed anxious to talk. During the course of the day Wright was given a submarine sandwich and two sodas. Except for occasional bathroom breaks, Wright remained in the interrogation room prior to Detective Mayfield's interrogation. The relaxed atmosphere during Detective Moser's interrogation was interrupted when a second State Police detective assigned to the case burst into the room and told Wright, "I'm in charge here and you're going to tell me what I want." Wright refused to speak to the interloper, who apparently did not stay long. After the second State Police detective departed, Wright again started to talk with Detective Moser. At some indeterminate time during the interrogation, Wright brought up the subject of the HiWay Inn killing. At first, according to Detective Moser, Wright suggested that someone else was involved, but as the questioning wore on Wright's story shifted and he eventually told Detective Moser that he was involved. Wright stated that an acquaintance, Lorinzo Dixon,[6] was the mastermind of the crime and threatened to kill him if he did not shoot the clerk.

*4 Detective Mayfield listened to Detective Moser's interrogation via a remote connection to a nearby detective's office. Eventually Detective Mayfield decided he had heard enough and was ready to interrogate Wright himself.[7] This interrogation began roughly 13 hours after Wright was first arrested. Wright was moved to a conference room where video equipment had been set up, and Detective Mayfield

began to question Wright ostensibly shortly after 7:30 p.m.[8] Unlike the previous interrogations, this one was videotaped.

Despite the fact that the police had the capability of recording Wright's first interrogations using the camera mounted on the ceiling, neither of the first two interviews nor the warnings alleged to have been given to Wright was recorded. Detective Moser explained the absence of recordings; "believe it or not, back then video tape was expensive." On the other hand, Detective Mayfield told the Court that the "Delaware State Police practice at that time was we always audio or videotape the interviews of people." The State offered no explanation why, even if video tape was expensive, audio recordings were not made of the first two interviews.

Turning to Wright's condition at the time of the interrogation, Detective Mayfield testified that in 1991 it was the practice of the State Police not to interview suspects who were intoxicated on drugs or alcohol. According to the detective, this practice as well as his training often caused him to delay interviews when the suspect was thought to be intoxicated. In fact, prior to interrogating Lorinzo Dixon the detective asked Dixon whether he was intoxicated. He asked no such question of Wright, however.

The trial judge found that Wright was intoxicated on heroin while he was being interrogated. At least part of that finding was based on her comparison of Wright's demeanor on the videotaped confession with his later demeanor in the courtroom. Substantial other evidence corroborates her finding. The search of Wright conducted when he was booked that morning failed to disclose that Wright was then in possession of heroin. The trial judge found that he used the secreted heroin during bathroom breaks occurring during the day. Another indication of his intoxication was the bizarre behavior Wright exhibited during the Moser interview. At one point, he began speaking softly, almost inaudibly, because he feared his answers were being overheard by others. Later, Wright curled up in a fetal position under the table in the interview room. At yet another point during the Moser interrogation, Wright insisted on writing down his answers on a piece of paper, passing the paper to Detective Moser who in turn handed it back to Wright, whereupon Wright would eat it.

*5 In the 2009 hearing Wright presented unopposed substantial credible testimony from several nationally-recognized experts leading to the conclusion that Wright's confession was unreliable. That expert testimony was discussed in this Court's 2012 opinion.[9] Some examples will suffice to describe its nature and import. There was expert testimony that Wright was withdrawing from heroin intoxication during the last interrogation, and that persons undergoing heroin withdrawal will do or say anything in order to get another fix. Still another expert testified about Wright's intellectual deficits, noting he was profoundly impaired to a point akin to mental retardation. Another expert testified that he administered a Gudjonsson Suggestibility Scale, which is a recognized test used to determine the degree to which a person is subject to suggestion. That test showed that Wright was "extremely suggestible" and was more likely than 998 people out of 1000 to change his answers in response to suggestion or pressure from his interrogator. The expert pointed to multiple instances during the recorded interrogation when Wright changed his answers in response to suggestions from Detective Mayfield. For example, a witness who saw two unidentified individuals fleeing the scene told police they were wearing dark clothing. In the interrogation Wright told the police he did not remember what pants he was wearing. The transcript shows that Detective Mayfield steered him into stating he was probably wearing jeans:

> EM [Detective Mayfield]: What about yourself, what were you wearing?
>
> W: I can't really say. I forgot. It's been, I can't really say.
>
> EM: You have no idea at all?
>
> W: No, sir.
>
> EM: Do you usually wear jeans?
>
> W: Yeah.
>
> EM: Well, do you think you had jeans on that night?
>
> W: Yeah. I probably had jeans on.

Although forewarned of the array of expert evidence Wright intended to call and the substance of their proposed testimony, the State offered nothing to contradict it.

There is other evidence calling into question the credibility of Wright's confession. During his interrogation Wright repeatedly got key facts wrong. For example, he stated the caliber of the pistol he used was different than the caliber of the gun actually used to kill Mr. Seifert. At another time during the interrogation he told the detective that one shot was fired, when in fact there were three. At still another point

Wright told the police that Mr. Seifert was lying on the floor when he fled the liquor store. In fact the victim's head and chest were still on the counter when he was first discovered.

The unopposed expert evidence and the inconsistencies between Wright's statement and the facts led this Court to conclude that his statement was unreliable:

> In particular, the court finds that (1) Wright likely did not understand his rights when given the *Miranda* warnings; (2) Wright was predisposed to being easily persuaded; (3) Wright's lack of sleep, the length of his interrogation, his heroin intoxication, and the early withdrawal stages all exacerbated his predisposition to suggestion; and (4) the interrogation was designed in part to suggest the "correct" answers to Wright. [10]

The State urges that despite all of this, Wright's confession was reliable because he told Detective Mayfield things only the killer would know. The State has never explained, however, precisely what information Wright knew (and got correct) that "only the killer would know."

The notion that Wright knew information only the real killer would know is belied by the fact that at least some information was likely fed to him. The Court discussed a moment ago Wright's amenability to suggestion and how Detective Mayfield's questioning at least sometimes steered Wright in the direction of "correct" answers. Wright contends that he was also fed information about the killing during the Moser interrogation, a contention that the trial judge rejected because the only thing Detective Moser knew about that killing was the sketchy information contained in the so-called State Police pass-on. [11] Since then, new evidence—unavailable to the trial judge—has come to light which leads the Court to conclude that Detective Moser had access to far more information than what was available from the pass-on.

*6 Detective Mayfield denied providing any information to Detective Moser about the HiWay Inn killing. According to Detective Mayfield, at that time there was considerable inter-agency rivalry between the Delaware State Police and the Wilmington Police, and those agencies were reluctant to share information with each other about their cases. The detective testified he would therefore not have shared information about the HiWay Inn killing with the Wilmington Police, including Detective Moser. The Court finds otherwise. There is substantial evidence that the Wilmington Police cooperated with the Delaware State police in connection with the HiWay Inn murder:

- The entire operation was geared toward obtaining evidence in the HiWay Inn case. Detective Merrill met with the Wilmington Police in the early morning prior to the execution of the arrest and search warrants. He was present when Wright was arrested and when his home was searched. When he was asked about the presence of Delaware State Police detectives Wilmington Detective Merrill testified:

  Q. And the Delaware State Police detectives?

  A. They were there also.

  Q. What was their reason for being there?

  A. It was their case. They were investigating another case and they thought there might be some evidence in this one.

- Detective Mayfield listened by remote connection as the Wilmington detectives interrogated Wright.

- Detective Mayfield met with Detective Moser during the latter's interrogation of Wright and urged Moser to "Keep it up. It takes a long time. Do the best you can. We don't have anything now, just try to get what you can."

- Detective Mayfield asked Detective Moser to sit in during the former's interrogation of Wright.

- Detective Mayfield again asked Detective Moser to sit in on his interrogation of co-perpetrator Lorinzo Dixon, who was arrested weeks later and who was not implicated in the unrelated city crimes for which Wright was arrested.

- Detective Mayfield authored a contemporaneous report in which he wrote he and "the Wilmington Police Detectives worked hand in hand with suspects, informants and anonymous phone calls and/or messages, in developing a suspect."

- Detective Mayfield met with Detective Browne of the Wilmington Police to discuss whether the HiWay Inn killing could have been related to an attempted robbery

> of a nearby liquor store, which occurred roughly an hour before the HiWay Inn robbery/murder.

When the trial judge ruled that Detective Moser could not have fed information to Wright because Moser was unaware of such information, she did not know that Detective Mayfield conferred with Detective Moser during the latter's interrogation. In light of this new evidence and the other evidence described above, the Court now finds it is more likely than not that Wright was fed information "that only the killer would know." [12]

It is against this factual backdrop that Wright challenges the sufficiency of the *Miranda* warnings give to him. Detective Mayfield's warnings consisted of the following:

> *7 Basically, you have the right to remain silent. Anything that you say can and will be used against you in a court of law. You have the right, right now, at any time, to have an attorney present with you, if you so desire. Can't afford to hire one, if the state feels that you're diligent and needs one, they'll appoint one for you. You also have the right at any time while we're talking not to answer.

He concluded his *Miranda* warnings with the following:

> Do you understand what I've asked [sic.] you today? Okay. Do you also understand that what we're going to be taking is a formal statement and that this statement's going to be video taped? Okay. Are you willing to give a statement in regards to this incident? Say yes or no.

The alleged defect is that Wright was told: "Can't afford to hire one, if the state feels that you're diligent and needs one, they'll appoint one for you." Detective Mayfield denied he used the phrase "if you are diligent" and insisted he said "if you are indigent." In the past the State has asserted that, because of his experience, Detective Mayfield most likely used the word "indigent." According to the State, "[a]t the time Detective Mayfield read Wright his *Miranda* warnings, he had been a State Trooper for 9 years, and had made thousands of arrests and administered *Miranda* warnings in all non-traffic arrests." [13] The detective's experience, however, hardly suggests that he gave proper *Miranda* warnings here. A few weeks after giving Wright his *Miranda* warnings, the detective once again had occasion to administer those warnings, this time to Lorinzo Dixon. Once again he dropped the ball, telling Dixon:

> What I'm gonna do first is read your rights to you. Okay? You have the right to remain silent. If you give up your right to remain silent, anything you say can and will be used against you in a court of law. You have the right at any time to request a lawyer, if, ah, if you can afford it. Or if you're, or if the court finds out that you're negligent for it. Okay? You also at any time have the right to answer any and all questions. Do you understand those rights?

In its 2012 opinion the Court found as fact that the detective used the phrase "if you are diligent" when he administered the warnings to Wright. There is more than ample evidence to support this finding. The transcript of that interrogation prepared by the State Police reads "if you are diligent." The State has sought to characterize this as a "typographical error," yet it stipulated to the accuracy of that transcript and Detective Mayfield also twice testified it was accurate. The Court itself has reviewed the videotape of the confession many times and finds that the detective used the phrase "if you are diligent." In a sense this is much ado about nothing because even if the detective used the phrase "if you are indigent" the warnings were flawed because he indisputably told Wright he could have a court-appointed lawyer "if the State feels ... [you] need[ ] one." Nonetheless, the Court notes that, for the reasons the second part of the Analysis section below, the phrase "if you are diligent" in its own right is sufficiently misleading to negate the effectiveness of the warnings.

Procedural History

Because the application of the law of the case is an issue here, it is necessary to present more detail about the complex procedural history than might ordinarily be required. Perhaps the clearest way to do this is to summarize the salient procedural events in chronological order.

*8 ● Before his trial Wright moved before trial to suppress his confession, but did not assert the *Miranda* warnings given to him were inadequate. This Court found that Wright's waiver of his *Miranda* rights was knowing, voluntary and intelligent, and denied the motion to suppress. No argument was made about the adequacy of the warnings given by Detective Mayfield and there was no discussion of those warnings in the court's opinion.

● Wright was tried before a jury and convicted of murder and related crimes. This Court sentenced him to death.

● Wright appealed his conviction and sentence to the Supreme Court, which affirmed both in 1993. [14]

● In 1994 Wright filed his first motion for post-conviction relief in which he challenged the adequacy of his representation at both the guilt and penalty phases of his trial. This Court found that Wright had effective representation during the guilt phase, but that his representation during the penalty phase was ineffective. It therefore granted him a new penalty hearing. The result did not change after the second penalty hearing, and Wright was again sentenced to death.

● In 1996 the Delaware Supreme Court affirmed the death penalty imposed after Wright's second penalty hearing. It also affirmed this Court's conclusion that Wright's counsel was not ineffective during the guilt phase of his trial. [15]

● In 1998 Wright filed another motion for post-conviction relief. One of his claims was that that "he received ineffective assistance of counsel in conjunction with his 1992 trial and appeal." The basis for that claim was, in part, his trial counsel's failure to argue that his waiver of his *Miranda* rights was not knowing, intelligent and voluntary. There was no contention that the warnings themselves were inadequate. This Court denied Wright's motion. [16] It did not have occasion to review the warnings actually given to Wright and did not do so in its opinion.

● Wright appealed the denial of his 1998 Rule 61 motion, and in 2000 the Supreme Court affirmed by judgment order this Court's 1998 denial of that motion. [17]

● Wright was resentenced after the Supreme Court affirmed the denial of his motion for post-conviction relief and his execution was scheduled for May 25, 2000. Two weeks before his scheduled execution Wright filed a petition for a writ of habeas corpus in the federal court, and that court promptly issued a stay of Wright's execution.

● In 2003, while the federal habeas corpus matter was pending, Wright filed his third motion for post-conviction relief. This Court stayed any resolution of that matter pending disposition of the petition for habeas corpus.

● In 2008 Wright filed his fourth motion for post-conviction relief in this Court. At the time his third Rule 61 motion was still pending. Wright asked that consideration of his fourth motion be stayed. Shortly thereafter the parties and the federal court agreed it would be more efficient if this Court were to first resolve the pending Rule 61 motions before it addressed the federal petition. [18]

● After this Court again took up the pending Rule 61 motions, Wright filed an amended fourth motion in which he asserted an actual innocence claim.

● In May 2009 Wright filed a "Consolidated" Rule 61 motion, which consolidated the claims presented in his third, fourth and amended fourth motions.

● In September 2009 Wright amended the consolidated motion to present his *Miranda* claims. Thereafter followed a lengthy series of evidentiary hearings, briefings and oral arguments culminating in this Court's 2012 opinion.

*9 ● In January, 2012 this Court issued an opinion in which it held that Wright's conviction and sentence was constitutionally infirm and that Wright was entitled to a new trial. It found that (1) the *Miranda* warnings given to Wright were inadequate, and (2) exculpatory evidence had been withheld from him. [19]

● In 2013 the Supreme Court reversed this Court's 2012 decision and remanded the matter to this court for reimposition of the death penalty. The Supreme Court found that Wright's *Miranda* claims were procedurally barred by Superior Court Rule 61(i)(4). It found that Wright's *Brady* claim was not procedurally barred, but

a divided Court held that **Wright** had failed to show prejudice from the withholding of the evidence. [20]

- This matter was remanded to this Court, which re-imposed **Wright's** death penalty, whereupon **Wright** now appealed to the Delaware Supreme Court. This time, in a 2014 opinion, the Supreme Court found that possibly exculpatory evidence which this Court rejected in 2012, when coupled with other withheld exculpatory evidence, made out a claim of a constitutional violation sufficient to warrant a new trial. [21]

- The matter is now on remand, and **Wright** has moved to suppress his confession. This is the court's opinion on that motion.

Analysis

In Part I of this opinion the Court will consider the law of the case doctrine and will explain why it does not bar consideration of **Wright's** *Miranda* argument. In Part II it will discuss why *Miranda* warnings were inadequate.

I. The law of the case doctrine does not bar Wright's *Miranda* claim.

In its 2013 opinion the Delaware Supreme Court held that **Wright's** *Miranda* claim was barred:

> The Superior Court decided to address the adequacy of **Wright's** *Miranda* warnings *sua sponte*. It listened to the same videotaped confession that was the subject of a motion to suppress before trial; a claim of error on direct appeal; the second Rule 61 motion; and the appeal of that motion. Each challenge was rejected after addressing **Wright's** understanding of his *Miranda* rights. In deciding **Wright's** fourth postconviction motion, the Superior Court did not have any new evidence upon which to conclude that **Wright's** warnings were defective. "[A] defendant is not entitled to have a court re-examine an issue that has been previously resolved 'simply because the claim is refined or restated.' " **Wright** did not ask for that relief, but if he had, there would be no basis on which to find that he overcame the procedural bar [22]

*10 At first blush it may seem strange for this Court to hold that **Wright's** *Miranda* claim is not barred when in 2013 the Supreme Court held that the claim was procedurally barred by the procedural rule governing motions for post-conviction relief. The result is different here because different procedural rules are in play. In 2013 the Supreme Court held that Criminal Rule 61(i)(4) [23] barred consideration of **Wright's** *Miranda* claim because the admissibility of his confession had previously been adjudicated. [24] In the Supreme Court's words, under Rule 61 a "defendant is not entitled to have a court re-examine an issue that has been previously resolved simply because the claim is refined or restated." [25] But this is no longer a post-conviction proceeding, and, as the State tacitly concedes, [26] Criminal Rule 61(i)(4) no longer applies. [27] It shows no disrespect to the Supreme Court, therefore, for this Court to again consider the *Miranda* claim is procedurally barred.

No doubt there are some similarities between Rule 61(i)(4) and the law of the case doctrine, [28] but there is at least one critical difference: The law of the case doctrine—unlike Criminal Rule 61(i)(4)—applies only to "specific issues" which have actually been litigated and decided. Although the Supreme Court and this Court have previously considered certain contentions about **Wright's** confession, the adequacy of his *Miranda* warnings was not among them. Because this "specific issue" has never been decided in this matter, those previous rulings are not law of the case with respect to this issue.

Before discussing the doctrine the court must mention some shorthand it has decided to employ. Throughout this opinion this court refers to the fact that **Wright** never previously presented, and the courts never decided, whether the *Miranda* warnings given to him were adequate. In point of fact, **Wright** did raise the issue in 2009 and it was decided in his favor in this court's 2012 opinion. The Supreme Court reversed without reaching the merits of the *Miranda* claim. The State does not contend for present purposes that the rulings following **Wright's** assertion of his *Miranda* claim constitute law of the case. It argues instead that rulings made *before* he asserted that claim are law of the case. Rather than repeatedly draw this distinction throughout this opinion the court, except where otherwise noted, will be referring to the rulings occurring before **Wright** asserted his claim.

A. The doctrine applies only to issues which were actually decided.

The Delaware Supreme Court has recently described the law of the case doctrine in *Hoskins v. State* wherein it wrote:

> Under the law of the case doctrine, issues resolved by this Court on appeal bind the trial court on remand, and tend to bind this Court should the case return on appeal after remand. The 'law of the case' is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation The law of the case doctrine requires that there must be some closure to matters already decided in a given case by the highest court of a particular jurisdiction. Yet the doctrine is not inflexible in that, unlike *res judicata,* it is not an *absolute* bar to reconsideration of a prior decision that is clearly wrong, produces an injustice or should be revisited because of changed circumstances. [29]

*11 An essential element of the doctrine is that the "specific legal principle" has previously been applied. [30] In other words, the issue in question must have been "actually decided" in the earlier proceeding. [31] Our Supreme Court has repeatedly stated in one fashion or another that a fundamental principle of the law of the case doctrine is that the specific issue must actually have been decided:

- "The 'law of the case' is established when a *specific legal principle* is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation." [32]
- "The prior decisions by this Court on any *adjudicated issue* ... became the law of the case in all subsequent stages of his continuing criminal proceedings." [33]
- "[A] court's decision in the first appeal is the law of the case on all questions *involved and decided*." [34]
- "The doctrine is not inflexible, however. It applies only to those matters necessary to a given decision and those matters which were *decided on the basis of a fully developed record.* Where, as here, this Court could not have envisioned the full factual posture of a particular claim, the prior ruling cannot be considered to be the law of the case." [35]
- "Arguments which have been *previously adjudicated* resulting in rulings which became the law of the case may not be reasserted in later proceedings." [36]
- "The doctrine of law of the case, a doctrine referring to the principle that issues once decided in a case, that recur in later stages of the same case, are not to be redetermined, could be applicable here *if the issue was actually litigated* and necessary to the court's judgment." [37]
- "[T]he trial court on remand is not constrained by the mandate as to *issues not addressed* on appeal." [38]
- Although the trial court is required to make a determination consistent with the appellate court's review, it is also "free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court *not settled by the decision.*" [39]

The federal courts also hold that the law of the case doctrine applies only to issues which have actually been decided. "The law-of-the-case doctrine only applies to issues the court actually decided." [40] This means that the issues "were fully briefed and squarely decided in an earlier appeal." [41] According to the United States Supreme Court, the law of the case doctrine "presumes a hearing on the merits" and it will not apply when the "case does not involve a previous consideration of the merits." [42] In short, as a federal court of appeals put it, the "law of the case doctrine precludes a court from reconsideration of *identical* issues." [43]

*12 The doctrine's requirement that the "specific issue" has previously been raised gives rise to the key difference between the law of the case doctrine and the procedural bars found in Criminal Rule 61: the law of the case doctrine does not extend to issues which could have been raised but were not. Retired Superior Court Judge Bernard Balick, [44] the draftsperson of Rule 61, included 61(i)(4) because "[i]t is essential to have some principle of res judicata for issues that were previously decided." [45] However, the law of the case doctrine is not as broad as *res judicata* and does not reach issues which "could have been" presented. In *Insurance Compony of America v. Barker,* the Delaware Supreme Court

held that "[t]he law of the case does not have the finality of *res judicata* since it only applies to litigated issues and does not reach issues which could have been but were not litigated."[46] This principle is commonly applied in other jurisdictions, including opinions from other jurisdictions cited by the Delaware Supreme Court. For example, in law of the case matters our Supreme Court has relied upon[47] the Third Circuit's opinion in *Bankers Trust Ca. v. Bethlehem Steel Carp.*[48] There the Third Circuit held that when determining whether an opinion constitutes law of the case that opinion must be considered "with particular reference to the issues considered."[49]

The Delaware Supreme Court's opinion in *In re Walt Disney Derivative Litigatian* illustrates the necessity of determining precisely what was decided in the earlier ruling:

> The appellants base their contrary argument upon their reading of this Court's opinion in *Brehm v. Eisner.* A "central holding" of *Brehm,* which the appellants claim is the "law of the case," is that the Disney board had a duty to approve the OEA because of its materiality. The appellants misread *Brehm.* There, in upholding a dismissal of the complaint in a procedural setting where the complaint's well-pled allegations must be taken as true, we observed that "in this case the economic exposure of the corporation to the payout scenarios of the Ovitz contract was material, particularly given its large size, for purposes of the directors' decision-making process." Contrary to the appellant's position, that observation *is not the law af the case, because in Brehm this Court was not addressing, and did not have before it,* the question of whether it was the exclusive province of the full board (as distinguished from a committee of the board) to approve the terms of the contract.... Therefore, in deciding the issue of which body-the full board or the compensation committee-was empowered to approve the OEA, the Chancellor was not constrained by any pronouncement made in *Brehm.*[50]

Thus, this Court is tasked with examining the earlier opinions in this matter to determine whether any court has specifically held that the *Miranda* wamings actually given to Wrlght were adequate. No such holding exists.

B. Nelther the Supreme Court nor thls Court has ever addressed the adequacy of the *Miranda* warnings given to Wright.

In his motion to suppress **Wright** made the point that no court has ever considered the adequacy of the *Miranda* warnings given to him. The State did not dispute that in its response, but instead relied upon rulings that **Wright's** waiver was voluntary or that his confession was voluntary.[51] Ever since **Wrlght** first raised his *Miranda* claim the State has responded with this contention. For example, in its brief before the Delaware Supreme Court, for example, the State wrote "[n]o issue has been more heavily litigated in **Wrlght's** case than the voluntariness of his confession."[52] In that same brief it asserted that this Court's earlier opinions were about the "voluntariness of **Wrlght's** confession."[53] But these considerations are distinct from the adequacy of the warnings given to **Wrlght.**

***13** To be effective, a waiver of *Miranda* rights must be "knowing, intelligent and voluntary."[54] The adequacy of the warnings given to the suspect goes to the "knowing and intelligent" standard: "The *Miranda* warnings ensure that a waiver of these rights is knowing and intelligent by requiring that the suspect be fully advised of this constitutional privilege."[55] On the other hand, the "voluntariness" of the waiver encompasses the suspect's mental state and his "capacity for self-determination."[56] In *Moran v. Burhine* the United States Supreme Court wrote:

> *Miranda* holds that the defendant may waive effectuation of the rights conveyed in the wamings provided the waiver is made voluntarily, knowingly and intelligently. *The inquiry has two distinct dimensions.* First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.[57]

Not surprisingly the Delaware Supreme Court has drawn the same distinction. [58] Consequently, the judicial findings upon which the State relies—that **Wright's** waiver of his *Miranda* rights was voluntary or that his confession was voluntary—are not law of the case. [59]

Turning to the rulings themselves, the Court will begin its review with those cited by the Delaware Supreme Court when it held that Criminal Rule 61 barred consideration of the adequacy of the *Miranda* warnings. In its 2013 *Wright* opinion [60] the Supreme Court cited two of its rulings and two rulings of this Court for the proposition that "the admissibility of **Wright's** confession has been challenged and upheld repeatedly." [61] They are discussed separately below.

Wright v. State, 633 A.2d 329, 334–35 (Del.1993).

This is the Supreme Court's opinion on **Wright's** direct appeal from his conviction. The *Miranda* warnings given to **Wright** were never mentioned in this opinion and their adequacy was never discussed. The Supreme Court listed the issues presented by **Wright** in that appeal:

> **Wright** raises five separate claims on appeal: (1) *his incriminating statements should have been suppressed because they were obtained following an unreasonable delay between arrest and initial presentment;* (2) jury instructions during the penalty phase of his trial were insufficient in defining mitigating circumstances; (3) the trial judge erred in her determination of non-statutory aggravating circumstances and mitigating circumstances; (4) imposition of the death sentence was disproportionate to the penalty imposed in similar cases; and (5) application to **Wright** of the death penalty statute, as revised after the date of the offenses, violated the *Ex Post Facto* Clause of the United States Constitution. [62]

***14** As the highlighted portion shows, there was a dispute about the admissibility of **Wright's** statement, but this dispute had nothing to do with the *Miranda* warnings given him. Rather, it turned on whether "there was an unreasonable delay between arrest and presentment." The Supreme Court's conclusion in its 1993 opinion confirms that its decision about the statement's admissibility was limited to this issue:

> **Wright** was arrested shortly after the 6:00 a.m. raid on his residence. After administrative matters were concluded, questioning of him began around noon. For the next eight and one-half hours, he willingly spoke with detectives concerning various crimes about which he had knowledge, waiving his *Miranda* rights three times. He was given food, drink, and opportunities to use the restroom in a non-threatening atmosphere. As counsel for the State observed at oral argument, the length of the interrogation and resulting delay in presentment was largely the result of the fact that **Wright** had a lot to say and was willing to say it. *Under such circumstances, the trial court's determination that there was no unreasonable delay is clearly supported by the record* and the product of an orderly and logical deductive process. Consequently, **Wright's** first claim of error must be rejected. [63]

Finally, any lingering doubt that this opinion did not concern constitutional issues arising from *Miranda* is quickly dispelled by the Supreme Court's comment that "**Wright** concedes that the question of whether there was unreasonable delay is purely one of statutory construction under Delaware law." [64]

Wright v. State, 746 A.2d 277, 2000 WL 139974 (Del.2000).

This is a judgment order of the Delaware Supreme Court affirming this Court's 1998 denial of an earlier Rule 61 petition by Wright. The order reads in its entirety:

> This 18 th day of January 2000 upon consideration of the decisions of the Superior Court dated September 28, 1998 and December 18, 1997 and the briefs of the parties and their contentions in oral argument, it appears to this Court that: to the extent the issues raised on appeal are factual, the record evidence supports the trial judge's factual findings; to the extent the errors alleged on appeal are attributed to an abuse of discretion, the record does not support those assertions; and to the extent the issues raised on appeal are legal, they are controlled by settled Delaware law, which was properly applied. [65]

As is usually the case with such orders, there is no reference to the specific issues considered by the Supreme Court, so it is necessary to refer to the trial court's opinion to determine precisely what has been affirmed. That opinion is discussed immediately below; suffice it to say the adequacy of the *Miranda* wamings was never an issue.

State v. Wright, 1998 WL 734771 (Del.Super. Sept. 28, 1998).

As mentioned, this is the Superior Court opinion which gave rise to the Supreme Court's 2000 judgment order. It arose from Wright's second motion for post-conviction relief. The argument presented by Wright and decided by this Court did not concern the adequacy of the *Miranda* warnings actually given to Wright. Instead, Wright argued his heroin intoxication made it impossible for him to knowingly and voluntarily waive his rights. This court summarized Wright's contentions in its opinion:

> **15 Wright claims that his trial counsel was ineffective because he did not present evidence or argue that Wright's heroin intoxicatian at the time of his canfession rendered him incapable af knawingly and intelligently waiving his* Miranda *rights.* As a preliminary matter, the Court observes that, whether argued with particularity by counsel or not, the matter of Wright's knowing and intelligent waiver of his *Miranda* rights was addressed in Wright's suppression motion [66]

The Court never analyzed, or even mentioned, the actual wamings given to Wright.

Insofar as the confession itself is concemed, this Court focused on Wright's ability to understand the "words that the officers used during the interrogation." That issue turned on Wright's mental state, not the language of the warnings given to him:

> Although his testimony at the post conviction evidentiary hearing was leamed and informative, Dr. Maslansky added no new information or analysis to his previous testimony at the 1992 guilt-phase trial. The value of Dr. Maslansky's ultimate conclusions is undermined by its lack of foundation. Dr. Maslansky was unaware, for example, that Wright already had a familiarity with his *Miranda* rights from previous arrests or that Wright had received *Miranda* warnings a number of times before giving his videotaped testimony. Dr. Maslansky's conclusions about the effect of heroin on Wright's ability to comprehend the questions posed during his interrogation were based on Wright's own estimate of how much heroin he had ingested. Such information was never corroborated and is inherently suspect. *At the hearing, Dr. Maslansky further canceded that Wright understaod the wards that the officers used during the interragation, that there was na thought disarder, and that Wright was responsive ta the officers' questians.* Finally, in earlier testimony that Dr. Maslansky gave during Wright's 1992 trial, he stated that Wright demonstrated an awareness of the consequences of what he said regarding his role in the murder in that he gave an explanation for what he did:

> He had to shoot Seifert or Dixon would have shot him. [67]

As close as this Court got to the adequacy of the *Miranda* warnings was to mention that **Wright** was aware of his right to remain silent. Once again, however, this was raised, however, in the context of his ability to understand and was not an examination of the warnings themselves:

> That **Wright** may not have fully grasped the ultimate consequences of his statements does not save him from his decision to speak *when he knew he had the right to remain silent. A criminal suspect need not know and understand every possible consequence of a waiver of the Fifth Amendment privilege,* and the police are not required to advise a suspect on every nuance of constitutional law as to whether he should speak or stand by his rights. [68]

In sum, nothing in this Court's 1998 opinion even purports to be a ruling on the adequacy of the warnings.

***State v. Wright*, 1992 WL 207255 (Del.Super.Aug. 6, 1992).**

The adequacy of the *Miranda* warnings was not contested in the motion giving rise to this opinion either. Instead the issue addressed in this opinion related to the delay in bringing **Wright** before a judicial officer and the length of his interrogation:

> There are two concerns which must be addressed regarding the time that the police interviewed the defendant: *first, the defendant alleges that he should have been presented after Detective Merrill's interview regarding the assault charge was completed: and second. the lengthy period of time during which the defendant was interviewed must be examined.* [69]

***16** This Court's holding confirms that it was a question of the delay in bringing **Wright** before a judicial officer—not the adequacy of the *Miranda* warning—which was decided:

> There is no evidence in this case of unreasonable delay in presenting the defendant to a judicial officer. The police finished searching the defendant's home, attended strategy meetings, interviewed Lester Mathis, and then began to interview the defendant. The defendant did not ask to end the interview or request the assistance of counsel. Instead, he voluntarily gave information about various crimes, including the Hi-Way Inn murder, to Detective Moser. Because the length of the interview was due to the defendant's continuing conversation with Detective Moser, *I hold that the delay was not unreasonable.* [70]

Having considered the rulings cited by the Supreme Court as constituting procedural bars under Criminal Rule 61, this Court will turn its attention to the remainder of the record. Perhaps the logical place to start is the suppression hearing this Court conducted before **Wright's** trial. **Wright** did not raise the adequacy of the warnings in his motion to suppress. Rather, he claimed "that his detention from the time of arrest until the time the statement was made was unreasonable and in violation of 11 *Del.C.* § 1909 and Super.Ct.Crim.R. 5(a)." [71] Also, as the trial judge later wrote, "[a]t the suppression hearing, the Court specifically considered whether **Wright** had the capacity to know what he was saying." [72]

None of this Court's other pre-trial or trial rulings considered the adequacy of the warnings. This Court has also examined the Supreme Court's 1996 opinion in which **Wright** appealed from the denial of an ineffective assistance of counsel claim relating to his trial counsel's performance during the guilt phase of his trial, and in which he appealed the re-imposition of the death penalty following his second penalty hearing. [73] No mention is made anywhere in that opinion of the adequacy of the warnings given **Wright**.

In its opposition to the current motion to suppress, the State directs the Court's attention to instances in which the name "*Miranda*" was mentioned or implied:

- "In this case, the interrogation began with a recitation of the *Miranda* rights." [74]
- "Nor has the Defendant provided the Court with any proof that he did not understand the importance of his *Miranda* rights." [75]
- "Dr. Maslansky was unaware, for example, that **Wright** already had a familiarity with his *Miranda* rights from previous arrests or that **Wright** had received *Miranda* warnings a number of times before giving his video-taped testimony." [76]
- "At the hearing, Dr. Maslansky further conceded that **Wright** understood the words that the officers used during the interrogation, that there was no thought disorder, and that **Wright** was responsive to the officer's questions." [77]
- "A criminal suspect need not know and understand every possible consequence of a waiver of the Fifth Amendment privilege, and the police are not required to advise a suspect of every nuance of constitutional law as to whether he should speak or stand by his rights." [78]

***17** ● "**Wright's** claim of ineffective [assistance of counsel] is procedurally barred under Rule 61(i)(4) as well as substantively without merit because the waiver of his *Miranda* rights was knowing and intelligent." [79]

In none of the passages relied upon by the State (or in any other passage, for that matter) was there even a mention of the actual warnings given to **Wright**, much less a consideration of their adequacy. There is no reason to believe, therefore, that the Supreme Court or this court has ruled on the adequacy of the warnings given to **Wright**.

C. The adequacy of the *Miranda* warnings was never previously presented to any Court.

Not only did the Supreme Court and this Court never decide whether the *Miranda* warnings given **Wright** were adequate, they also were never presented with this issue. It perhaps goes without saying that the surest way to determine whether an argument was presented is to examine the briefs or motions filed by the parties. The Sixth Circuit Court of Appeals recently articulated the significance of the briefing when determining whether an issue was decided for purposes of the law of the case doctrine:

> Application of these doctrines is limited to those questions necessarily decided in the earlier appeal. The phrase necessarily decided describes all issues that were *fully briefed and squarely decided* in an earlier appeal. [80]

The significance of the prior briefing in determining law of the case questions is underscored by the Delaware Supreme Court's longstanding practice that it will not decide issues unless they were fully briefed. For example, in *Roca v. E.I. DuPont de Nemours and Campany* the Court summarized the rule this way:

> This Court has held that the appealing party's opening brief must *fully* state the grounds for appeal, as well as the arguments and supporting authorities on each issue or claim of reversible error. Casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue for appeal and *a fortiori* no specific mention of a legal issue is insufficient. The failure of a party appellant to present and argue a legal issue in the text of an opening brief constitutes a waiver of that claim on appeal. Accordingly, we hold that, assuming arguendo that Roca preserved the ... issue in the Superior Court, Roca abandoned and waived that issue in his appeal to this Court by raising it for the first time at oral argument. [81]

Although *Roca* post-dates the Supreme Court's opinions on **Wright's** appeals, the rule requiring full briefing to preserve an issue was the same at the time of his appeals. [82] In light of this, there is no reason to believe that the Supreme Court would ever have ruled on the adequacy of the *Miranda* warnings unless that issue had been briefed.

***18** This Court has reviewed the briefs and appendices in the two aforementioned Supreme Court appeals. Nowhere did

the parties present any argument to the Supreme Court on the adequacy of the *Miranda* warnings given to **Wright**. Indeed, *Miranda* was not even mentioned in some of those briefs and mentioned only in passing in others. In any event there was never a discussion in the briefing of the requirements of *Miranda* :

- In **Wright's** direct appeal in 1993 neither **Wright** nor the State cited *Miranda* in any of their briefs, and neither side made mention in the briefs of the language used by Detective Mayfield in his warnings.
- In his two briefs filed in connection with the Supreme Court's 2000 decision **Wright** again did not cite *Miranda*. The State cited *Miranda* in passing on three occasions in its brief, but not in connection with the warnings given by Detective Mayfield. Once again, neither side referred to the language of the warnings given by Detective Mayfield, nor did either side include the transcript of those warnings in its appendix. The Supreme Court therefore had no information in this appeal about the contents of the warnings given to **Wright**.

This Court has similarly examined the papers filed with this court in connection with its opinions. There was no reference to the adequacy of the *Miranda* warnings in any of those papers. The Court finds, therefore, that the adequacy of the *Miranda* warnings was never presented to either this Court or the Supreme Court. It necessarily follows that neither court ever decided the issue.

D. Because the adequacy of the *Miranda* warnings was never decided, Wright's arguments are not barred by law of the case.

The hierarchical nature of our judicial system demands that an inferior court faithfully adhere to the directions given it by an appellate court. This obligation is sometimes referred to as the "mandate rule." That rule requires adherence to the decisions of the appellate court but leaves the inferior court free to make such other rulings as it sees fit. "While the mandate does not control a trial court as to matters not addressed on appeal, the trial court is bound to strictly comply with the appellate court's determination of any issues expressly or impliedly disposed of in its decision."[83] The mandate is limited to only those matters which were actually decided. The trial court is "free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court not settled by the decision."[84] Given that the Supreme Court never decided or even took up the issue whether the warnings given **Wright** were sufficient, its opinions do not prohibit this Court from considering **Wright's** *Miranda* argument.

As discussed previously, this Court's earlier decisions are not law of the case insofar as **Wright's** *Miranda* argument is concemed because, like the Supreme Court, it never ruled on that argument. But even assuming that this Court had, in fact, previously ruled on **Wright's** *Miranda* claims, such a ruling would not necessarily spell their end. A court has considerably more flexibility when applying the law of the case doctrine to its own decisions. In such instances the doctrine "is not an absolute bar to reconsideration of a prior decision that is clearly wrong, produces an injustice or should be revisited because of changed circumstances."[85] Under the circumstances presented here, the Court would not feel constrained by the law of the case doctrine to follow the hypothetical ruling by this Court. It is true that the law of the case doctrine serves to promote finality and judicial economy. But it was never intended to foster an injustice, particularly in a capital case. Our Supreme Court has "recognized the importance of finality in criminal litigation and especially in the context of capital litigation. Balanced against that interest, however, is the important role of courts in preventing an injustice."[86] Precluding review, under the banner of finality and judicial efficiency, of a meritorious contention never previously raised is inconsistent with this Court's role of preventing injustice. Almost seventy-five years ago Hugo Black wrote:

> ***19** Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.[87]

The same holds true today.

In sum, because neither the Supreme Court nor this Court has ever been presented with and never decided the specific issue whether the warnings given to **Wright** were adequate,

his *Miranda* claims are not barred by the doctrine of the law of the case.

II. Wright's confession must be suppressed because the warnings given to him by the interrogating detective da nat satisfy *Miranda*.

Courts do not require police officers to recite the warnings exactly as they appear in the *Miranda* opinion. Rather, officers are free to use whatever language they want so long as it reasonably conveys the essence of the warnings in *Miranda* and does not suggest any limitation on the so-called rights. The warnings given to Wright are deficient because they suggest a limitation on Wright's right to court-appointed counsel. In particular, the officer told Wright he was entitled to a court-appointed attorney "if the State feels ... [you] need[ ] one." This, of course, is untrue—Wright's entitlement to a court-appointed attorney is not a matter of grace from the State. Rather, he had an absolute right to a court-appointed attorney if he wanted one. The warnings given to him fail to satisfy *Miranda* and the ensuing statement must, as a matter of law, be suppressed.

A. The warnings given to Wright.

The first step in analyzing the sufficiency of the warnings is to identify precisely which of them must be scrutinized. In its 2012 opinion this Court addressed whether the State was required to refresh the *Miranda* warnings allegedly give to Wright before interrogations preceding Detective Mayfield's. The Court weighed the required factors set forth in *Ledda v. State*[88] and concluded:

> Perhaps no single factor discussed above would have required re-administration of the *Miranda* warnings, but after considering the circumstances in their totality of the circumstances, including the *Ledda* factors and Wright's obviously impaired condition, the court finds that Detective Mayfield was obligated to re-administer the warnings to Wright before he began his interrogation.[89]

The State did not challenge this Court's application of *Ledda* when it appealed that decision. More importantly, in the instant motion to suppress Wright expressly relied upon this Court's ruling that a balancing of the *Ledda* factors required that Detective Mayfield give a new set of warnings to him. Yet, the State again chose not to dispute this holding. It is well settled that the failure to brief an argument constitutes a waiver of that argument.[90] The State's silence is therefore dispositive of this issue, and the court adheres to its earlier ruling that Detective Mayfield was required to give a fresh set of *Miranda* warnings to Wright. Accordingly, the issue here is whether the specific warnings given by Detective Mayfield satisfy *Miranda*.[91]

B. The requirements of *Miranda*.

***20** A core principle of the Bill of Rights is that coerced confessions are not admissible in the trial of the accused. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." Over the years the Supreme Court "has recognized and applied several prophylactic rules designed to protect the core privilege against self-incrimination."[92] Foremost among these is the proverbial landmark 1966 decision in *Miranda v. Arizona*.[93] Before *Miranda* the admissibility of a confession was determined solely on the basis whether it was "voluntary" as that term was understood under the Due Process Clause.[94] The *Miranda* Court "presumed that interrogation in certain custodial circumstances is inherently coercive and that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights."[95] According to the *Miranda* court, the defendant

> [M]ust be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[96]

The prophylactic *Miranda* warnings are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected."[97]

The United States Supreme Court has, on several occasions, visited the issue whether particular warnings given to a suspect complied with the requirements of *Miranda*. The Court's most recent such occasion was *Florida v. Powell*[98]

which, the State contends is central to this issue. *Powell* cannot be considered in a vacuum because, as the Court wrote, "[o]ur decisions in *Prysock*[99] and *Duckworth*[100] inform our judgment here."[101] Taken together, these three opinions —*Prysock, Duckworth,* and *Powell* —provide guidelines for evaluating the sufficiency of warnings given to a suspect. Most notable among them is the principle that the warnings cannot convey a limitation on the rights *Miranda* requires to be conveyed to the suspect.

California v. Prysock[102]

The defendant in this case contended that although the warnings conveyed to him that he had the right to counsel during questioning, they did not explicitly state that he had the right to *court-appointed* counsel during questioning.[103] The defendant was advised in pertinent part as follows:

> You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. Do you understand this?
>
> You all, uh,—if,—you have the right to have a lawyer appointed to represent you at no cost to yourself. Do you understand this?[104]

The Court's analysis began with the principle that *Miranda* and its progeny do not require a strict, talismanic incantation of the warnings as they were articulated in *Miranda.*[105] What is required, however, is that the warnings touch all four bases, that is, they must reasonably convey all four of the *Miranda* warnings, without suggesting a limitation on any of those rights.

***21** The *Prysock* Court compared the warnings given to the defendant with warnings in two lower court cases in which the courts found the warning to be inadequate.[106] In one case the defendant was advised she had "an attorney appointed to represent you when you first appear before the U.S. Commissioner or the Court."[107] In the other the defendant was told "*if he was charged* ... he would be appointed counsel."[108] The warnings in these two cases were defective, according to the Supreme Court, because "[i]n both instances the reference to appointed counsel was linked to a future point in time after police interrogation, and therefore did not fully advise the suspect of his right to appointed counsel before such interrogation."[109] The Supreme Court found the warnings given to Prysock to be critically different because "[h]ere, in contrast, *nothing in the warnings given [Prysock] suggested any limitation on the right* to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general."[110] The proverbial bottom line is: he warnings cannot suggest a limitation on the right to appointed counsel.

Duckworth v. Eagan

The second case in the trilogy is *Duckworth v. Eagan,*[111] where police gave the defendant the following warning:

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. *You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning.* You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer."[112]

Defendant Eagan argued that the portion of the warning—"we have no way of giving you a lawyer, but one will be appointed for you if and when you go to court"—rendered the warnings inadequate because it conveyed to that he was not entitled to a court-appointed attorney during any interrogation.[113]

The analysis in *Duckworth* again began with the observation that *Miranda* does not require adherence to the "exact form" of the language used in that opinion to describe the required warnings.[114] The Court upheld the warnings because they "touched all the bases," and taken as a whole did not suggest

a limitation on the right to appointed counsel. [115] It noted that the defendant was told he had the "right to talk to a lawyer" both "before we ask you any questions" and "during questioning." [116] In the sentence immediately following, the defendant was told he had a right to the advice and presence of a lawyer even if he could not afford one. [117] Taken together, these two sentences reasonably conveyed that the defendant was entitled to a lawyer before and during questioning even if he could not afford one. [118]

*22 The Supreme Court rejected the notion that the "if and when you go to court" language negated those warnings by suggesting a limitation on the defendant's right to court-appointed counsel. [119] Rather, "[w]e think it must be relatively commonplace for a suspect, after receiving *Miranda* warnings, to ask *when* he will obtain counsel. The 'if and when you go to court' advice simply anticipates that question." [120]

Insofar as the present case is concerned, the key to *Duckworth* is that the defendant was explicitly told he had the "right to the advice and presence of a lawyer even if you cannot afford to hire one." That never occurred here. Wright was only told he would have an attorney appointed for him only if the State felt he needed one; he was never told he had an unconditional right to appointed counsel.

Florida v. Powell [121]

The State told both this Court and the Supreme Court that "*Powell* 's relevance to Wright's case can hardly be overstated." [122] In *Powell* the police read the defendant his *Miranda* rights from a card and the defendant also signed a waiver form acknowledging he had received those rights and was willing to waive them. [123] The warnings given to Powell were far more understandable than those given to Wright. The defendant in *Powell* was advised:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview. [124]

He contended that the warning "you have the right to talk to an attorney before answering any our questions" conveyed that he had the right to speak to an attorney before questioning began but not during the questioning itself. [125]

The *Powell* Court's analysis began with the now-familiar adage that when determining the adequacy of the warnings given to a defendant courts should not parse the warnings as if they were "construing a will or defining the terms of an easement." [126] Rather, the "inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*." [127] Of particular importance to Wright's claim, the *Powell* court repeated that a key element in this inquiry was whether the warnings suggested any limitation on the *Miranda* rights:

> Our decisions in *Prysock* and *Duckworth* inform our judgment here. Both concerned a suspect's entitlement to adequate notification of the right to appointed counsel. In *Prysock*, an officer informed the suspect of, *inter alia*, his right to a lawyer's presence during questioning and his right to counsel appointed at no cost. The Court of Appeals held the advice inadequate to comply with *Miranda* because it lacked an express statement that the appointment of an attorney would occur prior to the impending interrogation. We reversed. "*[N]othing in the warnings*," we observed, "*suggested any limitation on the right* to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right to a lawyer before [the suspect is] questioned, ... while [he is] being questioned, and all during the questioning." [128]

*23 The *Powell* court upheld the warnings given there because they would reasonably be understood to mean that the defendant had a right to counsel during questioning. [129]

To reach the opposite conclusion—that the suspect had a right to consult with counsel before, but not during, questioning—would require the suspect to first "come to the counterintuitive conclusion that he is obligated, or allowed, to hop in and out of the holding area to seek his attorney's advice [during the questioning]. Instead, the suspect would likely assume that he must stay put in the interrogation room and that his lawyer would be there with him the entire time." [130]

A synthesis [131] of these three opinion yields, at a minimum, the following principles:

1. The police are not required to recite the Warnings *verbatim* as they appear in *Miranda.*

2. The police must "touch all the bases" of *Miranda* and explain them in understandable terms.

3. The police cannot suggest any limitation or precondition on any of the rights described in the *Miranda* warnings.

The most important for present purposes is the principle—which comes from *Prysock* and is reiterated in *Powell* —that the police cannot suggest any limitations or preconditions on the rights described in *Miranda.* The importance of this principle is emphasized in an opinion upon which the State itself relies—the Third Circuit's decision in *United States v. Warren* : [132]

> Rather, as the *Pawell* decision underscores in quoting *Prysock,* attention must be focused upon whether anything in the warning suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right to a lawyer before the suspect is questioned, while he is being questioned, and all during the questioning. [133]

Other federal courts of appeal have drawn the same conclusion. The Eleventh Circuit, for instance, has opined that "*Prysack* thus stands for the proposition that a Miranda warning is adequate if it fully informs the accused of his right to consult with an attorney prior to questioning and does not condition the right to appointed counsel on some future event." [134]

In short, the Court must examine the warnings to determine if they explain all four of the so-called *Miranda* rights and do not suggest any limitation on any of those rights.

C. Why the warning was defective.

The warnings given by Detective Mayfield fail to satisfy *Miranda* because they contain a limitation on Wright's right to appointed counsel. As mentioned several times previously, the detective told Wright "[c]an't afford to hire one, if the state feels that you're diligent and needs one, they'll appoint one for you." The idea conveyed to Wright that his right to appointed counsel was dependent upon the State's decision he "needs one" is wholly inconsistent with *Miranda.* According to the *Miranda* Court, "[i]f the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide." [135]

*24 This case is little different than the one before the Maryland Supreme Court in *State v. Luckett* :

> [N]o police officer advising a suspect of his rights under *Miranda* should intimate, much less declare affirmatively, a limitation upon the right to counsel. Detective Barba's statements that the right to counsel applied only to discussion of the specifics of "the case," being wrong as a matter of law, rendered the advisements constitutionally infirm. The constitutional infirmity of the warnings rendered similarly infirm Respondent's subsequent waiver of his rights, because his purported waiver was not made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. [136]

In the instant case the detective "declare[d] affirmatively a limitation on the right to counsel"—he told Wright he could have court appointed counsel only if the State feels he needed one.

Another case illustrating the error of telling the defendant his entitlement to a court-appointed lawyer was dependent upon the State's approval is the Ninth Circuit's decision in *United States v. Connell.* [137] In that case warnings to the

defendant that "a lawyer *may* be appointed to represent you" and if the defendant wanted a lawyer but could not afford one "arrangements will be made for me to obtain a lawyer in *accordance with the law* " were held to be defective because the police also told the defendant that "you must make your own arrangements to obtain a lawyer and this will be at no expense to the government." [138] Of particular significance in *Connell* was that the language "the government *may* appoint one for you" suggested that the defendant's right to counsel was dependent upon the government's approval. The court reasoned:

> Application of the above principles to the facts of Connell's case compels the conclusion that the warnings at issue fell below minimum required standards. Like the warnings issued in *Garcia* and *Twomey,* the warnings Connell received were equivocal and open to misinterpretation. Although told that he had the right to talk to an attorney before, during, and after questioning, this statement was immediately followed by a strong assertion that such an attorney could not be obtained at the Government's expense. The subsequent statements regarding appointed counsel in both the oral and written warnings—that "a lawyer *may* be appointed to represent you" (oral) and that if I want but cannot afford a lawyer "arrangements will be made for me to obtain a lawyer in *accordance with the law*" (written)—did not clearly inform Connell that if he could not afford an attorney one would be appointed for him prior to questioning, if he so desired. The oral warning, using the word "may", *leaves the impression that praviding an attorney, if Cannell could not affard one, was discretionary with the government,* particularly in light of the previous strong statement that "you must make your own arrangements to obtain a lawyer and this will be at no expense to the government." [139]

***25** The Court of Appeals invalidated the warnings because they left "the impression providing an attorney if Connell could not afford one was discretionary with the government." [140] The same is true of a warning which told **Wright** he was entitled to court-appointed counsel "if the State feels ... [you] need[ ] one."

D. The State's other arguments.

The State raises several arguments, none of which require a different result. It should be recalled that the State was responding to a three-pronged motion to suppress—(1) the *Miranda* warnings were inadequate; (2) **Wright's** waiver of his *Miranda* rights was not voluntary; and (3) **Wright's** confession was not voluntary. It may well be that certain of the State's argurnents in its response were not addressed to the first prong, but rather to one of the latter two. Nonetheless the Court will separately consider them.

1. Simply advising Wright he had a right to counsel is not sufficient.

In its brief in its 2012 appeal to the Delaware Supreme Court, [141] and again here, the State urges that Detective Mayfield told **Wright** he had a right to counsel. The State stressed that Detective Mayfield told **Wright** that "[y]ou have the right, right now, at any time, to have an attorney present with you." This is fine as far as it goes, but it falls short because it does not tell **Wright** that he has a right to a court-appointed attorney if he cannot afford one. According to the *Miranda* court the right to have an attorney present and the right to a court-appointed attorney are distinct and both must be covered:

> In order fully to apprise a person interrogated of the extent of his rights under this system then, *it is necessary to warn him not anly that he has the right ta consult with an attarney, but also that if he is indigent a lawyer will he appointed to represent him.* Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation —the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it. [142]

The Supreme Court has stated that "the four warnings *Miranda* requires are invariable." [143] Advice to a suspect that he has "the right, right now, at any time to have an attorney present with you" is therefore no substitute for the invariable requirement that the suspect be advised he is entitled to *free* counsel if he is indigent.

While on the subject of the four "invariable" *Miranda* warnings, the Court will distinguish some dictum from the Delaware Supreme Court which neither side has mentioned. The Court is not in the habit of setting up straw men and knocking them down, but in this instance it will mention the Delaware Supreme Court's opinion *Crawford v.* State, [144] even though the State has not relied upon it. In *Crawford* our Supreme Court was confronted with a claim that a suspect had invoked his right to counsel and therefore his statement should have been suppressed—an issue not present here. During the course of its analysis the court referred to the United State's Supreme Court's decision in *Michigan v. Tucker* [145] and suggested in a parenthetical expression following a citation that *Tucker* stands for the proposition that a "failure of interrogating officers to advise suspect of right to appointed counsel did not invalidate an otherwise voluntary statement." [146] Specifically the *Crawford* court wrote:

> ***26** Although it has not specifically addressed the question of an ambiguous invocation of the right to counsel, the Supreme Court has considered related issues on several occasions. *Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974)* (since the procedural rules of *Miranda* were not themselves rights protected by the constitution, strict adherence to the form suggested in *Miranda* was not constitutionally required, *thus failure of interrogating officers to advise suspect of right to appointed counsel did not invalidate an otherwise voluntary statement*). [147]

Because it was unnecessary to the *Crawford* Court's holding, its interpretation of *Michigan v. Tucker* is dictum and is not binding upon this Court. It is therefore permissible for this Court to say that it has a different view of the holding in *Tucker*. The issue before the United States Supreme Court in *Tucker* was whether a statement taken in violation of *Miranda* could be used to impeach the defendant if he testified. The officer in that case failed to advise the defendant of his right to appointed counsel, and the lower courts held that this omission required suppression of his statement. [148] That holding was never disturbed by the Supreme Court. [149] To the contrary the high court observed that *Miranda* had been satisfied because Tucker's statement was excluded during the prosecution's case in chief:

> Our determination that the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination does not mean there was not a disregard, albeit an inadvertent disregard, of the procedural rules later established in Miranda. The question for decision is how sweeping the judicially imposed consequences of this disregard shall be. This Court said in Miranda that statements taken in violation of the Miranda principles must not be used to prove the prosecution's case at trial. That requirement was fully complied with by the state court here. [150]

Tucker therefore does not support the notion that an interrogating officer may omit the required advice about the right to a free attorney so long as the officer simply tells the suspect he has a right to counsel. To the contrary, *Tucker* reinforces the essential nature of the advice about a court-appointed attorney, and that the omission of such advice requires exclusion during the prosecution's case-in-chief.

2. *Duckworth v. Eagan* is distinct

The State directs this Court's attention to the United State's Supreme Court's holding in *Duckwarth v. Eagan*. That case is readily distinguished from the present matter. As discussed previously, the *Duckworth* Court upheld a warning in which the suspect was told that a lawyer would be appointed for him "if and when you go to court." The Supreme Court based its holding on the fact that the suspect was also told that he had a right to counsel before and during questioning and, in the immediately following sentence, that one would be appointed for him if he could not afford one. [151] In this case

the detective never told Wright that he had the unconditional right to appointed counsel; instead he was only told that a lawyer would be appointed for him if the State felt he needed one. Thus this case, unlike *Duckworth,* lacks a catchall phrase that would have apprised Wright of his right.

3. Adequate *Miranda* warnings are not a mere "component part"

*27 The State also suggests that the Court should ignore the defective *Miranda* wamings if it finds that Wright's confession was voluntary. [152] In its opposition to the motion to suppress it argues:

> As the United States Supreme Court has repeatedly held, *Miranda* wamings are prophylactic, and *Miranda* did not create a substantive right. *It is the voluntariness of a confession, with the provision of Miranda warnings functioning as an important component in the totality of circumstances analysis that courts must employee when reviewing a defendant's confession.* The Delaware Supreme Court has developed a two-part test to determine whether a waiver of *Miranda* is voluntary....

This argument is contradicted by the United States Supreme Court, which on numerous occasions has held that effective *Miranda* wamings are an absolute prerequisite to admission of a confession. While it is true that the *Miranda* warnings given a suspect in a custodial interrogation are part of the mix to be considered when determining whether the waiver of those rights is voluntary, it would be a mistake to relegate them to a mere "component in the totality of circumstances" to be considered in making that determination. Rather, adequate warnings are essential, and without them any ensuing statement is inadmissible as a matter of law during the prosecution's case-in-chief. They are "prerequisites to the admissibility of any statement made by a defendant." [153] "The central principle established by [*Miranda*]," according to the Supreme Court, is "if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated above, his responses cannot be introduced into evidence to establish his guilt." [154] Put another way, *Miranda's* "core ruling [is] that unwarned statements may not be used as evidence in the prosecution's case in chief." [155]

4. Wright's previous experience with *Miranda* warnings is irrelevant

The State points out that Wright has had previous experience with *Miranda* warnings. That experience, whatever it might be, does not lessen the obligation of the police to give adequate *Miranda* wamings:

> Whether a suspect in custody is mature or young, a Ph.D. or a high school drop-out, a repeat offender familiar with the criminal justice system or an individual with a previously clean record does not vary the fact that sufficient *Miranda* warnings must be given. [156]

5. The jury's verdict does not validate the warnings given

*28 The State refers to the jury verdicts in Wright's first trial (in the guilt and penalty phases) and its verdict after Wright's second penalty hearing. The adequacy of the *Miranda* warnings is a question of law for the court, not a question of fact for the jury. [157]

E. Suppression is required

Every day that a police officer leaves for work the officer does so uncertain that he or she will return home at the end of the shift. At any moment a police officer can face an unexpected, split-second decision in which a life can hang in the balance. In the words of the United States Supreme Court, "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." [158] Indeed, there are emergency situations in which the *Miranda* warnings need not be given before custodial questioning:

> [T]he need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against

> self-incrimination. We decline to place officers ... in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the Miranda warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence. [159]

This, however, was not such a situation. **Wright** was in a tightly controlled situation, and the police were not faced with any on-going emergency at the time he was interrogated.

Courts do not "expect police officers to read *United States Reports* in their spare time, to study arcane constitutional law treatises, or to analyze constitutional developments with a law professor's precision," [160] but as discussed previously, the strictures of *Miranda* were familiar by the time **Wright** was questioned and police in Delaware, as elsewhere, had developed adequate procedures designed to insure compliance with them. Nonetheless, **Wright** did not receive warnings which even arguably satisfied *Miranda*. "The *Miranda* rule is not a code of police conduct," [161] but rather is a prophylactic rule designed to protect core constitutional rights. There is only one remedy here—**Wright's** confession must be suppressed and the State cannot use that confession during its case-in-chief. The *Miranda* Court itself made it clear that the "warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant." [162] There is simply no reason here to allow the admission of a statement obtained in violation of *Miranda*. Therefore the court has no choice but to suppress **Wright's** statement.

***29 Wherefore,** Defendant's motion to suppress is **GRANTED.**

Footnotes

1 **Wright** also contends that his waiver of his *Miranda* rights and his statement were both involuntary. Because of the Court's resolution of the argument centered on the adequacy of the *Miranda* warnings given to **Wright**, the Court need not reach his other arguments.

2 *Florida v. Powell*, 559 U.S. 50, 64 (2010).

3 *E.g.*, *State v. Oakes*, 373 A.2d 210, 212 (Del.1977) (Delaware State Police Officer "read defendant the *Miranda* warnings from a card and asked if defendant understood his rights."); *State v. Aiken*, 1992 WL 301739, at *3 (Del.Super.Oct. 9, 1992) (Before interrogating defendant on two occasions in 1991 police used a "*Miranda* card designed for police to use when questioning suspects."); *State v. Kopera* ; 1991 WL 236970, at *1 (Del.Super.Oct. 17, 1991) (Detective "read to Mr. Kopera the Miranda rights contained on the Delaware State Police Miranda rights card."). *See also United States v. Velasquez*, 885 F.2d 1076, 1079 (3d Cir.1989) ("[Delaware State Police officer] Durnan testified that he read Velasquez *Miranda* warnings from a card, reading slowly, in English, and stopping after each sentence to ask if she understood. She answered in the affirmative each time. Durnan also testified that he provided Velasquez with a card containing the *Miranda* warnings in Spanish."); *United States v. Smith*, 679 F.Supp. 410, 411 (D.Del.1988) ("At about 11:25 a.m. [Delaware State Police] Corporal Durnan handcuffed Mr. Smith, placed him under arrest and read him the *Miranda* warnings from a card."). In one case in which the adequacy of the warnings was contested the Delaware Supreme Court noted that the card "was the best evidence" of the warnings actually given to the defendant. *Walley v. State*, 622 A.2d 1097, 1993 WL 78221, at *2 (Del.1993) (TABLE).

4 In an earlier hearing Detective Merrill was also asked to recite the warnings he gave to **Wright**, and in that hearing he recited them in a manner which satisfied *Miranda*.

5 *Liu v. State*, 628 A.2d 1376, 1380 (Del.1993) (Expert testified in 1990 trial on Defendant's understanding of warnings "after examining the *Miranda* waiver forms the police use."); *Black v. State*, 616 A.2d 320, 322 (Del.1992) (During the 1990 interrogation Defendant "was once again advised of his *Miranda* rights and signed a form to that effect."); *Torres v. State*, 608 A.2d 731, 1992 WL 53406, *4 (Del.1992) (TABLE) ("The record also shows that Torres voluntarily waived his *Miranda* rights by executing a written *Miranda* waiver form prior to giving each tape-recorded statement."); *Lodge v. State*, 599 A.2d 413, 1991 WL 134474, at *1 (Del.1991) (TABLE) (Defendant completed "another *Miranda* waiver form and relinquishing his *Miranda* rights for a second time."); *Deputy v. State*, 500 A.2d 581, 586 (Del.1985) (Defendant "signed a written [Delaware State Police] form acknowledging the *Miranda* warnings."); *State v. Dyson*, 1989 WL 48580, at *1 (Del.Super. May 5, 1989) ("The defendant executed a *Miranda* warning waiver form."); *State v. Brophy*, 1986 WL 13100, at *4 (Del.Super.Sept. 12, 1986) (Detective "testified that he watched the defendant sign the *Miranda* form.").

6 Dixon was arrested later and denied any complicity in the HiWay Inn killing. He ultimately pled to robbery in the first degree and possession of a firearm during the commission of a felony in exchange for a sentence he believed would result in his release after serving an additional five months. At a 2009 Rule 61 evidentiary hearing Dixon denied any complicity and testified he entered his plea only because his friend **Wright** was sentenced to death for a crime they did not commit and Dixon was afraid the same thing would happen to him.

7 During the Rule 61 evidentiary hearing, Detective Mayfield objected to the nomenclature "interrogation" and insisted his interaction with **Wright** was an "interview." The Court has chose to use the term "interrogation" to refer to questions asked of a suspect, and the tem "interview" to refer to questions asked of a non-suspect (*i.e.* a witness). The Supreme Court uses the term "interrogation" in *Miranda* and its progeny, and the court will use it here. It does not ascribe any negative connotation to the term.

8 Detective Mayfield at the beginning of the interrogation said that the time was 7:34 p.m., and indeed a clock behind **Wright** in the video indicated it was 7:34. However, the video shows that throughout the interrogation, the hand of the clock never moved. This creates considerable doubt as to when the interrogation actually began.

9 *State v. **Wright***, 2012 WL 1400932, at *12–18 (Del.Super.Jan. 3, 2012).

10 ***Wright***, 2012 WL 140932, at *18.

11 This is a document routinely created by police departments to circulate basic information about unsolved crimes to other officers.

12 The law of the case doctrine does not preclude this Court from changing its earlier finding. That doctrine is discussed in some detail in the "Analysis" portion of this opinion. Suffice for now, the Delaware Supreme Court has held "[t]he law of the case doctrine does not preclude this Court or the Superior Court from reexamining the prior rulings in this case when the factual premises of those prior rulings are demonstrated to have been mistaken." *Hamilton v. State*, 831 A.2d 881, 887 (Del.2003). Given the new evidence about Detective Mayfield conferring with Detective Moser, the Court is not bound by the law of the case here.

13 Supreme Court docket in No. 10, 2012, D.I. 34 at 14.

14 ***Wright** v. State*, 633 A.2d 329 (Del.1993).

15 ***Wright** v. State*, 671 A.2d 1353, 1357–9 (Del.1996).

16 *State v. **Wright***, 1998 WL 734771 (Del.Super.)

17 ***Wright** v. State*, 2000 WL 139974 (Del.)

18 Federal law requires that a petitioner exhaust all of his claims in the state court before presenting them in federal court. 28 U.S.C. § 2254(b)(1)(A). At the time **Wright's** federal petition was a "mixed petition," meaning that it contained both exhausted and unexhausted claims. The apparent purpose of the third and fourth Rule 61 motions was to present the unexhausted claims in the state court. Rather than dismiss the mixed petition, the federal court allowed **Wright** the opportunity to present those claims in state court.

19 *State v. **Wright***, 2012 WL 1400932 (Del.Super.), rev'd 67 A.3d 319 (Del.2013)

20 *State v. **Wright***, 67 A.3d 319 (Del.2013)

21 ***Wright** v. State*, 91 A.3d 972 (Del.2014)

22 *State v. **Wright***, 67 A.3d 319, 323 (Del.2013). The Supreme Court was apparently misinformed about what occurred in this case. Contrary to the statement that "**Wright** did not ask for that relief," **Wright** filed an amended motion expressly alleging that the *Miranda* warnings given to him were defective. And contrary to the statement that this court "addressed the issue sua sponte," there were multiple rounds of briefing and oral arguments specifically addressing the *Miranda* issue.

23 At the time of the Supreme Court's 2013 opinion Criminal Rule 61(i)(4) provided that any post-conviction ground "for relief that was formerly adjudicated ... is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice."

24 *State v. **Wright***, 67 A.3d 319, 323 (Del.2013).

25 *Id.* (internal quotation marks omitted).

26 The State does not rely upon Criminal Rule 61 in its response to the motion to suppress.

27 The State tacitly concedes the point because it does not argue that the Supreme Court's holding is dispositive of the issue here. Nor does it argue that Criminal Rule 61, upon which the Supreme Court relied, still applies here.

28 *Hoskins v. State*, 102 A.3d 724, 729 (Del.2014).

29 *Id.* at 729 (emphasis in original) (internal alterations, footnotes, and quotation marks omitted).

30 *Id.* (internal quotation marks omitted).

31 *May v. Bigmar, Inc.*, 838 A.2d 285, 288 n.8 (Del. Ch.2008).

32 *Kenton v. Kenton*, 571 A.2d 778, 784 (Del.1990) (emphasis added).

33 *Brittingham v. State*, 705 A.2d 577, 579 (Del.1998) (emphasis added).

34 *Marine v. State*, 624 A.2d 1181, 1184 n.5 (Del.1993) (emphasis added).

35 *Zirn v. VLI Corp.*, 681 A.2d 1050, 1062 n.7 (Del.1996) (emphasis added).

36 *Fenton v. State*, 567 A.2d 420, 1989 WL 136962, at *1 (Del.1989) (TABLE) (emphasis added).
37 *French v. French*, 622 A.2d 109, 1992 WL 453269, at *3 (Del.1992) (TABLE) (emphasis added).
38 *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 38 (Del.2005) (emphasis added).
39 *Motorola Inc. v. Amkor Technology, Inc.*, 958 A.2d 852, 859 (Del.2008) (emphasis added).
40 *John B. v. Emkes*, 710 F.3d 394, 403 (6th Cir.2013).
41 *Perkins v. Am. Elec. Power Fuel Supply, Inc.*, 91 F. App'x 370, 374 (6th Cir.2004) (*quoting* 1B James Wm. Moore, Moore's Federal Practice ¶ 0.404[1], at II–5 (2d ed. 1996)).
42 *United States v. Hatter*, 532 U.S. 557, 566 (2001).
43 *McKenzie v. BellSouth Telecomm., Inc.*, 219 F.3d 508, 512 n.3 (6th Cir.2000) (quoting *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (6th Cir.1997)(emphasis added)).
44 Judge Balick also served with distinction as a Vice Chancellor of the court of chancery.
45 B. Balick, *Proposed Rule for Post Conviction proceedings in the Superior Court of the State of Delaware*. Reported at 2012 WL 1400932 *52 (Del.Super.)
46 628 A.2d 38, 41 n.5 (Del.1993).
47 *Insurance Co. of Am. v. Barker*, 628 A.2d 38 (Del.1993); *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26 (Del.2005); ***Wright*** *v. Moore*, 953 A.2d 223 (Del.2008).
48 761 F.2d 943 (3d Cir.1985)
49 *Id.* at 950.
50 906 A.2d 27, 54 (Del.2006) (emphasis added).
51 For example, on one occasion this Court summarized its earlier rulings, noting that "the Court [previously] examined the totality of circumstances including the behavior of the interrogators, the conduct of the defendant, his age, his intellect, his experience, and all other pertinent factors."
52 Supreme Court docket in No. 10, 2012, D.I. 34 at 6.
53 *Id.* at 18 ("The now-retired Superior Court Judge considered the voluntariness of Wright's confession in three separate opinions.").
54 *Maryland v. Shatzer*, 559 U.S. 98, 104 (2010).
55 *Colorado v. Spring*, 479 U.S. 564, 74 (1987) (internal citations omitted).
56 *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973).
57 475 U.S. 412, 421 (1986) (emphasis added) (internal citations and internal quotation marks omitted).
58 *E.g., Markward v. State*, 667 A.2d 1319, 1995 WL 496947, at *2 (Del.1995) (TABLE); *Marine v. State*, 607 A.2d 1185, 1195–96 (Del.1992).
59 There are occasions when this Court wrote that Wright's waiver of his *Miranda* rights was "knowing, intelligent and voluntary." In each of those opinions, however, the only issue presented was whether his waiver was "voluntary;" the adequacy of the warnings given him was never argued.
60 *State v. **Wright***, 67 A.3d 319 (Del.2013).
61 *Id.* at 323. The cases discussed in the text were cited in footnote 12 of the Supreme Court's opinion.
62 ***Wright*** *v. State*, 633 A.2d 329, 333 (Del.1993).
63 *Id.* at 336.
64 *Id.* at 334.
65 ***Wright*** *v. State*, 746 A.2d 277, 2000 WL 139974, at*1 (Del. 2000).
66 *State v. **Wright***, 1998 WL 734771, at *5 (Del.Super.Sept. 28, 1999) (emphasis added).
67 ***Wright***, 1998 WL 734771, at *6 (emphasis added) (internal footnotes omitted).
68 *Id.*
69 *State v. **Wright***, 1992 WL 207255, at *2 (Del.Super.Aug. 6, 1992) (emphasis added).
70 *Id.* at *4.
71 *Id.* at *1.
72 ***Wright***, 1998 WL 734771, at *6.
73 ***Wright*** *v. State*, 671 A.2d 1353 (Del.1996).
74 State's Resp. at (D.I.# 510) (quoting *State v. **Wright***, I.D. No. 91004136DI, D.I.# 28, at 16–17 (Del. Super. Oct. 31, 1991)).
75 *Id.* at 6.
76 *Id.* at 8–9 (quoting ***Wright***, 1998 WL 734771, at *6).

77 *Id.* at 9.

78 *Id.*

79 *Id.*

80 Kindle v. City of Jeffersontown, Ky., 2014 WL 5293680, at *5 (6th Cir.2014) (internal quotations and quotations omitted).

81 842 A.2d 1238, 1242–43 (Del.2004).

82 *E.g., Black v. State,* 625 A.2d 278, 1993 WL 132989 (Del.1993) ("The failure to brief an issue that was raised below constitutes a waiver and abandonment of that issue on appeal"); *Barr v. State,* 571 A.2d 786, 1989 WL 160445, at *2 (Del.1989) (Appellant "has failed to argue the point in his brief, or even to refer to it. We conclude that Barr has waived or abandoned this contention.").

83 *Insurance Corp. of Am.,* 628 A.2d at 39.

84 *Motorola Inc.,* 958 A.2d at 860.

85 *Hoskins,* 102 A.3d at 79 (quoting *Gannet Co. v. Kanaga,* 750 A.2d 1174, 1181 (Del.2000)).

86 *Zebroski v. State,* 12 A.3d 1115, 1120 (Del.2010). Our Supreme Court is "acutely sensitive to the special scrutiny capital cases merit on review." *Jackson v. State,* 21 A.3d 27, 37 (Del.2011).

87 *Hormel v. Helvering,* 312 U.S. 552, 557 (1941).

88 564 A.2d 1125 (Del.1989).

89 *Wright,* 2012 WL 1400932, at*44.

90 Superior Court Criminal Rule 12(f) provides:

> **(f) Effect of Failure to Raise Defenses or Objections.** Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

The State has never asked for relief from its decision not to brief the *Ledda*-issue. Consequently, the State has waived any argument that this court incorrectly applied *Ledda. Brown v. United Water Del., Inc,* 3 A.3d 272, 276 (Del.2010) (party's decision not to brief issue in Superior Court constitutes waiver).

91 Even assuming the State had not waived any argument that Detective Mayfield was required to refresh the *Miranda* warnings, it is questionable whether the State could successfully rely on the earlier warnings allegedly given to Wright. "Under Miranda the burden of proving that proper warnings were given is on the government.... While there was testimony that the police officers read to appellant a card concerning his rights, the evidence does not demonstrate that a constitutionally adequate warning was given. The government's burden may not be met by presumptions or inferences that when police officers read to an accused from a card they are reading Miranda warnings or that what is read, without revelation of its contents, meets constitutional standards." *Moll v. United States,* 413 F.2d 1233, 1237–38 (5th Cir.1969). If the State had failed to prove that adequate warnings had been given to Wright by Detective Merrill or Detective Moser Wright's confession would possibly be suppressed because a statement given after a *Miranda* warning is inadmissible of the defendant first gave an unwarned confession. *Missouri v. Seibert,* 542 U.S. 600 (2004). Because of this court's unchallenged *Ledda*-ruling it need not reach these issues.

92 *United States v. Patane,* 542 U.S. 630, 637 (2004).

93 384 U.S. 436 (1966).

94 *E.g., Haynes v. Washington,* 373 U.S. 503, 513–14 (1963) (Defendant's written confession was involuntary and therefore inadmissible where it was made while the defendant was held by the police incommunicado and after he was told by police officers that he could not communicate by telephone with his wife until after he made written confession.).

95 *New York v. Quarles,* 467 U.S. 649, 654 (1984).

96 384 U.S. at 479.

97 *Michigan v. Tucker,* 417 U.S. 443, 444 (1974).

98 559 U.S. 50 (2010).

99 453 U.S. 355 (1981).

100 492 U.S. 195 (1989).

101 559 U.S. at 60.

102 453 U.S. 355 (1981).

103 *See id.* at 558–59.

104 *Id.* at 357.

105 *Id.* at 359–60.

106 *Id.* at 360–61.

107 *United States v. Garcia,* 431 F.2d 134, 134 (9th Cir.1970) (per curiam).

108 *People v. Bolinski*, 67 Cal.Rptr. 347, 355 (Cal.App.1968).
109 453 U.S. at 360.
110 *Id.* at 360–61.
111 492 U.S. 195, 198 (1989) (emphasis in original). Eagan made an ostensibly exculpatory statement after receiving the warnings quoted in the text. *Id.* The next day Eagan was questioned a second time. *Id.* Prior to that questioning he signed a form in which he acknowledged he was told "that if I do not hire an attorney, one will be provided for me." *Id.* at 199. Eagan admitted his participation in the crime during the second round of questioning. *Id.* The issue before the Supreme Court turned on the adequacy of the first warnings. *Id.* at 201–02. The warnings given Eagan before his second interrogation did not figure in the Supreme Court's analysis. *Id.* at 203–05.
112 *Id.* at 199.
113 *Id.*
114 *Id.* at 202.
115 *Id.* at 203.
116 *Id.* at 198.
117 *Id.*
118 *Id.*
119 *Id.* at 204.
120 *Id.*
121 559 U.S. 50 (2010).
122 Supreme Court Docket in No. 10, 212; D.I. 34 at 28.
123 559 U.S. at 53–54.
124 *Id.* at 54.
125 *Id.*
126 *Id.* at 60 (quoting *Duckworth*, 492 U.S. at 203).
127 *Id.* at 59 (internal alterations, citations and quotations omitted).
128 *Id* (emphasis added) (internal citations omitted).
129 *Id.* at 62.
130 *Id.* at 62–63.
131 This synthesis is similar to the standard for judging the adequacy of jury instructions: "The test is whether the jury instruction correctly states the law and is not so confusing or inaccurate as to undermine the jury's ability to reach a verdict. A trial court's jury instruction is not a ground for reversal if it is reasonably informative and not misleading, judged by common practices and standards of verbal communication." *Perkins v. State*, 920 A.2d 391, 398 (Del.2007). The warning given here would not meet this standard because the warning was inaccurate—it told Wright he could only have a court-appointed attorney if the state felt he needed one.
132 642 F.3d 182 (3d Cir.2011).
133 *Id.* at 185 (internal alterations and quotations omitted).
134 *United States v. Contreras*, 667 F.2d 976, 979 (11th Cir.1982).
135 *Miranda*, 384 U.S. at 480.
136 993 A.2d 25, 28 (Md.2010) (internal footnote and quotation marks omitted); *see also Commonwealth v. Seng*, 766 N.E.2d 492, 545 (Mass.2002) (Warning that " if you don't have money for a lawyer, they can help find one for you," was defective.).
137 869 F.2d 1349 (9th Cir.1989)
138 *Id.* at 1350–51, 1353.
139 *Id.* at 1353.
140 *Id.*
141 Supreme Court Docket in No. 10, 2012: D.I. 34.
142 *Miranda*, 384 U.S. at 480 (emphasis added).
143 *E.g.*, *J.D.B. v. North Carolina*, — U.S.——, 131 S.Ct. 2394, 2401 (2011).
144 580 A.2d 571 (Del.1990).
145 417 U.S. 433 (1974).
146 *Crawford*, 580 A.2d at 574.
147 *Id.*

148 417 U.S. at 437–38.

149 *Id.* at 445.

150 *Id.*

151 The warning given in *Duckworth* was:

> You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. 492 U.S. at 198.

152 The State uses the terms "voluntary waiver of *Miranda* rights" and "voluntary confession" interchangeably. They are, however, distinct concepts. The State begins its argument with the assertion "[i]t is the *voluntariness of a confession* ... that courts must employee when reviewing a defendant's confession," which is immediately followed by a discussion that "[t]he Delaware Supreme Court has adopted a two-part test to determine whether a *waiver of Miranda is voluntary.*"

153 *Miranda*, 384 U.S. at 476; *Schneckloth*, 412 U.S. at 232 ("[I]n *Miranda* ..., we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation.").

154 *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984).

155 *Dickerson v. United States*, 530 U.S. 428, 443–44 (2000).

156 *Rush v. State*, 939 A.2d 689, 703 (Md.2008).

157 *Connell*, 869 F.2d at 1351 ("Whether Connell was given adequate *Miranda* warnings is a question of law."); *United States v. Caldwell*, 954 F.2d 496, 501 (8th Cir.1992); *United States v. Campbell*, 2008 WL 202555, at *2 (S.D.Fl. Jan. 23, 2008); *Commonwealth v. Edwards*, 830 N.E.2d 158, 165 (Mass.2005).

158 *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

159 *New York v. Quarles*, 467 U.S. 649, 656 (1984).

160 *Ganwich v. Knapp*, 319 F.3d 1115, 1125 (9th Cir.2003).

161 *United States v. Patane*, 542 U.S. 630, 636 (2004).

162 *Miranda*, 384 U.S. at 476.

End of Document

2014 WL 7465795
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware,
IN AND FOR NEW CASTLE COUNTY.

State of Delaware, Plaintiff,
v.
Jermaine Wright, Defendant.

ID No. 91004136DI | December 16, 2014

Attorneys and Law Firms

Steven P. Wood (argued), Gregory E. Smith (argued), Esquire, Maria T. Knoll, Esquire, Esquire and John S. Taylor, Esquire, Department of Justice, Wilmington, Delaware—Attorneys for The State.

Eugene Maurer and Allison S. Mielke (argued), Wilmington, Delaware, and Herbert W. Mondros, Esquire, Margolis Edelstein, Wilmington, Delaware—Attorneys for Defendant.

OPINION ON MOTION FOR RECUSAL

JOHN A. PARKINS, JR., JUDGE

***1** The State has filed a motion asking me to recuse myself[1] which Defendant Wright opposes. The State's motion primarily rests on two arguments. First, it points to my[2] statements (made in the context of judicial proceedings) that I had little or no confidence in the verdict in this case. Its argument overlooks entirely two fundamental principles enunciated by the Delaware Supreme Court concerning judicial recusal. Further the State overlooks that the Delaware Supreme Court has agreed with my conclusions which, according to the State, require my recusal. Second, the State contends that I should recuse myself because several years ago I had a professional relationship and friendship with a Wilmington police detective (not involved in the investigation of the instant crime) who will likely testify at Defendant's second trial. I made a full and prompt disclosure of that relationship and both sides expressly consented to my presiding over this case. Years later, after I granted Wright relief, the State has had second thoughts. Even though no new facts have arisen since its waiver, it has reversed course and now asks me to now recuse myself. Its request is barred by its waiver. But, even putting the State's waiver aside, its argument is without merit for reasons the State has apparently overlooked. In this regard I note that the State has been unable to cite a single case in which a judge has recused himself under circumstances similar to those presented here.

Background

***2** In 2012 I wrote that "[i]t would be an understatement to say that this case has a long and convoluted history."[3] The case has become even more procedurally complex in the comparatively short time since then, and it is necessary to have an understanding of some of this recent history in order to understand the State's contentions. I will therefore briefly summarize the pertinent procedural events, beginning with my 2012 opinion.

- In January 2012 I issued an opinion in which I granted Wright relief under Superior Court Rule 61. (That opinion will be referred to as *Wright–2012*.)[4] In that opinion I denied most of Wright's claims for relief. However, I granted Wright a new trial because but I found that his confession was obtained in violation of *Miranda v. Arizona*[5] and because exculpatory evidence had been withheld from him in violation of *Brady v. Maryland*.[6]

- After issuing *Wright–2012*, I concluded that Wright was entitled to a new proof positive hearing. I conducted that hearing and I found that the State had not shown the required "proof positive and presumption great." Consequently I set bail for Wright at $200,000 cash. Wright was unable to make bail.

- The State appealed my *Wright–2012* decision as well as my decision that Wright was entitled to a new proof positive hearing and bail. During that appeal the Supreme Court twice remanded the matter to me for additional findings, none of which are germane to the issue now before me.

- The Supreme Court reversed *Wright–2012* as well as my finding that Wright was entitled to a new proof positive hearing and bail. (This Supreme Court opinion will be referred to as *Wright–2013*.)[7] The Supreme

Ex. C

Court reinstated Wright's conviction and remanded to me for resentencing.

- Upon remand, I re-sentenced Wright to death, whereupon Wright appealed. In his appeal Wright challenged the rulings I made denying his other claims.

- The Supreme Court again reversed and this time vacated Wright's conviction and death sentence. It found that Wright was entitled to a new trial because, when additional withheld evidence was considered, Wright made out a *Brady* claim. (This Supreme Court opinion will be referred to as *Wright–2014.*) [8]

- The case has been remanded to me for the new trial, and the State has filed this motion asking me to recuse myself. This is my opinion.

Analysis

I. *The standard to be applied.*

Ground zero of any recusal analysis [9] is Rule 2.11 [10] of the Delaware Judges' Code of Judicial Conduct. This section specifies, in non-exclusive terms, circumstances requiring a judge to recuse himself. [11] The State agrees that none of those specific circumstances apply here. [12] Instead it argues that a general catchall provision in Rule 2.11—a "judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where ... [the] judge has a personal bias or prejudice concerning a party"—requires my recusal.

*3 Application of this catchall standard requires a two part-analysis: First, I must make a subjective determination whether I am biased; and second, if not, I must make an objective determination whether there is an appearance of bias which might reasonably raise questions about my impartiality. The proverbial seminal case here is the Delaware Supreme Court's opinion in *Los v. Los.* [13] In that case, a Family Court judge denied a husband's request for recusal, which the husband appealed to the Supreme Court. [14] On appeal the Supreme Court set out the procedure for trial judge's to follow when faced with a motion for recusal:

> When faced with a claim of personal bias or prejudice under [Rule 2.11] the judge is required to engage in a two-part analysis. First, he must, as a matter of subjective belief, be satisfied that he can proceed to hear the cause free of bias or prejudice concerning that party. Second, even if the judge believes that he has no bias, situations may arise where, actual bias aside, there is the appearance of bias sufficient to cause doubt as to the judge's impartiality. [15]

Since that opinion, the courts of this state have consistently applied what has become known as the *Los* test. I will first discuss the subjective test required by *Los,* and then I will present the objective analysis *Los* requires.

A. The subjective test.

The first part of the *Los* test—whether I am satisfied I can hear the case free from bias—is subjective. [16] "First the judge must be satisfied as a subjective matter that the judge can proceed to hear the case without bias." [17] Because of its subjective nature, I need not cite any evidence in support of my conclusion, and "[o]n appeal of the judge's recusal decision, the reviewing court must be satisfied that the trial judge engaged in the subjective test and will review the merits of the objective test." [18]

In general, a trial judge satisfies the first prong of the *Los* test if he makes that determination on the record, [19] and I do so now. I am convinced that I am, have been and will continue to be impartial in these proceedings. I have therefore concluded that the subjective test in *Los* does not require me to recuse myself. The terse nature of this conclusion should not be taken as an indication that I have given this aspect of the *Los* test short shrift. As any judge would do under these circumstances, I have devoted considerable introspection to the issue. My reflection confirms my belief that at no time during this litigation have I been biased against the State. Indeed (although I need not cite any supporting evidence) I note the salient fact that I decided most of Wright's claims against him, which is hardly consistent with the State's notion that I am biased against it. [20]

B. The objective test.

1. *The standard for the objective test.*

*4 The objective test requires me to determine whether an informed objective observer, after considering all the facts and circumstances of the case, would conclude that a fair and impartial hearing was unlikely. In *Fritzinger v. State* the Delaware Supreme Court stated the rule this way:

> [W]e must assess whether an objective observer would view all the circumstances and conclude that a fair or impartial hearing was unlikely. That requires us to assess the circumstances objectively to determine whether there is an appearance of bias sufficient to cause doubt about judicial impartiality. [21]

The hypothetical "objective observer" is one who is fully informed about the facts and circumstances of the case. [22] The Second Circuit Court of Appeals described the objective observer as "reasonable person [who] *knows and understands all the relevant facts.*" [23] This view follows the approach taken by Judge Richard Posner of the Seventh Circuit, who described the test as:

> The test for an appearance of partiality is ... whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case. [24]

Similarly, in a memorandum opinion declining to recuse himself Chief Justice Rehnquist wrote "[t]his inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." [25] Four years after the Chief Justice's opinion, Justice Scalia labeled this principle "well established." [26]

The State urges that, when applying the informed observer standard, I should not dissect the appearance issues like a judge, but I should instead consider them as would a man on the street. To the extent that the State is asking me to turn a blind eye to the contents of the record and the legal principles giving rise to my earlier rulings, I cannot do so.

> Like all legal issues, judges determine appearance of impropriety-not by considering what a straw poll of the only partly informed man-in-the-street would show-but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge. [27]

2. *The State's substantive contentions.*

*5 The State advances two arguments why an objective observer would conclude that I am biased. It primarily relies upon my statements in my opinion and from the bench that I lack confidence in the verdict. [28] Secondly, it relies upon my professional relationship and friendship with Captain William Browne of the Wilmington Police Department. Also sprinkled throughout its motion are perfunctory legal contentions which are not expressly tied to either of the State's major themes. I will address some of these in connection with the State's primary arguments insofar as I can tell they are related to either of those themes.

Before considering principle contentions expressed in the State's motion, however, I will address an implied argument which permeates its motion: I was so anxious to grant Wright relief that I ostensibly invented a theory for him and granted him relief on the basis of an argument he did not make.

a. *I did not invent an argument for Wright.*

As noted previously, I found that Wright's confession was taken in violation of *Miranda*. In particular, I found that the interrogating officer's advisement that Wright would be entitled to appointed counsel only "if you are diligent and the State feels you need one," not only failed to adequately convey the *Miranda* warnings to Wright, but also was actually misleading. The Delaware Supreme Court never reached the merits of this in *Wright–2013* because it concluded that this contention was procedurally barred by Superior Court Criminal Rule 61. The State refers to this holding at several

junctures in its motion,[29] perhaps to suggest that my ruling warrants recusal. In particular, it quotes a portion of the following passage by the Supreme Court in *Wright–2013* which taken in its entirety might suggest that I invented this argument on Wright's behalf:

> The Superior Court decided to address the adequacy of Wright's *Miranda* warnings *sua sponte.* It listened to the same videotaped confession that was the subject of a motion to suppress before trial; a claim of error on direct appeal; the second Rule 61 motion; and the appeal of that motion. Each challenge was rejected after addressing Wright's understanding of his *Miranda* rights. In deciding Wright's fourth postconviction motion, the Superior Court did not have any new evidence upon which to conclude that Wright's *Miranda* warnings were defective. A defendant is not entitled to have a court re-examine an issue that has been previously resolved simply because the claim is refined or restated. Wright did not ask for that relief, but if he had, there would be no basis on which to find that he overcame the procedural bar of Rule 61(i)(4). Reconsideration is not warranted in the interest of justice.[30]

An observer might understand from the above passage that (1) "Wright did not ask for that relief" and (2) I "decided to address the adequacy of Wright's *Miranda* warnings *sua sponte*." This in turn might lead the observer to infer that I was so bent on granting Wright relief that I made up the theory for him and then sprang it as a surprise in my 2012 opinion.

The record, however, shows something entirely different. The Supreme Court was apparently incorrectly advised in *Wright–2013* about what the record has to say. Contrary to what the Court wrote, Wright did in fact expressly ask for relief based upon the *Miranda* warnings he was given. For example, in a portion of his 2009 amended petition—titled "The Admission of Mr. Wright's Alleged Confession Violated *Miranda*"—Wright wrote:

> *6 [T]he Miranda rights provided to Mr. Wright were facially defective. Rather than tell Mr. Wright that he had a constitutional right to the appointment of counsel if he could not afford one, Detective Mayfield conditioned the appointment of counsel on whether "[t]he State feels that you're diligent ... and further conditioned his right to counsel on whether or not the State believes he "needs one." Detective Mayfield's version of Miranda rights fundamentally altered the nature of Mr. Wright's constitutional right to counsel....[31]

When the Supreme Court wrote that I "decided to address the adequacy of Wright's *Miranda* warnings *sua sponte* " it was apparently laboring under a misapprehension about what is contained in this voluminous record. It had apparently not been told that the parties submitted multiple briefs and presented at least two oral arguments on this very issue. At the hearing on the instant recusal motion the State acknowledged that the *Miranda* issue had been fully briefed while the matter was pending before me:

> THE COURT: [T]here was briefing on the Miranda issue that I ruled upon, wasn't there?
>
> THE STATE: Yes, Your Honor, many rounds of briefing.
>
> THE COURT: On that particular issue.
>
> THE STATE: It was no exaggeration saying many rounds of briefing on specifically on the Miranda issue. I don't believe that's any exaggeration.[32]

I realize that by writing this I risk appearing to be obdurately clinging to the view that Wright's *Miranda* argument is not procedurally barred by Rule 61(i)(4). That is not my intent. Nor is my purpose here to quibble with the Supreme Court's conclusions. Rather, it is solely to show that, contrary to what an observer might infer from the passage in *Wright–2013*, I was not so determined to grant Wright relief that I invented a reason for him.[33]

b. *My comments that I lacked confidence in the verdict do not require my recusal.*

Having dispensed with the preliminary matter, I will turn to the State's two primary arguments. The first argument focuses on comments I made during the proceedings concerning the verdict in the guilt phase of Wright's trial. In *Wright–2012* and in comments from the bench I expressed a lack of confidence in it. The State contends in its principal argument[34] here that my assessments of the evidence show that "an objective observer would surely conclude that [my] fair and impartial consideration [of future issues] is unlikely."[35] The State overlooks, however, well-settled Delaware law, and also overlooks the fact that the Delaware Supreme Court expressly agreed with my conclusions.

i. The statements which allegedly show bios stem from my rulings on substantive issues which were upheld by the Supreme Court.

*7 The analysis must start, of course, with a consideration of my statements which the State claims manifest bias on my part. As already mentioned, those statements stem from my rulings that I lacked confidence in the verdict. They were made in response to substantive constitutional standards established by the United States Supreme Court and followed by the Delaware Supreme Court, and the Delaware Supreme Court expressly agreed with my lack of confidence in *Wright–2014*.[36]

a. The stotements which allegedly shaw bias.

Although the State refers in its motion to my "repetitive and public comments,"[37] it concedes that it relies exclusively[38] on the following three statements I made from the bench:

- "When you read the opinion you'll see that I have grave concerns over the sufficiency of the evidence that was [used] to convict Mr. Wright. In fact I have virtually no confidence in the evidence."[39]
- "As the Court pointed out in [*Wright–2012*] there is little if any, evidence to connect the defendant to the crime."[40]
- "Therefore I find that there is little, if any, evidence linking the defendant to this horrific crime, and therefore I am going to deny the State's application to hold the defendant without bail."[41]

The State argues that, "despite the Defendant's videotaped confession to the murder," these statements show that I believe that "the Defendant is, in effect, innocent."[42] An informed observer, however, would not reach that conclusion because that observer would be aware from *Wright–2012* that I took into account that confession:

- "Aside from that confession and the dubious testimony of Mr. Samuels about Mr. Wright's purported jailhouse confession, there is absolutely no evidence linking Wright to this horrific crime."[43]
- "[T]he only evidence against Wright is his confession, the statement of jail house informant Samuels, and the admission of Lorinzo Dixon during his plea colloquy that he participated in the crime"[44]

My assessment of the evidence was not fanciful. At one of the Rule 61 hearings in this case the State conceded that this assessment was accurate:

> THE COURT: Is there anything else that links Mr. Wright to this killing other than his confession and Samuel's statement? Is there any physical evidence that links him to there?
>
> * * *
>
> THE STATE: No, there's not some piece of clothing that I can point to Your Honor from the record.
>
> THE COURT: Is there any evidence at all other than the aforementioned confession and Samuels testimony?
>
> *8 THE STATE: If I may just have a moment, Your Honor.
>
> THE COURT: Do you want to confer?
>
> THE STATE: Yes, please.
>
> THE COURT: Sure, go ahead.
>
> (State counsel conferring.)
>
> THE STATE: I just wanted to make sure I was not forgetting something, Your Honor and, no, I'm not.[45]

As mentioned, the State also contends that in effect I expressed an opinion that Wright is innocent. An informed observer would know better: in *Wright–2012* I wrote that "[t]he court emphasizes that it is not saying that Wright did not murder Phillip Seifert."[46] Further, the State overlooks that even if I had formed a view whether Wright actually murdered Philip Seifert, that view would not be pertinent to the recusal calculus because it would have been based exclusively upon the record.[47] In an oft-quoted passage, renowned Judge Jerome Frank once wrote:

> Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those

> court-house dramas called trials, he could never render decisions.[48]

b. My rulings were made in respause to substantive law requiremeuts.

My holding that I had little or no confidence in the verdict was not gratuitous. Rather, I was required to address that issue by the substantive law underlying Wright's *Brady* claims. "The holding *in Brady v. Maryland* requires disclosure only of evidence that is both favorable to the accused and material either to guilt or to punishment."[49] Materiality for *Brady* purposes turns on whether the State's suppression of evidence undermines confidence in the verdict.

> One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put thc whole case in such a different light ***as to undermine confidence in the vcrdict.***[50]

Not surprisingly, the undermines-the-confidence-in-the-verdict standard is routinely applied in the Delaware courts. In *Atkinson v. State*[51] the Delaware Supreme Court explained the law this way:

> The United States Supreme Court expanded the definition of materiality in *Kyles v. Whitley*. In *Kyles*, the Court held that materiality does not require a showing that the suppressed evidence ultimately would have resulted in an acquittal. Rather, the *Kyles* Court required that the defendant, in light of the undisclosed evidence, receive a fair trial, understood as a trial resulting in a verdict worthy of confidence. Thus, ***in order ta shaw a reasanable prabability of a different result, o defendant ueed only shaw thot the suppressed evidence undermiues the confidence in the autcome of the trial.***[52]

My expression of concem about the verdict in Wright's trial, therefore, is not an expression of a personal bias, but merely an assessment of the evidence I was required to make by *Brady* and its progeny.

c. The Delaware Supreme Caurt reached the same conclusion about the lack of confidence in the verdict which I reached.

*9 In *Wright–2014*, the Delaware Supreme Court expressed the same concern I expressed about the verdict in this case. The Court wrote "[t]he postconviction evidence led the Superior Court to conclude that it had no confidence in the outcome of the trial. Neither do we."[53] Despite the obvious significance of the Supreme Court's conclusion, the State made no mention of it in its motion.

In short, an informed observer would understand that I was not on an intellectual lark when I expressed doubt about the trustworthincss of thc vcrdict and would also understand that the highest court of this state shared my concern. This alone is dispositive of the State's contention. Nonetheless, I will discuss two legal principles which are also dispositive.

c. Statements in judiciol rulings almost never canstitute grounds far recusol.

The State's motion overlooks entirely the well established principle that judicial pronouncements made during the course of litigation almost never constitute a ground for recusal. As the Delaware Supreme Court has observed:

> [T]his Court previously has held that the bias ... is not created merely because the trial judge has made adverse rulings during the course of a prior proceeding. In fact, a trial judge's rulings alone almost never constitute a valid *per se* basis for disqualification on the ground of bias.[54]

This principle has often been repeated been repeated in one form or another in the Delaware courts.[55] It is also widely accepted elsewhere, and is seen as a prophylaxis against judge shopping:

> The traditional judicial view is that if a judge can be disqualified for bias following a comment or ruling during court proceedings there is no limit to disqualification motions and there would be a return to "judge shopping."[56]

The United States Supreme Court has also reached the conclusion that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion."[57] It is undisputed that all of my allegedly offending statements arose either as a judicial ruling or a reference to one of my judicial rulings. Consequently, they cannot be grounds for my recusal.

d. ***Statements nat based on an extrajudicial source da not require recusal.***

A second well-established principle which is dispositive here, and which the State also overlooked, is the extrajudicial source rule. In *Los,* the Delaware Supreme Court wrote that "[t]o be disqualified the alleged bias or prejudice of the judge '*must* stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.' "[58] The existence of an extrajudicial source has generally been thought by Delaware courts to be a *sine qua nan* to a request for recusal.[59] The operation of the extrajudicial source rule was described by this court in 2011:

> ***10** With respect to the objective inquiry, to be disqualified on this ground the alleged bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." The exclusive source of this judge's knowledge of Defendant is the criminal trial and the attendant pretrial and post-trial proceedings; this judge's knowledge of Defendant has arisen solely in the judicial context. Consequently, this Court's opinions on all of Defendant's motions, including the instant motions, are based solely on the record of this case and the applicable law; at no time have any extrajudicial sources influenced any decision on the merits of Defendant's arguments.[60]

While the existence of the extrajudicial source rule remains unquestioned in Delaware, its exact scope may be in a state of flux. When our Supreme Court first postulated the rule in *Los* it cited to the United States Supreme Court's decision in *United States v. Grinell*[61] for the proposition that a party seeking recusal because of a judge's opinions *must* show an extrajudicial source for those opinions.[62] But after the Delaware Supreme Court's opinion in *Los,* the United States Supreme Court revisited its holding in *Grinell.* In *Liteky v. United States,* the Court recast the extrajudicial source *rule* as the extrajudicial source *factor.*[63] According to the *Liteky* Court, in rare cases it would be possible for a party to make out a claim for recusal even in the absence of an extrajudicial source.[64] The Court held that judicial rulings (even if they are incorrect) are not grounds for recusal absent "knowledge acquired outside [judicial] proceedings," *ar* a "deep-seated and unequivocal antagonism that would render fair judgment impossible."[65]

Liteky did not involve an interpretation of the Federal Constitution and therefore is not binding on state courts.[66] Although the Delaware courts appear not to have followed *Liteky*, the issue whether the so-called extrajudicial source rule is a *rule* or a *factor* is not free from doubt. With a single exception, the Delaware cases (including those from the Supreme Court) after *Liteky* suggest that Delaware still adheres to the extrajudicial source *rule*. The one exception, however, raises some question. In *Gattis v. State* the Delaware Supreme Court took note of the shift in *Liteky*:

> ***11** In *Liteky,* the majority opinion held that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, *do not constitute a basis for a bias ar partiality motion unless they "display a deep-seated favoritism or antaganism that would make* fair judgment impossible." The concurring Justices in Liteky argued that this standard effectively asks the reviewing court to determine "whether fair judgment is impossible" and could be construed to require "some direct inquiry to the judge's actual, rather than apparent, state of mind...." Justice Kennedy advocated a more straightforward standard, to focus on "the appearance of partiality, not its place of origin." "Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified."[67]

This language could be understood as an endorsement of *Liteky's* extrajudicial *factar* analysis. But other language in *Gattis* suggests the opposite is true. The *Gattis* court reiterated that "[u]nder the objective portion of the test, for the judge to be disqualified, the alleged bias or prejudice of the judge *must* stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge leamed from his participation in the case."[68] Since *Gattis*, the Delaware Supreme Court[69] and the lower courts[70] have on multiple occasions opined, without exception, that the absence of an extrajudicial source precludes the finding that recusal is required.

Whether Delaware still adheres to the extrajudicial source *rule* (as opposed to *factar*) is largely an academic question here because, under either standard, the State has failed to make a showing that my recusal is necessary. The State concedes, as it must, that my opinions were not based on any extrajudicial source.[71] If indeed Delaware adheres to the extrajudicial *rule* theory, the State's concession is the end of the story. On the other hand, if our Supreme Court would now subscribe to the extrajudicial *factar* theory, for all intents and purposes, the State's concession is still the end of the story. Thc State has not shown a "deep-seated favoritism or antagonism [on my part] that would make fair judgment impossible." First, as discussed above, the notion that I have manifested a "deep-seated favoritism or antagonism" overlooks that I was required by the applicable law to assess the strength of the State's case, and therefore my assessment was not gratuitous. Second, it ignores the fact that the Supreme Court expressly agreed with my lack of confidence in the verdict. Third, it forgets that I ruled in its favor on most of Wright's claims. Taken either singly or together, these facts dispel any notion that I have harbored deep-seated bias or antagonism against the State.

*12 In sum, this case is no different from the one before the Delaware Supreme Court in *Henry v. State* in which it held:

> Henry's fourth claim is that the Superior Court judge who presided over the [Violation of Probation] hearing should have recused himself, presumably because his familiarity with Henry would result in judicial bias. Generally, a claim of bias on the part of a judge must stem from an extrajudicial source. Because there is no evidence, indeed no claim, of any extrajudicial source of judicial bias, we conclude that Henry's fourth claim, too, is without merit.[72]

***i. The State's belated argument misreads* Liteky.**

At oral argument the State argued, for the first time, that the context in which I made the allegedly offending statements somehow transformed them from appropriate judicial comment into something requiring recusal. It did not, however, explain the logic of this assertion and asserted no authority in support of it other than an erroneous interpretation of the United States Supreme Court's opinion in *Liteky v. United States*.[73] At oral argument the State articulated for the first timc the following argument:

> And what *Liteky* said essentially was that ... judicial rulings do not include, and I'm quoting from the *Litkey* opinion —this is the Supreme Court Reporter version in 1157 —"in and of themselves, i.e., apart from surrounding comments or accompanying opinion, closed parenthetical, they, and the they refers to judicial rulings, cannot possibly show reliance on extrajudicial source and only can in the rarest of circumstances evidence the degree of favoritism and antagonism required as discussed below when no extrajudicial source is involved."[74]
>
> * * *
>
> The reason that matters is that what *Liteky* says is those kinds of comments, the ones surrounding rulings, are not subject to what I'll characterize as a great presumption of propriety.[75]
>
> * * *
>
> But what *Liteky* says is that comments surrounding rulings are different than the rulings themselves. And that is the distinction that we think is of moment here.[76]
>
> * * *
>
> Your Honor ... what I think *Liteky* is talking about are comments that are not necessary to the ruling.[77]

The argument that judicial statements which are proper in one context of a judicial proceeding may give rise to recusal

if made in another context of the judicial proceeding has never received any support in the case law. As one United States Court of Appeals put it, "there was no authority for the proposition that the time and manner of the judge's ruling creates a reasonable doubt about impartiality, absent any other indicia of bias or partiality." [78]

The State's reliance upon *Liteky* is misplaced; that case had nothing to do with whether the context of a judicial statement determined whether recusal was required. Instead, according to the *Liteky* Court, the issue before it was "whether required recusal ... is subject to the limitation that has come to be known as the 'extrajudicial source' doctrine." [79] The language in *Liteky* to which the State alluded at oral argument is wholly unrelated to the proposition for which the State cites it. Rather, the *Liteky* Court simply pointing out that judicial rulings, in and of themselves, seldom disclose the existence of an extrajudicial source. The Supreme Court wrote:

> *13 First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source. [80]

I reject the argument, therefore, that my otherwise appropriate comments about my lack of confidence in the verdict somehow require my recusal merely because, in the State's view, they were made in the wrong phase of the proceedings.

c. *My decisions concerning Wright's bail do not show a deep-seated bias on my part.*

In a random argument the State points to the amount of bail I set once I determined (erroneously) that Wright was entitled to bail. According to the State, the bail I set ($200,000 cash only) was lower than that in three other murder cases over which I presided. [81] The relevance of this is not explained in the State's papers, so I am left to assume the State believes this shows some "deep-seated favoritism or antagonism" on my part. If that is the intent of the State's reference to the bail I set for Wright, the contention is contradicted by the record. The State does not mention in its papers that the bail I set was the maximum recommended for Class A felonies in the bail guidelines for Justices of the Peace Courts. The State also forgets that I denied Wright's request to post property in lieu of cash, and overlooks the fact that after setting Wright's bail I stayed his release so that the State would have an opportunity to appeal my ruling. An informed observer, who was aware of these unmentioned facts, would not infer from the amount of bail I set that I was biased either against the State or in favor of Wright.

f. *My past professional relationship and friendship with a witness who has no stake in the outcome of the case does not require my recusal.*

The State's other argument is that my relationship with Captain William Browne of the Wilmington Police Department requires me to recuse myself from Wright's trial. It makes this argument despite the fact that it previously expressly waived its right to seek my recusal on the basis of this. Their waiver alone bars the State's argument. But there are other reasons why that relationship does not require my recusal. First, Captain Browne has no stake whatsoever in the outcome of Wright's second trial and thus an informed reasonable observer would not believe his presence as a witness would affect my rulings in this case. Second, the jury—not me—will be called upon to make any necessary judgments about Captain Browne's credibility.

i. *Background matters relating to Captain Browne.*

a. *My relationship with Captain Browne.*

I first met Captain Browne when, while in private practice, I represented some Wilmington police officers who were sued in a 2004 federal civil rights action styled *Estate of Harry Smith v. City of Wilmington*. This civil case arose out of a police-involved shooting. As it does in all such matters, the Wilmington Police Department investigated the matter; (then Lieutenant) Browne was in charge of that investigation. As would be expected, I had frequent contact with him during my preparation for trial in the *Smith* case. [82] During the pendency of the *Smith* matter, Captain Browne was himself named as a defendant in a different civil rights action. [83] I represented him (and others) in that matter until I was appointed to the bench in 2008.

*14 Although I would characterize Captain Browne as a friend at that time, most of our interaction was professional.

On a few occasions I visited Captain Browne at his home to discuss either the *Smith* matter or his own case. I recall a single social interaction with him—in September 2007—when we attended a Phillies game together. The isolation of the bench quickly took its toll on my friendship with him. In the months after I assumed my current office I briefly spoke with Captain Browne perhaps two or three times; those contacts soon ceased entirely. The last time I remember speaking with him was at a chance meeting at a funeral in October 2011, when we briefly conversed, in the presence of others. As I recall, the topic of that short conversation was the ill fortune of the Phillies who were then involved in a playoff series with the St. Louis Cardinals.

b. The role of Captain Browne's testimony in the instant case.

Captain Browne did not participate in the HiWay Inn investigation.[84] Rather his testimony in the present matter relates to an attempted robbery of Brandywine Valley Liquor Store ("BVLS") which may provide evidence which exculpates Wright. The Delaware Supreme Court described the BVLS evidence and its exculpatory nature:

> The nearby BVLS attempted robbery occurred close in time to the Hi–Way Inn robbery. The two crimes occurred within forty minutes of each other and took place less than two miles apart. The descriptions of the suspects in the BVLS robbery were similar to the descriptions of the two men seen leaving the Hi–Way Inn. Both crimes involved the use of a firearm. The BVLS crime was an attempted robbery using a handgun, and the Hi–Way Inn murder involved the use of a .22 caliber weapon.
>
> As the Superior Court noted, a plausible argument can be made that the unsuccessful perpetrators of the BVLS attempted robbery were the same individuals involved in the Hi–Way Inn robbery shortly thereafter. The court explained:
>
> > It should be recalled that Debra Milner (the barmaid at the HiWay Inn) told police that prior to the crime a black man wearing a red plaid flannel shirt came into the tavern and apparently surveyed the scene. (After viewing photos Ms. Milner denied that either Wright or Dixon resembled that man.) No red shirt was ever found at Wright's or Dixon's home. But according to a report prepared by the Wilmington Police Department, Mr. Baxter described one of the Brandywine Village perpetrators as wearing a "red coat", suggesting of course that it was one of the Brandywine Village perpetrators, not Wright or Dixon, who cased the HiWay Inn.
>
> Police ruled Wright and Dixon out as possible suspects based on Baxter's witness identification. Such evidence, if presented at trial, would have been exculpatory.[85]

There is no indication that his testimony will be disputed. Neither side disputed his testimony at the Rule 61 hearing, and the State has not pointed to any new facts in its motion to suggest that his testimony will change at trial.

ii. The State expressly waived any claim I should recuse myself.

There are several reasons why Captain Browne's participation as a witness does not cause me to recuse myself. The one of immediate note is that the State has already waived its right to seek my recusal because of his participation

a. My disclosure of my relationship with Captain Browne and the State's waiver of any conflict.

***15** When I joined the court I inherited this case from my predecessor, who was the trial judge and presided over several pre- and posttrial hearings. By the time this case came to me the file was already quite voluminous. When I first assumed responsibility for it there was no indication Captain Browne would play any role in these proceedings. It was not until months later that I became aware of his possible role as a witness. By then I had invested considerable time familiarizing myself with the file. Upon learning of the possibility that Captain Browne might be a witness in the Rule 61 proceedings, I immediately disclosed my relationship and told counsel I did not think I could fairly rule upon his credibility if called upon to do so. I initiated a discussion with counsel about whether my recusal was necessary. Defendant's counsel asked me not to recuse myself, but the State initially felt I should do so. I demurred at the time, telling counsel it appeared that Captain Browne's testimony would be undisputed, thus making any judgment about his credibility unnecessary. I also told counsel I was concerned that I had already devoted considerable time to familiarizing myself with the record and it would be a substantial burden on the court for a replacement judge to do that over again.

The State changed its mind a few days later and waived recusal. During an on-the-record teleconference, counsel for the State told the court:

> I think we just have, I guess, maybe a list of things to clean up. Just one short one on the William Browne issue. Your Honor, the State thinks that we might be able to resolve that issue entirely if counsel for Mr. Wright will waive any claim that you should not be able to decide the case based on that testimony and also having Jermaine Wright himself acknowledge that. Then the issue would go away. [86]

A few days after that conference Wright (and his counsel) appeared in open court, at which time I conducted a colloquy with Wright. During that colloquy I repeated the facts concerning my friendship and professional relationship with Captain Browne. [87] Wright, who had previously privately consulted with his counsel about this, personally affirmed that he agreed to waive my recusal. At no time since then—until the filing of the present motion—has the State ever expressed any concern over my presiding in this case.

The State does not contend that its waiver is invalid, nor has it ever asserted the waiver was limited in scope. Although the rules for waiver of recusal are "quite exacting," they have been satisfied here. The Delaware Supreme Court summarized those rules:

> It is well settled in Delaware that a party may waive her rights. But, the standards for proving waiver under Delaware law are quite exacting. Waiver is the voluntary and intentional relinquishment of a known right. It implies knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those rights. We also have explained that the facts relied upon to prove waiver must be unequivocal. Applying those principles, we have required a party claiming waiver to show three elements: (1) that there is a requirement or condition to be waived, (2) that the waiving party must know of the requirement or condition, and (3) that the waiving party must intend to waive that requirement or condition. [88]

All of these requirements are satisfied here. It is undisputed that the State knew that it had a right to seek my recusal, knew of the facts giving rise to that right and intended to waive that right.

Notably, the State does not contend there are any procedural irregularities in its waiver of recusal. The Delaware Judges' Code of Judicial Conduct provides that the parties may waive recusal, provided certain requirements are met:

> ***16** A judge disqualified by the terms of Rule 2.11 ... may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's disqualification. If the parties and their lawyers, after such disclosure and an opportunity to confer outside of the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding. [89]

The State agrees that (a) I disclosed on the record the basis of disqualification; (b) its counsel had an opportunity several days, in fact to confer outside of [my presence]; and (c) all agreed on the record that I should not be disqualified. I conclude, therefore, that the State's waiver was valid.

b. The State is bound by its waiver.

Having made a valid waiver, the State is now bound by it. Courts have traditionally held that a waiver of a judge's potential recusal is binding. Just this year the United States Court of Appeals for the District of Columbia Circuit observed that the withdrawal of a request for recusal constitutes a waiver of that request and is therefore binding:

> In the current appeal, Brice notes in passing a comment about Brice and one of the witnesses that the

> District Court made at the February 15, 2006, pre-trial hearing. Brice's counsel was present at that hearing. At the conclusion of the relevant pre-trial hearings, after initially objecting to the judge's comment and seeking recusal, Brice then expressly withdrew and thereby waived any recusal claim based on that comment. [90]

Other courts have reached the same conclusion about the binding nature of such waivers. [91]

There is a sound policy reason why a waiver of recusal, once made, cannot generally be withdrawn. Judicial resources are scarce, and after a party waives a right to seek recusal the presiding judge will ordinarily devote some those scarce resources to resolution of the matters raised in that case. As discussed later in this opinion, a withdrawal of that waiver would result in the irretrievable loss of the judicial resources expended on that case. Accordingly, courts cannot, and do not, allow withdrawal of a waiver of recusal except in the most extraordinary of circumstances.

c. *The State has not shown good grounds for withdrawing its waiver.*

The State has fallen far short of showing any extraordinary circumstances which would justify allowing it to withdraw its waiver. It concedes that no new facts have come to light which prompt its motion. Rather, it asserts that it did not appreciate the consequences of its waiver at the time it made it.

According to the State, "[t]he importance of Captain Browne as a trial witness is now obvious, albeit only in hindsight." I need not, however, make a metaphysical determination whether that testimony is more important (a) when Wright is trying to establish he is entitled to a new trial, or (b) when Wright's new trial takes place. Absent a showing of the development of new facts, the State's failure to appreciate the possible consequences of its waiver is of no relevance here.

***17** The State concedes that no new facts have come to light about Captain Browne's role in this matter. In its motion the State sought to explain why it now believes Captain Browne's role is somehow more significant than it was when it waived the conflict:

> The importance of Capt. Browne as a trial witness is now obvious, albeit only in hindsight. *[1]* He is, in effect, the sole witness to most of the important facts relevant to the identity of the perpetrators of the BVLS robbery. *[2]* This Court has held that evidence as to the identity of BVLS robbery perpetrators is exculpatory. *[3]* Obviously, if a jury were to conclude that either the Defendant of his indicted codefendant were [sic.] the perpetrators of the BVLS robbery, the evidence would be inculpatory. [92]

But all of these matters were either known or readily apparent at the time it waived its right to seek my recusal. The following refers to the correspondingly numbered sentences in the afore-quoted passage from the State's motion:

1. The State concedes it was aware at the time of its waiver that Captain Browne "was the sole witness to most of the important facts relevant to ... BVLS robbery." [93]

2. Although the State did not know, of course, at the time of its waiver that I would eventually hold "that evidence as to the identity of the BVLS robbery perpetrators is exculpatory," the State concedes my holding is "certainly similar" to the claim then being made by Wright at the time. [94]

3. With respect to the assertion that "[o]bviously, if a jury were to conclude that either the Defendant of his indicted codefendant were the perpetrators of the BVLS robbery, the evidence would be inculpatory," the State's concession that it is "obvious" dispels any thought that this was unknown to the State at the time of its waiver. More to the point perhaps, the State conceded at oral argument that it was aware of this when it waived recusal. [95]

When asked at oral argument whether there were any new facts which had come to light about Captain Browne's role, the State responded "[f]actually, Your Honor, there's not a change in the facts," [96] and later, "the facts have not changed." [97] This precludes it from withdrawing its waiver.

The reason the State now offers is that it improvidently waived the right to seek recusal. At oral argument it contended that it did not become aware of the consequence of its waiver until the Supreme Court "refined" Wright's *Brady* claim in *Wright–2014*:

> There's no question that we said what we said. It's in the record. And our response to the Court's questions is simply we think that circumstances have changed significantly because of the court's 2014 opinion and its refined description of the role of what I'll call the first robbery is in a determination of the defendant's guilt for the HiWay Inn robbery.[98]

Nowhere in these proceedings has the State explained how it is that the Supreme Court's *Wright–2014* opinion "refined" Wright's theory.

The idea that the significance of Captain Browne's testimony somehow did not become apparent to the State until *Wright–2014* is unsupportable. The State has not even attempted to point to anything in the record which misled it about the role of his testimony in this case. As the State conceded at oral argument, the way it understands the role of that testimony in light of the Supreme Court's "refine[ment]"[99] in *Wright–2014* is "certainly similar"[100] to the way it understood the testimony's role when it waived its right to seek recusal.

iii. Even putting oside the State's waiver, my relationship with Coptain Browne does not require me to recuse myself.

***18** Captain Browne has no stake in the outcome of Wright's second trial and therefore, no informed reasonable observer would conclude that his presence as a witness would affect my rulings in this case. The authorities appear unanimous that a judge's friendship with a witness who has no stake in the litigation does not require the judge to recuse himself. One respected treatise noted:

> While a judge's impartiality may sometimes be called into question on the basis of her friendships with parties or attorneys, the fact that a judge is friends with others who may play a role in a proceeding before her does not necessarily raise the same type of concerns. For example, the fact that a judge is friend with a witness does not ordinarily warrant an inference that the judge would be predisposed to credit that witness' testimony. Consequently, when a disqualification motion alleges no more than friendship between a judge and a witness, the court will usually deny the motion.[101]

Even a judge's friendship with a nominal litigant or a lawyer —the latter of which is certainly more problematic than friendship with a witness—does not by itself require the judge to recuse himself. "Many courts therefore have held that a judge need not disqualify himself just because a friend—even a close friend—appears as a lawyer,"[102] let alone a mere witness. The Tenth Circuit's opinion in *David v. City and County of Denver*[103] illustrates the point. In that case, the judge was presiding in a civil rights case against a police chief and a number of police officers.[104] The judge had previously represented the chief some twenty years before and the judge also knew several of the law enforcement witnesses in the case before him.[105] Further, the judge had recently spoken to some of them, including the police chief, in connection with an investigation of the murder of the judge's son.[106] The judge declined to recuse himself.[107] In affirming his decision, the Court of Appeals wrote:

> Although the test in this circuit is one of reasonableness, it is reasonableness tempered with a knowledge of the relevant facts. It is hardly possible for a judge with criminal jurisdiction to have no knowledge of some personnel in law enforcement. We must examine the judge's discretionary decision not to recuse both in light of the judge's duty to decide cases fairly and his duty to avoid impropriety, determined from an informed, reasonable viewpoint. There is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is. Our review of these matters leads us to conclude that the trial judge did not abuse his

> discretion in denying [the motion for disqualification]. [108]

If the judge under these circumstances did not abuse his discretion in refusing to recuse himself where the acquaintance/former client was a *party*, it goes without saying that my relationship with Captain Browne—who is merely a *witness* with no stake in the outcome of this case—does not require me to recuse myself. As the Sixth Circuit put it, "it would not be an abuse of discretion to decline to recuse when friends are merely witnesses instead of the target of the lawsuit." [109] Jurists at the opposite end of the judicial hierarchy from me have not recused themselves because of friendship with a participant. Justice Scalia once wrote when declining to recuse himself:

> ***19** [W]hile friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue. [110]

The State has not cited any authority holding that a judge should recuse himself simply because he is friend of a witness who has no stake in the outcome of the litigation. It attempts to fill that void by substituting unsupported anecdotal statements from the two Deputy Attorneys General who authored the State's motion. Its motion recites that the "experience of the undersigned prosecutors" is that it is the common practice of Delaware trial judges to recuse themselves when it is likely the judge has had "more than an incidental professional or personal relationship" with an important witness. Courts do not accept the unsupported opinions of lawyers as legal authority, and this case is a good illustration of why. At oral argument one of the "undersigned prosecutors" admitted he had tried only four cases to verdict in this court and, contrary to what he stated in the motion, he was unaware of a single instance in which a judge recused because of a friendship with a witness. The other "undersigned prosecutor" had considerably more experience, but he could not name any judge who had recused himself because of friendship with a witness, neither could he recall anything about when this last occurred or even how often it had occurred. [111]

In its motion the State argued, again without supporting legal authority, that I should recuse myself because I might be required to rule on evidentiary objections during Captain Browne's testimony. [112] According to the State, "depending on how it goes" one side or the other may be required to "impeach his ability to accurately recount the events of his 1991 investigation." [113] It continues that because of this I might be called upon "to make rulings that directly involve a former client." [114] It is difficult to understand why Captain Browne's testimony would be impeached, given that neither side disputed that testimony during the Rule 61 proceedings. An informed reasonable observer would realize that a witness who has no stake in litigation would care not one whit about evidentiary rulings made during his testimony and therefore would realize that his participation would not influence my evidentiary rulings. Finally, I note that the Delaware Supreme Court has already dispensed with the State's argument. In *Jackson v. State*, it opined:

> It is part of a trial judge's normal role to rule upon the admissibility of contested evidence. In the event a judge declares certain evidence to be inadmissable, the judge is expected to exclude that evidence as a factor in any further decision making process. To require a judge to disqualify himself or herself from further participation in a case where the judge acts as a gatekeeper for the admissibility of evidence would impose an unreasonable and totally impracticable standard. A conscientious application of the subjective test by a judge faced with a recusal motion based on exposure to inadmissible evidence in the same proceeding will, in most cases, provide sufficient protection from bias. [115]

***20** Another reason why my recusal is not called for here is that I will not be called upon to make any judgments about Captain Browne's credibility. [116] The State conjured the possibility that, even though I will not be the trier of fact at Wright's second trial, I might still be called upon to pass judgment on Captain Browne's credibility. Its theory goes this way:

- If Wright is again convicted of first degree murder, and
- If the State can develop evidence that Wright was in fact the perpetrator of the BVLS attempted robbery, and

98 *Id.* at 55
99 *Id.*
100 *Id.* at 58.
101 Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 8.2 (2d ed. 2007). Flamm's treatise has been relied upon at least twice by the Delaware Supreme Court. *See Del. Transit Corp. v. Amalgamated Transit Union Local 842*, 34 A.3d 1064, 1071 (Del.2011); *Capano v. State*, 781 A.2d 556, 640 (Del.2001).
102 *United States v. Murphy*, 768 F.2d 1518, 36 (7th Cir.1985).
103 101 F.3d 1344 (10th Cir.1996).
104 *Id.* at 1348–50.
105 *Id.* at 1350.
106 *Id.*
107 *Id.*
108 *Id.* at 1351 (internal emphasis, citation, and questions omitted).
109 *Lawrence v. Bloomfield Twp.*, 313 F. A'ppx. 743, 79 (6th Cir.2008).
110 *Cheney*, 541 U.S. at 916 (emphasis in original).
111 Tr. at 23–25.
112 The State seems to have abandoned this contention during oral argument, but I have addressed it out of caution.
113 State's Mot. for Recusal, ¶ 16.
114 *Id.* ¶ 17
115 684 A.2d 745, 753 (Del.1994).
116 It should be recalled here that his testimony was undisputed at the Rule 61 hearing and the State has yet to proffer a reason why it will be disputed at trial. Even in the unlikely event his credibility becomes an issue at trial it will be the jury, not me, which will make that judgment
117 At oral argument the State indicated it is having trouble re-locating witnesses who testified in this case. There is little reason to believe it will be able to find previously unknown witnesses relating to the BVLS crime.
118 James Wm. Moore et al., Moore's Federal Practice § 63.60 [1][b], at 62–63 (3d ed. 1999).
119 *Busch v. City of New York*, 2005 WL 2219309, at *7 (E.D.N.Y.2005) (emphasis added) (alterations omitted).
120 *In re Filbert*, 578 F. A'ppx., 79, 81 (3d Cir.2014) (internal quotations omitted).
121 998 F.2d 1344, 1349–50 (6th Cir.1993).
122 *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 976 F.Supp. 84, 87 (D.Mass.1997) (quoting *El Fenix de Puerto Rico v. The M/Y JOHANNY*, 36 F.3d 136, 141 n.6 (1st Cir.1994)).
123 *Cheney*, 541 U.S. at 929.
124 *Reeder*, 2006 WL 510067, at *23.
125 *Desmond*, 2011 WL 91984, at *8–9.
126 *Id.* at *9.
127 *Los*, 595 A.2d at 385.
128 The Declaration of Independence para. 10 (U.S. 1776).
129 Del. Judges' Code of Judicial Conduct Rule 1.2(B).
130 *Id.* Preamble.
131 *Id.* Rule 2.4(A).
132 *Id.* Rule 2.8.
133 *In re Drexel Burnham Lambert Inc.*, 861 F.2d at 1315.
134 *McCann v. Communications Design Corp.*, 775 F.Supp. 1506, 1533 (D.Conn.1991).
135 *United States v. Hammond*, 2013 WL 637007, at *4 (S.D.N.Y. Feb. 21, 2013)(alterations and internal quotations omitted).
136 *The Delawore Bar in the Twentieth Century*, at 187–88 (The Delaware State Bar Association 1994).

End of Document

69 *Pinkston v. State*, 91 A.3d 562 (Del.2014) (TABLE) (citing *Los* for the proposition that "a claim of judicial bias must stem from an extrajudicial source."); *Fisher v. Fisher*, 979 A.2d 1110 (Del.2009) (TABLE) ("Generally ... allegations of a judge's bias must stem from an extrajudicial source and cannot be based solely on adverse rulings in the present case"); *Jackson v. State*, 21 A.3d 27, 35 (Del.2011)("This Court rejected that claim under a plain error standard of review, because the judge's familiarity with the victim resulted entirely from a judicial, rather than extrajudicial source and recusal was therefore not required").

70 *BAC Home Loans Servicing v. Brooks*, 2012 WL 1413608, at *3 (Del.Super. Feb. 2, 2012) ("Disqualification is only required where the alleged bias or prejudice of the judge stems from "an extrajudicial source and result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case.") (alteration in original); *Johnson v. State*, 2011 WL 2083907, at *4 (Del.Super. May 4, 2011)("For a judge's personal bias against a defendant to be disqualifying, it must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."); *State v. Carletti*, 2011 WL 6157469, at *1 (Del.Super. Dec. 9, 2011) ("[F]or the Commissioner to be disqualified, the alleged bias or prejudice "must stem from an extrajudicial source and result in an opinion on the merits of some basis other than what the ... [Commissioner] learned from his participation in the case.") (alteration in original).

71 Tr. at 28–29.

72 931 A.2d 437, 437 ¶ 12 (Del.2007) (TABLE) (footnote omitted).

73 510 U.S. 540.

74 Tr. at 4–5.

75 *Id.* at 6 (internal quotation marks added for clarity).

76 *Id.* at 8.

77 *Id.* at 70.

78 *Estate of Bishop v. Equinox Int'l Corp.*, 256 F.3d 1050, 1057 (10th Cir.2001) (internal alteration and quotation omitted).

79 *Liteky*, 510 U.S. at 541.

80 *Id.* at 555 (internal citation omitted).

81 In one of the three cases mentioned by the State I had no role in setting the defendant's bail.

82 The *Smith* case was tried before a federal jury in April 2007.

83 The State's petition incorrectly states that I represented Captain Browne in two matters.

84 Arguably Browne played a peripheral role in the HiWay Inn investigation. The Wilmington Police Department executed the arrest warrant issued against Wright and the search warrant issued for the search of his home. (Both were executed at the same time). The Wilmington police did so because the warrants were issued in connection with two crimes committed within the city. Captain Browne was part of the Wilmington SWAT team that executed those warrants. No evidence incriminating Wright in the HiWay Inn murder was found during that search.

85 *Wright–2014*, 91 A.2d at 991–92.

86 Sept. 10, 2009 Teleconference Tr. at 2, D.I. at 427.

87 In its motion for recusal the State recited that I "thus found it necessary" to advise Wright of my relationship. State's Mot. for Recusal, ¶ 4. This might suggest that my disclosures were something other than voluntary. The State requested that I advise Wright personally of my relationship with Captain Browne and I confirm Wright's waiver with him on the record. I would have to do this even if the State had not asked.

88 *Bantum v. New Castle Cnty Vo–Tech Educ. Ass'n*, 21 A.3d 44, 50 (Del.2011) (internal alterations, footnotes, and quotations omitted).

89 Del. Judges' Code of Judicial Conduct Rule 2.11. The rule has thee exceptions where a waiver is prohibited. In general terms parties may not waive a conflict when a judge has a personal bias, has personal knowledge of disputed facts or has previously been involved in the matter in some capacity other than as a judge. The State does not argue that any of those exceptions are applicable here.

90 *United States v. Brice*, 748 F.3d 1288, 1290 n.1 (D.C.Cir.2014).

91 *Unif. Masters v. McKesson Corp.*, 465 F. App'x. 466 (6th Cir.2012); *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661 (8th Cir.2003); *United States v. Bayless*, 201 F.3d 116 (2d Cir.2000); *United States v. Sampson*, 12 F.Supp.3d 203 (D.Mass.2014)("[A] waiver of grounds for recusal generally cannot be withdrawn at a later date.").

92 State's Mot. for Recusal, ¶ 16 (italicized numbers added).

93 Tr. at 57.

94 *Id.* at 58.

95 *Id.*

96 *Id.* at 59.

97 *Id.* at 60.

construed as suggesting that I violated Rule 2.10. But as that rule expressly provides that it does not "extend to statements made in the course of the judge's official duties." The State concedes that I never made any "public comments" except in the course of these proceedings. Therefore, although perhaps unintended, the suggestion that I violated Rule 2.10 is misguided.

38 Tr. at 28.

39 State's Mot. for Recusal, ¶¶ 5,19.

40 *Id.* ¶¶ 6, 19.

41 *Id.* ¶¶ 6, 22.

42 *Id.* ¶ 19

43 *Wright*–2012, 2012 WL 1400932, at *39 (emphasis added).

44 *Id.* at *24 (emphasis added).

45 June 12, 2009 Oral Argument Tr. at 122–23.

46 *Wright–2012*, 2012 WL 1400932, at *26.

47 See text accompanying footnotes 54 through 68, *infra*.

48 *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (2d Cir.1943).

49 *United States v. Bagley*, 473 U.S. 667, 674 (1985) (internal quotations omitted).

50 *Kyles v. Whitley* 514 U.S. 419, 435 (1995) (emphasis added).

51 778 A.2d 1058 (Del.2001).

52 *Id.* at 1065 (alteration in original and internal quotations omitted).

53 *Wright–2014*, 91 A.3d at 994.

54 *In re of Wittrock*, 649 A.2d 1053, 1053 (Del.1994) (internal citations omitted).

55 *Flowers v. State*, 53 A.3d 301 (Del.2012) (TABLE) ("The fact that a judge has made rulings adverse to a party is not, in and of itself, evidence of bias."); *Brooks v. BAC Home Loans Servicing, LP*, 53 A.3d 301 (Del.2012) (TABLE) ("The trial court's adverse rulings simply form no valid basis for the judge's disqualification in this case."); *Dickens v. State*, 2 A.3d 73 (Del.2010)(TABLE) ("[A] judge's adverse rulings, standing alone, do not constitute a valid basis for the judge's disqualification on the ground of bias."); *Fairthorne Maint. Corp. v. Rammuno*, 2006 WL 4782464, at *1 (Del.Ch. Aug. 31, 2006) ("The fact that you do not like what a judge says about the litigation at issue during a conference does not justify a request for recusal").

56 Leslie W. Abramson, *Judicial Disqualification under Cannon 3 of the Code of Judicial* Conduct, at 25 (2d ed. 1986).

57 *Liteky v. United States*, 510 U.S. 540, 555 (1994).

58 *Los*, 595 A.2d at 384 (emphasis added).

59 *E.g., Henry v. State*, 931 A.2d 437 (Del.2007) (TABLE) ("Generally, a claim of bias on the part of a judge must stem from an extrajudicial source. Because there is no evidence, indeed no claim, of any extrajudicial source of judicial bias, we conclude that Henry's fourth claim, too, is without merit."); *Chinski v. State*, 900 A.2d 100 (Del.2006) (TABLE) (No requirement of recusal because "[w]e find no basis for disqualification of the judge in this case. There is no evidence of bias or prejudice stemming from 'an extrajudicial source' resulting 'in an opinion on the merits other than what the judge learned from his participation in the case.' "); *Beck v. Beck*, 766 A.2d 482, 485 (Del. 2001) (the alleged bias or prejudice must be based on information that the trial judge acquired from an "extrajudicial source."); *Jackson v. State*, 684 A.2d 745, 743 (Del.1996) ("To serve as a disqualifying factor, the alleged bias or prejudice of the judge must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."); *Custis v. Collins*, 615 A.2d 278 (Del.1993) (TABLE) ("[T]he burden is upon the proponent of an allegation of bias to demonstrate that the judge's bias originated from an extra-judicial source and resulted in an opinion on some basis other than what the judge learned from his or her participation in the case.").

60 *State v. Desmond*, 2011 WL 91984, at *13 (Del.Super. Jan. 5, 2011) (footnotes omitted).

61 384 U.S. 563 (1966).

62 595 A.2d at 384.

63 510 U.S. at 556.

64 *Id.* at 555–56.

65 *Id.* at 556.

66 *Liteky* involved interpretation of 28 U.S.C. § 455, which is very similar to the Delaware Judges' Code of Judicial Conduct Rule 2.11. "In 1974, Congress followed the ABA's lead and amended § 455(a) to harmonize the federal statutory approach with the Model Code of Judicial Conduct." *Desmond*, 2011 WL 91984, at *9.

67 955 A.2d at 1284 (emphasis in original and added) (footnotes omitted).

68 *Id.* at 1281 (emphasis added)(internal quotations omitted).

(C) A judge disqualified by the terms of Rule 2.11, except a disqualification by the terms of Rule 2.11(A)(1) or Rule 2.11(A)(4), may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's disqualification. If the parties and their lawyers, after such disclosure and an opportunity to confer outside of the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

12 Tr. at 30–31.

13 595 A.2d 381 (Del.1991).

14 The appeal was taken after entry of a final judgment by the Family Court. *Id.* at 383 n.2.

15 *Id.* at 385.

16 *Gattis v. State*, 955 A.2d 1276, 1285 (Del.2008) ("The first step requires the judge to be subjectively satisfied that she can proceed to hear the cause free of bias or prejudice concerning that party.").

17 *Dickens v. State*, 49 A.3d 1192 (Del.2012)(TABLE).

18 *Los*, 595 A.2d at 385.

19 *Fritzinger v. State*, 10 A.3d 603, 611 (Del.2010) ("The judge must make both determinations on the record.").

20 The State contends that a statement I made when I disclosed my friendship with Captain Browne "is, in effect, a ruling that the first or 'subjective' prong of the *Los* recusal [sic] precludes his participation in the matter." State's Mot. for Recusal, ¶ 17. This is not correct. In that disclosure I stated I could not be objective if I were called upon to make judgments about his credibility. Up until this point Captain Browne's credibility has never been put in issue in this case, and given his role in this matter, it is highly unlikely to become an issue in the future. Consequently, my statement that I could not fairly judge Captain Browne's credibility is not the equivalent of a subjective determination that I am biased.

21 10 A.3d at 613 (footnotes omitted).

22 The State's motion did not address the standard to be applied when constructing the hypothetical observer. When asked about this standard at oral argument, the State responded the issue had not been addresses by the courts. Tr. at 3. To the contrary, scores of courts, including courts of this state, have applied the "informed observer" standard. Just a few of those cases are referenced in the text. Indeed, the court's research did not reveal a single case in which a court disavowed the "informed observer" standard. In any event, even though it had not researched the matter, the State conceded that the standard should be an "informed" observer.

23 *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir.1988) (emphasis added).

24 *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir.1985).

25 *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (mem., Rehnquist, C.J.).

26 *Cheney v. United States. Dist. Court for D.C.*, 541 U.S. 913, 923 (2004)(mem., Scalia, J.).

27 *In re Drexel Burnham Lambert Inc.*, 861 F.2d at 1314.

28 At oral argument the State labeled this argument as "being of much greater significance" than its argument about my friendship and former professional relationship with a witness. Tr. at 31.

29 State's Mot. for Recusal, ¶¶ 5, 8, 19, 20, 22.

30 State's Mot. for Recusal, ¶ 8 (citing *Wright–2013*, 67 A.2d at 323–4) (emphasis added). In its motion the State does not quote the second highlighted portion in its motion.

31 Consol. Successor Pet. For Postconviction Relief, D.I. 387, at 6.

32 Tr. at 42.

33 After Wright's conviction was vacated and the matter remanded I wrote a letter to counsel about scheduling. D.I. 494. The State asserts I "once again *sua sponte* raised the issue of the admissibility of the Defendant's confession, at least implicitly, by suggesting that a scheduling conference include a discussion of a schedule to resolve the issue." State's Mot. for Recusal, ¶ 20. No inference of bias arises from that letter. The Supreme Court held that Wright's *Miranda* claim was barred by Rule 61(i)(4), which applies to motions for postconviction relief. *See Wright–2013*, 67 A.3d at 323–34. But this is no longer a proceeding for postconviction relief and is not governed by Rule 61. It does not stretch the imagination to conclude there is at least a plausible argument that the reason why the Supreme Court held the *Miranda* claim was barred no longer applies here. As Defendant confirms, I was simply anticipating the obvious when I told counsel I wanted to promptly schedule the inevitable challenge to Wright's confession.

34 At oral argument the State told me that this is their principal argument. Tr. at 31.

35 State's Mot. for Recusal, ¶ 22.

36 91 A.3d at 994.

37 Motion, ¶ 18. The State's choice of the words "repetitive and public comments" is unfortunate and warrants comment. As the State is presumably aware, The Delaware Code of Judicial Conduct Rule 2.10(A) requires a judge to "abstain from public comment on the merits of a pending or impending proceeding." Thus the State's reference to my "repeated public comments" might easily be

Footnotes

1 It is unclear from the State's written motion whether it is addressed to me or some other unidentified judge. In its opening paragraph, for example, the State "prays that this Honorable Court issue an Order recusing the Hon. John E. [*sic.*] Parkins, Jr. from all further proceedings in this matter." The same phrase is repeated in the conclusion to the State's motion. At oral argument the State confirmed, however, that it intended that the motion be addressed to me. This is consistent with the Delaware Supreme Court's rulings that a motion for recusal should be addressed in the first instance by the judge who is the subject of the motion. *E.g., In re McLeod*, 99 A.3d 227 (Del.2014) (TABLE); *In re Webb*, 23 A.3d 866 (Del.2011) (TABLE).

2 Throughout my judicial career I have always written my opinions in the third person in the hope that, at least superficially, the use of third person might reinforce the idea that the judge is writing for an institution and not expressing personal views. In this matter I have chosen to depart from that practice because I am the focus of this opinion and it seems strained to refer to my comments in this case as if they were made by someone else. I am not so vain as to think anyone has ever noticed, or even cared, that my opinions are written in third-person. I mention my use of first person here only out of caution lest it be misconstrued as an indication that I take the request for recusal personally. I note in passing that the use of third person in recusal opinions can sometimes yield an odd sort of reverse-anthropomorphism. Take, for example, a judge from the mid-west whose use of the third person constrained her to write: "the possibility that the Court's husband and son may have formed an opinion with respect to the reputation of a given defendant or any other matter implicated by this litigation does not give this Court pause ... to doubt her own impartiality." *Williams v. Balcor Pension Investors*, 1990 WL 205805, *7 (N.D.Ill. Nov. 28, 1990).

3 *State v. Wright*, 2012 WL 1400932, at *10 (Del.Super. Jan. 3, 2012).

4 *Wright*, 2012 WL 1400932, at *47.

5 384 U.S. 436 (1966).

6 373 U.S. 83 (1963).

7 *State v. Wright*, 67 A.3d 319, 319 (Del.2013).

8 *Wright v. State*, 91 A.3d 972, 995 (Del.2014).

9 *Reeder v. Del. Dep't of Ins.*, 2006 WL 510067, at *16 (Del. Ch. Feb. 24, 2006)("The touchstone for evaluating whether a judge should disqualify himself or herself is the Delaware Judges' Code of Judicial Conduct.")

10 In its motion the State mistakenly cited and quoted at length former Rule 3(c)(1), which was modified and re-codified several years ago. At oral argument the State conceded that Rule 2.11—not the out-dated Rule quoted in its motion—applies here.

11 Despite the length of the Rule, its importance justifies setting it out in full:

> (A) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (1) The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) The judge or the judge's spouse or domestic partner, or a person within the third degree of relationship, calculated according to the civil law system, to either of them, or the spouse or domestic partner of such a person:
>
> (a) is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (b) is acting as a lawyer in the proceeding;
>
> (c) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> (d) is to the judge's knowledge likely to be a material witness in the proceedings.
>
> (3) The judge knows that, individually or as a fiduciary, the judge or the judge's spouse or domestic partner or minor child residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (4) The judge
>
> (a) served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it, or the judge was associated in the practice of law within the preceding year with a law firm or lawyer acting as counsel in the proceeding;
>
> (b) served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy
>
> (B) A judge should keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

therefore vital that the public perceive that the courts are independent of that agency. From our nation's very beginning an independent judiciary has been an essential part of our national fabric. Indeed, one of King George's "Injuries and Usurpations" set forth in the Declaration of Independence was "He has made judges dependent on his Will alone." [128] This principle is no less important today than it was 238 years ago. The Delaware Judges' Code of Judicial Conduct, which as the name implies governs the conduct of Delaware Judges, states as a basic tenant that "[a]n independent and honorable judiciary is indispensible to justice in our society." [129] To this end the Code of Judicial Conduct "is to be construed so as to not impinge on the essential independence of judges in making decisions." [130] The Code requires that judges "be unswayed by fear of criticism." [131] A judge may therefore not use "disqualification to avoid cases that present difficult, controversial or unpopular issues." [132]

***23** The independence of the courts would be subject to serious and legitimate questions if judges were to recuse themselves whenever faced with a non-meritorious recusal request. This would create the specter that "the price of avoiding any hint of impropriety, no matter how evanescent, would grant litigants the power to veto the assignment of judges." [133] Judges must avoid creating the perception that a litigant can manipulate the judiciary simply by filing a frivolous motion for recusal. "Granting Plaintiff's Recusal Motion under these circumstances would not only be wrong, but it would also undermine public confidence in the judiciary, for the judiciary would appear easily manipulated by any litigant who is prepared to claim that a court is biased, no matter how speculative and fanciful the allegations." [134] The need to avoid creating such a perception is particularly acute when the meritless request for recusal is made by the branch of government charged with prosecuting crimes. The appearance that a judge could be intimidated by such a request for recusal would be disastrous to the public's perception of the independence of the judiciary and the fairness of our criminal justice system. A judge is therefore obliged not to recuse himself under such circumstances:

> A judge must "carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning her impartiality might be seeking to avoid the adverse consequences of her presiding over their case. Indeed, the public interest mandates that judges not be intimidated out of an abundance of caution into granting disqualification motions: A trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may create the appearance of bias, and a timid judge, like a biased judge, is intrinsically a lawless judge." [135]

Despite my reference to the Declaration of Independence, I do not view this matter as some sort of intra-governmental clash of historic dimension. Far from it. Still, it is impossible to fathom how my recusal in the face of this motion would not seriously erode the confidence of an informed observer in the independence of the judiciary.

I wish to conclude this opinion with a word about the two attorneys who filed the motion for recusal. I believe it is fair to say that this case is one of high profile and has generated at least some public interest. Moreover, the friends and loved-ones of Philip Seifert, who was ruthlessly murdered that cold January night, are entitled to know why I will continue to sit on this case. I have therefore described the flaws in the moving party's request in more detail than I might have otherwise have set out. Unfortunately, this might be viewed by the uninformed as a criticism of the Department of Justice and the Deputy Attorneys General who authored the motion or as personal pique on my part. This opinion was never intended as such. Twenty years ago I had the privilege of authoring a chapter on the history of the Department of Justice which was included in *The Delaware Bar in the Twentieth Century*. In that chapter I wrote

> As the century draws to a close ... increasingly sophisticated legal considerations have become intertwined in virtually every facet of day-to-day activities of state government. Our state has been fortunate to have had the services of attorneys general and the men and women who served under them, whose skill, dedication, willingness to sacrifice and plain hard work have made Delaware a better place. [136]

In my six years on the bench I have developed even more respect for the Department's attorneys and its leaders. This holds true for the attorneys who filed the instant motion.

For the foregoing reasons, the motion for recusal is **DENIED**.

> but retaining a ground of attack on the judge's rulings. The concern, in a word, is judge-shopping. [122]

II. ***The reasons why I may not recuse myself.***

In light of the lack of merit to the State's motion, there is a temptation at this point in the opinion to declare myself unbiased and then recuse myself. I cannot do this. Harkening once again to the words of Justice Scalia, "[i]f I could have done so in good conscience, I would have been pleased to demonstrate my integrity, and immediately silence the criticism, by getting off the case. Since I believe there is no basis for recusal, I cannot." [123]

Time and again the courts of this state and elsewhere have emphasized the obligation of a judge to refuse unwarranted requests for recusal. The Court of Chancery succinctly stated the principle:

> The decision to recuse or disqualify must not be made lightly, because to do so is contrary to the Delaware Judges' Code of Judicial Conduct and inevitably leaves the case as one of the recused or disqualified judge's colleague's problems to deal with, thereby invariably impinging on his or her ability to address the many other matters already pending on his or her docket. [124]

In *Desmond v. State* Resident Judge Cooch explored in detail the history of this so-called "duty to sit" and how that duty interrelates with the other duties of judges who are faced with a motion to recuse. [125] I will not gild the lily by repeating his work. For present purposes it is sufficient to note his conclusion:

> *22 There remains an inherent "duty to sit" that is integral to the role of a judge. Under this approach, "[a] judge has as strong a duty to sit when there is no legitimate reason to recuse as he or she does to recuse when the law and facts require." In short, a judge's duty to recuse or disqualify is complementary to, but not greater than, his or her baseline duty not to recuse in the absence of any objective basis. This principle continues to apply in Delaware. [126]

Our Supreme Court has expressed the same view about the burden caused by recusals:

> While we find no abuse of discretion in the refusal to recuse in this case, we note that there is a compelling policy reason for a judge not to disqualify himself at the behest of a party who initiates litigation against a judge. In the absence of genuine bias, a litigant should not be permitted to "judge shop" through the disqualification process. The orderly administration of justice would be severely hampered by permitting a party to obtain disqualification of a judge through the expedient of filing suit against him. [127]

This case perhaps stands as a paradigm of the needless waste of judicial resources resulting from an unnecessary recusal. It dates back to 1991, and was procedurally complex long before I issued *Wright–2012*. Since then the case has grown in complexity. The docket sheet itself is almost 90 pages long. It is not the procedural complexity alone which will deplete judicial resources if I unnecessarily recuse myself. The record in this matter is immense, consisting of more than 500 docket entries, which includes thousands of pages of transcripts, motions, briefs and opinions. One might think that a new judge need not be familiar with the previous record when presiding over Wright's second trial, but the reality is that it will be essential for the judge to be intimately familiar with it. Both the State and Wright's counsel have indicated that there will be a considerable motion practice before trial. In the State's view, many of the defenses which might otherwise be available to Wright are procedurally barred in his second trial because of events occurring over the course of the 23 years since Wright was indicted. Although it remains to be seen which prior rulings may, or may not be revisited, it is inevitable that knowledge of the prior record will be required. Recusal would require a new judge to spend literally hundreds of hours coming up to speed on that voluminous and complex history.

There is a second policy reason why recusal is inappropriate here. The Department of Justice is, of course, the branch of government charged by our state constitution with responsibility for the prosecution of alleged crimes. It is

- The State would offer that evidence at the penalty hearing as an aggravating circumstance, and
- I would have to weigh the any newly discovered evidence of Wright's involvement in the BVLS attempted robbery against Captain Browne's conclusion that Wright was not the perpetrator of the BVLS crime, then
- I would have to make a judgment about Captain Browne's credibility.

The route to the State's conclusion is tenuous and the destination is remote. It is tenuous because it hinges on the premise that the State can discover evidence that Wright was a perpetrator of the BVLS attempted robbery. The State tried and was unable to develop such evidence 22 years ago when Wright was first tried. There is scant likelihood it will be able to do so now. [117]

The remoteness of the possibility I would have to make a judgment about Captain Browne's credibility argues against recusal. It is settled that a "judge should not recuse on unsupported, irrational, speculative, or highly tenuous grounds. A judge must hear a case unless some reasonable factual basis to doubt the impartiality of the tribunal is shown by some kind of probative evidence." [118] A New York federal court made an observation which is especially pertinent here:

> [W]hen deciding a recusal motion, the trial judge must carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning his impartiality might be seeking to avoid the adverse consequences of his presiding over their case. ***Recusal is not warrouted for reosons that are remote, contiugeut, or speculotive ond o trial judge should uot recuse himself on unsupported, irrational, or highly teuuous speculotion lest the price of mointaining the oppeorance of justice be the power of litigonts or third parties to exercise o veto over the ossignment of judges. The pertinence of these considerotions is heightened when a disqualificotion motion is uode iu a litigotiou thot is not uew, but has odvonced cousiderably before the judge in question.*** [119]

In the same vein the Third Circuit wrote this year that "recusal is not required on the basis of unsupported, irrational, or highly tenuous speculation." [120]

***21** In sum, the State asks me to recuse myself because I once had a professional relationship and friendship with a witness who has no stake in the outcome of this case. It does so even though I will not be called upon to make any judgment about Captain Browne's credibility. This case is for all intents and purposes the same as *United States v. Dandy* wherein the United States Court of Appeals held:

> In this case, Judge Cleland was not called upon to evaluate the credibility of Mowat [a witness acquainted with the judge] because defendant Dandy was tried by a jury. Furthermore, Mowat was simply one of many government witnesses and did not have a personal stake in the outcome which might have influenced Judge Cleland. [121]

g. *Judge shopping*

The lack of merit to the State's argument suggests the possibility that Captain Browne's testimony has little, if anything, to do with why the State wishes me to recuse myself. It is more than ironic that the State was content for me to preside over this case during a hearing in which I was called upon to make judgments about the credibility of the witnesses, but now the State objects to my presiding over a trial in which I will not be called upon to assess credibility. The State concedes that no new facts have arisen which have caused its change of heart. What has occurred is that I granted Wright relief. An informed observer could therefore easily conclude that the State is motivated by the fact that I have ruled against it on crucial issues; in other words, it is judge shopping. This weighs heavily against allowing the State to withdraw its waiver:

> [A] litigant who is aware of a potential ground for recusal should not be permitted to 'sandbag' that ground, hoping for a satisfactory resolution,

CERTIFICATE OF SERVICE

The undersigned certifies that on April 9, 2015, she caused the attached *Corrected Opening Brief* to be electronically delivered through File and Serve Xpress to the following: upon the following:

Eugene J. Maurer, Jr., Esq.
Allison S. Mielke, Esq.
1201-A King Street
Wilmington, DE 19801

Herbert W. Mondros, Esq.
Margolis Edelstein
750 Shipyard Drive
Suite 102
Wilmington, DE 19801

/s/ Elizabeth R. McFarlan
Bar ID No. 3579