



IN THE SUPREME COURT OF THE STATE OF DELAWARE

FREDERICK GRAY,)
)
 Petitioner,) No. 251, 252, 2014
)
 v.)
)
 STATE OF DELAWARE,)
)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF

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DATED: February 2, 2015

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	ii
NATURE AND STAGE OF THE PROCEEDINGS	1
SUMMARY OF THE ARGUMENT	2
STATEMENT OF FACTS	3
ARGUMENT	
I. THE COURT-BELOW ABUSED ITS DISCRETION WHEN IT FAILED TO DECLARE A MISTRIAL AFTER THE STATE PRODUCED <i>BRADY</i> EVIDENCE DURING THE TRIAL	13
II. THE COURT-BELOW ABUSED ITS DISCRETION WHEN IT ADMITTED THE 11 DEL.C. § 3507 VIDEOTAPED STATEMENT OF WITNESS SHANA GRAY WHEN THE STATEMENT WAS INVOLUNTARILY MADE	20
CONCLUSION	25
Det. Pigford’s Supplemental Report	Exhibit A
Motion to Dismiss	Exhibit B
Oral Decision Denying Motion to Dismiss	Exhibit C
Oral Decision Denying Objection to 3507 Statement	Exhibit D
Sentence Order	Exhibit E

TABLE OF CITATIONS

Cases

Berry v. State, 2013 WL 1352424 (Del. Apr. 3, 2013) 20

Blackburn v. Alabama, 361 U.S. 199 (1960) 22

Brady v. Maryland, 373 U.S. 83, 87 (1963) 13

Guy v. State, 913 A.2d 558 (Del. 2006) 13

Hatcher v. State, 337 A.2d 30 (Del. 1975) 20, 22

Jackson v. State, 770 A.2d 506 (Del. 2001) 15

Keys v. State, 337 A.2d 18 (Del. 1975) 20

Oliver v. State, 60 A.3d 1093 (Del. 2013) 17, 18

Starling v. State, 882 A.2d 747 (Del. 2005) 14

State v. Rooks, 401 A.2d 943 (Del. 1979) 22

Taylor v. State, 22 A.3d 851 (Del. 2011) 22, 23

Wright v. State, 91 A.3d 972 (Del. 2014) 14, 15, 19

Woodlin v. State, 3 A.3d 1084 (Del. 2010) 21

Constitutional Provisions

U.S. Const., Amend. XIV *passim*

Del. Const., Art. I, § 7 *passim*

Statutes

11 *Del.C.* § 3507(a) 20

NATURE AND STAGE OF PROCEEDINGS

On February 4, 2013 at approximately 7:00 p.m., at or near the vicinity of East 23rd Street, in the City of Wilmington, County of New Castle, State of Delaware, the Petitioner-Appellant, Frederick Gray, date of birth August 4, 1991, was arrested by the Wilmington Police Department and charged with Attempted Murder in the First Degree, 11 Del.C. § 531 (a)(5), Possession of a Firearm During the Commission of a Felony, 11 Del.C. § 1447A, Possession of a Weapon With a Removed, Obliterated, or Altered Serial Number, 11 Del.C. § 1459, Possession of a Firearm by a Person Prohibited, 11 Del.C. § 1448(e)(2), and misdemeanor Resisting Arrest, 11 Del.C. § 1257(b), from an incident on February 3, 2013.

Additionally, he was separately charged with Robbery First Degree, 11 Del.C. § 832, Possession of a Firearm During Commission of a Felony, 11 Del.C. § 1447A, Conspiracy Second Degree, 11 Del.C. § 512, and Possession of a Firearm by a Person Prohibited, 11 Del.C. § 1448, from an incident on February 2, 2013.

The two cases were severed on a motion from defense counsel. The second set of offenses were tried separately and have a separate appeal in number 250, 2014. Prior to trial, the immediate offenses were again

severed, with the Possession of a Firearm by a Person Prohibited tried separately in a bench trial in case number 1302A. The remaining charges were tried in case number 1302B. On the second day of trial, January 15, 2014 evidence was disclosed to defense counsel that constitutes *Brady* material. (*See Exhibit A, Det. Pigford's Supplemental Report*) Following a defense motion to dismiss, the trial court denied the motion. (*See Exhibit B, Motion to Dismiss; See Exhibit C, Oral Ruling on Motion to Dismiss*). On January 17, 2014, the trial court admitted the prior statement of witness Shana Gray into evidence over the objection of defense counsel. (*See Exhibit D, Oral Ruling on Objection*). On January 24, 2014 the appellant was found guilty on all charges and on April 25, 2014 sentenced to life in prison. Both cases are herein appealed. (*See Exhibit E, Sentence Order*).

SUMMARY OF THE ARGUMENT

- I. THE COURT-BELOW ABUSED ITS DISCRETION WHEN IT FAILED TO DECLARE A MISTRIAL AFTER THE STATE PRODUCED *BRADY* EVIDENCE DURING THE TRIAL

- II. THE COURT-BELOW ABUSED ITS DISCRETION WHEN IT ADMITTED THE 11 DEL.C. § 3507 VIDEOTAPED STATEMENT OF WITNESS SHANA GRAY WHEN THE STATEMENT WAS INVOLUNTARILY MADE

STATEMENT OF FACTS

On February, 3, 2013 at approximately 3:50 p.m, Officers Wilkers and Murphy were sitting in their Ford Crown Victoria police cruiser in the area of C and Buttonwood Street in the City of Wilmington, County of New Castle, State of Delaware. They observed a white Chevy Equinox with non-functioning taillights. The Officer initiated a traffic stop, however the vehicle did not stop and the Officers pursued. The pursuit ended on Peach Street, where the occupants of the white Chevy Equinox fled the vehicle. While fleeing, one occupant fired approximately three shots at the officers, striking Officer Wilkers in the face. Two co-defendants were arrested that day, the defendant was arrested at home the following day. Located at the scene were two handguns, one near the suspect vehicle and one located down an alley a short distance away from the vehicle.

The defendant was charged with Attempted Murder in the First Degree, 11 Del.C. § 531 (a)(5), Possession of a Firearm During the Commission of a Felony, 11 Del.C. § 1447A, Possession of a Weapon With a Removed, Obliterated, or Altered Serial Number, 11 Del.C. § 1459, Possession of a Firearm by a Person Prohibited, 11 Del.C. § 1448(e)(2), and misdemeanor Resisting Arrest, 11 Del.C. § 1257(b).

At trial, the State first called Officer Stephy who testified as to his observations of the scene.¹ Officer Stephy took photographs and videos of the scene as well. The State then called Officer Nagowski who testified as to his collection of evidence including bullet shell casings and handguns.² The State's third witness was Officer Gearhardt who testified to his crime scene sketch and produced a map of the area.³

The State then called Richard Danner with the Wilmington Fire Department who provided video of the incident.⁴ Mr. Danner testified that he was approached by Officers who wanted video from the Emergency Operation Center located across the street from the incident. Mr. Danner found the video, but was unable to record it zoomed in, he testified that in order to do so Officers used a handheld video camera to record the screen while the video played. He testified that that was insufficiently zoomed in, so Officers then zoomed in even further on the screen using the handheld camera. Mr. Danner testified that he was asked to do this by Officers of the Wilmington Police Department because they wanted to see if anything was discarded by the suspects. The State then called Officer Rhoades who

¹ D.I. 01/14/14, p. 54.

² D.I. 01/15/14, p. 34.

³ D.I. 01/15/14, p. 59.

⁴ D.I. 01/15/14, p. 85.

testified that he held the handheld camera and recorded the video screen to produce the video entered at trial.⁵

The State's next witness, Nilda Burgos, testified that she was at home at the time of the incident, and she located a gun in the alleyway behind her house and called Officers attention to it.⁶ The State called Officer Henry who testified that he was approached by a woman about a gun in an alleyway near her house.⁷ Officer Henry testified he went to where the gun was and waited until Evidence Detection Officers arrived.

The State then called Officer Murphy who testified that he was on patrol with Officer Wilkers.⁸ They observed the white Chevy Equinox with non-functioning taillights and initiated a traffic stop at which time the suspect vehicle took off. It came to a stop on Peach street and the suspects began to flee the vehicle away from the Officers. Officer Murphy testified that he was the driver, Officer Wilkers the passenger. He testified that he exited the police vehicle and began to chase after the driver of the white Chevy Equinox. He did not observe the shooting, but heard it occur behind him. He continued to pursue the suspect down alleyways behind Peach street, eventually apprehending the suspect he was chasing back on Peach

⁵ D.I. 01/15/14, p. 117.

⁶ D.I. 01/15/14, p. 127.

⁷ D.I. 01/15/14, p. 134.

⁸ D.I. 01/15/14, p. 139.

street. During Officer Wilkers direct examination, it was discovered that he made a statement the day after the incident in which he contradicted his earlier statement. A55. This inconsistent statement had been recorded in a report by Detective Pigford and had not been provided to the defense. Ex. A. The Court allowed the State to complete their direct examination and then recessed for the day. The next morning, the defendant moved for a mistrial based on the newly provided report and was overruled by the Court. A22; A73.

Trial resumed on the 16th with the cross-examination of Officer Murphy. A.75. The defense questioned Officer Wilkers about his inconsistent statements regarding how many people exited the vehicle and how many suspects he chased. He indicated that the next day while walking the scene he said he only chased one suspect down an alley, and not two as he had previously reported. He stated that this suspect exited from the driver's seat and fled on foot and he pursued. He testified he assisted in arresting this suspect, Jared Wiggins. He testified that he did not see the rear driver's side passenger with a gun, and that he did not chase this suspect. A86.

The State then called Pamela Portis to testify that she had been picked up in the White SUV earlier before the police chase began.⁹ She testified that Jared Wiggins was the driver, the defendant was the front seat passenger, Ronald Boyce the driver's side rear passenger and then herself and her niece in the backseat next to Mr. Boyce. Ms. Portis had previously told the Police that Mr. Boyce was the rear middle seat passenger, so the State entered her previous statement under 11 Del.C. § 3507 through the testimony of Detective Pigford. After Ms. Portis the State then called the co-defendant, Ronald Boyce, to testify.¹⁰

Mr. Boyce testified that he was in the middle of the back seat, and that he exited the car after it stopped. He testified that he observed the driver, Jared Wiggins flee down an alley, and that the defendant and he fled down the street with the defendant in front. He said he did not see anything in the defendant's hand as he fled. He admitted he had a gun on him, a silver .40 caliber and that he dropped it in the street on accident. He said he knew the defendant had a gun and that he had seen it but was unsure what it looked like. He testified that he had a pending case, Possession of a Firearm by a Person Prohibited.

⁹ D.I. 01/16/14, p. 156.

¹⁰ D.I. 01/16/14, p. 185.

On cross-examination Mr. Boyce testified that he had no deal with the State on the Possession of a Firearm by a Person Prohibited case regarding his testimony.¹¹ He testified that he had previously told the police he did not see the defendant with a gun, and did not see him shoot. He also testified that after he saw the driver, Jared Wiggins run, an officer chased him. He then got out of the vehicle and ran down the street, away from the officer.

The State then called Stephanie Horner from RJ Lee Group who provided testing on the gunshot residue samples provided.¹² She testified that she could not definitively say whether any suspect had fired a firearm based on the samples she was provided. The State's next witness was Officer Paul DiMarco who responded to the scene the day of the incident.¹³ He testified that he saw the two vehicles, the patrol vehicle and the suspect vehicle in their original positions. He testified that they were parked on an angle and not directly lined up. He also testified that he witnessed Officer Witte drive Officer Wilkers to the hospital. The State then called Officer Brian Witte who testified that he drove Officer Wilkers to the hospital in Officer Wilkers patrol vehicle.¹⁴ He also testified as to the relative positions of the suspect vehicle and the patrol vehicle. The State then called Darlene

¹¹ D.I. 01/16/14, p. 216.

¹² D.I. 01/17/14, p. 9.

¹³ D.I. 01/17/14, p. 49.

¹⁴ D.I. 01/17/14, p. 65.

Harvey to testify that she and the defendant were dating at the time of the incident, but she couldn't remember the substance of any conversation with him.¹⁵

The State then called the defendant's mother, Shana Gray. A100. She testified that she had not talked to her son regarding the incident on February 3, 2013. The State then sought to introduce her 11 Del.C. 3507 statement inconsistent with her testimony. The defense was afforded the opportunity to *voir dire* the witness regarding her statement. A102. On *voir dire* she testified that she was compelled to go with the police to their headquarters and she was unable to leave until her son had been apprehended. A103. She testified that she requested to leave at the station but was again told she could not. She also testified that she was never read her Miranda warnings and was told she was not under arrest. She also testified that she was primarily interested in her son's safety. A103. After the *voir dire*, the Court entered her statement over defendant's objection. A104.

The State then called Sara Shields from Bode Technologies who did DNA testing on the firearms.¹⁶ She testified that the silver .40 caliber handgun had DNA from Ronald Boyce. She also testified that she could not identify any of the suspects DNA as being on the black 9 millimeter

¹⁵ D.I. 01/17/14, pp. 78-79.

¹⁶ D.I. 01/17/14, p. 122.

handgun. The State then called Amy Stier, a forensic nurse who treated Officer Wilkers.¹⁷ She testified to the extent of his injuries and their life-threatening nature.

The State's next witness was Officer Andrew Shaub.¹⁸ Officer Shaub testified that upon arriving at the scene he witnessed two suspects running down the street away from the police vehicle and suspect vehicle. He chased one of the suspects down an alleyway. The State then called Officer Henry Law, who testified to the ballistics evidence he obtained.¹⁹ He testified that the bullet casings he located were fired from the black 9 millimeter and not the .40 caliber. He also testified that no fingerprints were located on any of the weapons recovered. He took photographs of the bullet strikes on the patrol vehicle as well.

The State then called Carl Rone to testify as to his examination of the guns and bullet strikes on the patrol vehicle.²⁰ Mr. Rone testified to the angle of impact for the bullet strikes on the vehicle. On cross-examination he testified that he believed the projectile that struck Officer Wilkers was a ricochet. A107. The State then called Officer Wilkers to testify about the shooting. He recalled that the person in the passenger seat of the suspect

¹⁷ D.I. 01/17/14, p. 155.

¹⁸ D.I. 01/17/14, p. 185.

¹⁹ D.I. 01/17/14, p. 204.

²⁰ D.I. 01/21/14 p.

vehicle stepped out, raised a gun and fired at him. He identified the defendant as the person who shot him.²¹ On cross-examination he indicated he did not see anything on the driver's side of the vehicle, his attention was focused on the passenger side and that he did not see a muzzle blast or hear a shot, but realized he had been shot when he was on the ground.²²

Lastly, the State called Detective Pigford who was the Chief Investigative Officer.²³ He testified to his interviews of the co-defendants, his review of the scene and his review of the physical evidence. Upon completion of Detective Pigford's testimony, the State rested.²⁴

The Court held a colloquy with the defendant regarding his right not to testify, which he elected to retain.²⁵ The defense then called Officer Watson who testified that she chased a suspect down an alleyway.²⁶ The defense then recalled Detective Pigford to ask follow up questions regarding his arrest of co-defendant Ronald Boyce.²⁷ After that, the defense rested, closings were heard and the jury was allowed to deliberate.

²¹ D.I. 01/23/14, pp. 73 – 74.

²² D.I. 01/23/14, p. 93.

²³ D.I. 01/23/14, p. 97.

²⁴ D.I. 01/23/14, p. 217.

²⁵ D.I. 01/23/14, pp. 218 – 219.

²⁶ D.I. 01/23/14, p. 220.

²⁷ D.I. 01/23/14, p. 237.

I. THE COURT-BELOW ABUSED ITS DISCRETION WHEN IT FAILED TO DECLARE A MISTRIAL AFTER THE STATE PRODUCED *BRADY* EVIDENCE DURING THE TRIAL

Question Presented

The question presented was raised below in a motion presented to the Court during trial before the Hon. Calvin Scott on January 16, 2014. A22.

Standard of Review

The standard of review arising out of an application for a mistrial is abuse of discretion.²⁸

Merits of Argument

Failure to properly disclosed exculpatory evidence is a violation of due process under both the U.S. Constitution and the Delaware Constitution.²⁹ The United States Supreme Court decision in *Brady v. Maryland* found that, “suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”³⁰ The Delaware Supreme Court has repeatedly reinforced this

²⁸ *Guy v. State*, 913 A.2d 558 (Del. 2006).

²⁹ U.S. Const., Amend. XIV; Del. Const., Art. I, § 7.

³⁰ 373 U.S. 83, 87 (1963).

decision, most recently in *Wright v. State*.³¹ There are three requirements for a *Brady* violation: “(1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the State; and (3) its suppression prejudices the defendant.”³²

First, the evidence disclosed at trial is favorable to the accused, because it is both exculpatory and impeaching. Detective Pigford’s report not only details the inconsistent statement of Officer Murphy, but it continues into other areas of interest to the defendant as well. Ex. A. Perhaps most importantly, the report also indicates that Mr. Rone discovered that the bullet that hit Officer Wilkers was a ricochet, and not a direct shot. This conclusion was not found in any materials previously disclosed.

Second, the evidence was clearly suppressed by the State. It was produced during the second day of testimony in the trial, long after it should have been disclosed.

Third, the evidence that was not disclosed was material to the defense and was unable to be effectively used during trial. The requirement of “[m]ateriality does not require the defendant to show that the disclosure of

³¹ 91 A.3d 972 (Del. 2014).

³² *Starling v. State*, 882 A.2d 747, 759 (Del. 2005) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

the suppressed evidence would have resulted in an acquittal.”³³ The defense merely needs to show “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”³⁴ Here, the defense was unable to use the late discovered report effectively and had it been able to the result may have been different.

The inconsistent statements of Officer Murphy were not effectively used by the defense because of the short amount of time afforded to review those statements. The defense had been operating on the assumption that Officer Murphy had chased two suspects down one of the alleyways. In its opening statement, the defense noted that the videos the State would introduce would show co-defendant Jared Wiggins running down an alleyway, the same alleyway the firearm that was used was found. A49. Originally, it was believed that Officer Murphy would testify that he had chased two suspects, co-defendants Wiggins and Boyce, that he observed both, and neither committed the act. Had the defense been aware of the inconsistent testimony of Officer Murphy, they would have highlighted that Ronald Boyce remained at the vehicle while the Officer chased another suspect. Officer Murphy testified he heard the shots behind him, which is

³³ *Wright v. State*, 91 A.3d 972, 988 (Del. 2014).

³⁴ *Jackson v. State*, 770 A.2d 506, 516 (Del. 2001) (quoting *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

where Ronald Boyce would have been located. A59. Therefore, he would have been unobserved while committing the act of shooting at Officer Wilkers.

Lastly, and perhaps most importantly, the discovery that the bullet that struck Officer Wilkers was a ricochet was never explored by the defense because it was never revealed. Mr. Rone's expert report contains no information on this ricochet. Mr. Rone apparently only made this conclusion verbally to Detective Pigford, but never formalized it or recorded it. A114. The defense never obtained its own experts to discuss bullet trajectory or ricochet effects because it was unaware that the bullet was a ricochet.

The primary defense was to indicate that another occupant of the vehicle had fired, a defense that would have been bolstered by the revelation that the bullet that struck Officer Wilkers was a ricochet, and not a direct shot. There is no mention of a ricochet at all in the defense opening because it was unknown. While the defense did have the opportunity to cross-examine the State's expert regarding the ricochet, that cross-examination was nearly toothless. A114. The trajectory angles of the bullets were not explored pre-trial because the defense believed the bullet that entered Officer Wilkers was a direct shot. Therefore, no expert was obtained by the

defense to analyze the trajectory angles of the bullet strikes, which may have indicated the location of the shooter. Additionally, a ricochet implicates intent and whether the shooter had the requisite intent to commit murder or was merely firing blindly. Having not had the opportunity prior to trial to have an expert review the bullet strikes, the cross-examination was unable to fully explore the implications of a ricochet.

The trial court's remedy, of a single night to review the report, was insufficient to cure the breach. When evaluating a Rule 16 breach, a "trial judge has broad discretion to fashion an appropriate sanction..."³⁵ Remedies include: "1) order prompt compliance with the discovery rule; 2) grant a continuance; 3) prohibit the party from introducing in evidence material not disclosed; or 4) such other order the Court deems just under the circumstances."³⁶ When reviewing discovery violations, "[the Court] applies a three-part test analyzing: (1) the centrality of the error to the case; (2) the closeness of the case; and (3) the steps taken to mitigate the results of the error."³⁷ The Court "will reverse only if substantial rights of the accused are prejudicially affected."³⁸

³⁵ *Oliver v. State*, 60 A.3d 1093, 1096 (Del. 2013).

³⁶ *Id.*

³⁷ *Id.* at 1097.

³⁸ *Id.* at 1097 (citing *Fuller v State*, 922 A.2d 415, 2007 WL 812752, at *2 (Del. Mar. 19, 2007)).

In *Oliver*, the undiscovered evidence consisted of notes of an expert witness and the remedy fashioned by the trial court was the delay of trial for one night, which the Court deemed insufficient.³⁹ In that case, the evidence consisted of non-*Brady* material, but the trial court in the immediate case employed the same remedy, a nightly recess. The Court in *Oliver* noted the “highly technical nature” of the evidence as a reason that a one night recess was insufficient.⁴⁰ Similarly here, the undiscovered evidence, the revelation that the bullet that struck Officer Wilkers was a ricochet, is technical in nature and was unable to be fully explored by the defense. Because a ricochet implicates intent as well, it is doubly prejudicial to the defense.

Lastly, while the undiscovered evidence consisted of a single report, because that report contained multiple portions of *Brady* material, the analysis is affected. Where there are multiple pieces of evidence, “[a] reviewing court first evaluates the “tendency and force of the undisclosed evidence item by item.” The court then evaluates the “cumulative effect” of the suppressed evidence separately. “Individual items of suppressed

³⁹ *Id.*

⁴⁰ *Id.* at 1099.

evidence may not be material on their own, but may, in the aggregate, 'undermine [] confidence in the outcome of the trial.' ”⁴¹

The defense would contend that in this case, this Court should consider the report not merely as one piece of evidence, but two based on the contents. This would lend further weight to the defense contention that the material was prejudicial and that the cumulative effect of its non-disclosure substantially prejudiced the defense. An inconsistent statement that put a co-defendant in a new and different position coupled with knowledge of a ricochet substantially affected the defense strategy of implicating a co-defendant as a possible shooter. None of this was brought up in opening and the more technical aspects were unable to be fully explored on cross-examination. Based on this, the defense believes that the defendant's due process rights were substantially affected and that the result of the proceeding may have been different had it been properly disclosed.

⁴¹ *Wright v. State*, 91 A.3d 972, 988 (Del. 2014).

II. THE COURT-BELOW ABUSED ITS DISCRETION WHEN IT ADMITTED THE 11 DEL.C. § 3507 VIDEOTAPED STATEMENT OF WITNESS SHANA GRAY WHEN THE STATEMENT WAS INVOLUNTARILY MADE

Question Presented

The question presented was raised below in an objection. A104.

Standard of Review

The standard of review arising out of an objection is abuse of discretion.⁴²

Merits of Argument

According to Rule 3507, “voluntary out-of-court prior statement[s] of a witness who is present and subject to cross examination may be used as affirmative evidence...”⁴³ This Court has previously interpreted the standard for admitting 3507 statements as requiring that the statement touch on the events, and that the statement was voluntarily made.⁴⁴ In order to admit the statement the trial judge must find that “by a preponderance of the evidence that the statement was voluntarily made, and must render an

⁴² *Berry v. State*, 2013 WL 1352424, at *2 (Del. Apr. 3, 2013).

⁴³ Title 11, Section 3507(a).

⁴⁴ *Keys v. State*, 337 A.2d 18 (Del. 1975); *Hatcher v. State*, 337 A.2d 30 (Del. 1975).

explicit determination on the issue before admitting it for the jury's consideration."⁴⁵

In the immediate case, the witness, Ms. Gray, testified on direct examination that she was taken to the Wilmington Police Department to speak to police and then she was asked "Q: When you talked to Detective Pigford did you tell him the truth? A: Yes. Q: And when you talked to Detective Pigford did anyone force you to talk to him? A: No." A101. At this point, the State sought to introduce her prior videotaped statement, defense counsel objected and requested a *voir dire*. The court granted the *voir dire* and the witness testified that she was told she had to go with the police to the station and had to stay until they apprehended her son. A102. She testified that at no point was she told she had the right to remain silent, nor were her other Constitutional rights read to her. A103. She also testified that she was very concerned for her son's safety while speaking to the officers. A103. The court overruled defense counsel's objection, relying on the original statement made by the witness in direct examination that she was not forced to answer questions. A104.

The trial court appeared to separate the question of voluntariness of defendant confessions from that of witness statements, which this Court has

⁴⁵ *Woodlin v. State*, 3 A.3d 1084, 1087 (Del. 2010).

specifically linked.⁴⁶ In *Hatcher*, this Court specifically noted that “[w]hile those cases dealt with the voluntariness of a defendant’s out-of-court confession and not prior out-of-court statements of witnesses generally, the possibility of coercion by improper conduct is no less present in the one than the other.”⁴⁷ A judgment on voluntariness must be based on a ‘totality of the circumstances’.⁴⁸

“Factors which bear on these circumstances include the following: defendant’s age and mental condition (whether he was ‘dull,’ for example), whether he was denied a hearing before a magistrate, whether he was advised of his right to remain silent or his right to counsel, whether he was held incommunicado and if so how long, whether he was denied food for long periods, whether there were any threats of mob violence, the legality of his arrest, *Payne v. State of Arkansas*, supra; defendant’s educational background and experience, his emotional stability or lack thereof, his record as to former crimes, whether the police used subterfuge in obtaining the statement, whether the statement was composed by a police officer, whether defendant had the aid of counsel or relatives or friends, whether there was prolonged police questioning of defendant.”⁴⁹

A witness’s statement is involuntary if his or her will is overborne.⁵⁰

The Court in *Taylor* identified five different factors to consider when determining if his or her will was overborne, including whether he or she was read his or her constitutional rights, police lying about important parts

⁴⁶ See A104, p. 108 “THE COURT: Okay. But that’s not at issue here, so I don’t know how *Miranda* applies to this.”

⁴⁷ *Hatcher v. State*, 337 A.2d 30, 32 (Del. 1975).

⁴⁸ *Blackburn v. State of Alabama*, 361 U.S. 199 (1960).

⁴⁹ *State v. Rooks*, 401 A.2d 943, 948 (Del. 1979).

⁵⁰ *Taylor v. State*, 22 A.3d 851, 853 (Del. 2011).

of the case, threats that authorities will take away children, extended periods of detention without food and extravagant promises or inducements.⁵¹ This Court extended *Miranda* protections to “the interrogation of a witness who is in custody and is told by the police that he is under arrest.”⁵² This Court found that “custodial interrogations are inherently coercive, [and] any statement by a defendant in custody is presumptively involuntary. . .”⁵³ Here, there is no question that the witness was in custody and was being questioned. While the police did not utter the magic words, “under arrest”, the circumstances amount to a custodial interrogation since she was there under duress and not allowed to leave. Had this been a confession of a defendant under the same circumstances, it is very doubtful any court would have admitted the statement as voluntary absent *Miranda* warnings.

Moreover, the trial judge conducted no balancing test, and did not take into consideration the full totality of the circumstances. The ruling by the trial court was, “But then she also said she gave the statement voluntarily. And I don’t know how we get around that, so, as the Court views it, the statement was voluntary.” A104. The defense contends that based on the witness’s statements on *voir dire* that her statements were

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 854.

involuntary when examined under a totality of the circumstances test. She was questionably detained, not read her rights, had her apartment searched by a S.W.A.T. team, told she was not able to leave, told that her son was a suspect in a police shooting case and she told the court that she was overwhelmingly concerned for his safety when making statements to the police. Based on the lack of test conducted by the court and the circumstances of the statement, the defense contends it should have been excluded.

CONCLUSION

Based upon the arguments and the authorities cited herein, the undersigned counsel respectfully submits that the Appellant's convictions should be reversed.

Respectfully submitted,

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DATED: February 1, 2015

Wilmington Police Department case number: 30-13-7884

Wilmington Police Detective Red number: 13-S-12

Incident: Attempted Murder (Shooting) of an on-duty uniformed police officer.

Date and Time: Sunday February 3rd 2013 at approximately 1550 hours.

Location: 1200 Blk of Peach St. Wilmington DE 19801

Investigator Assigned: Det M/Sgt. George Pigford

Weather: Approximately 29 degrees F, overcast. Road surfaces dry and it was daylight.

Victim Information: Wilkers, Justin WMN 34 D.O.B. 02/18/78 c/o 300 N. Walnut St. Wilmington DE 19801

Suspect Information: Gray, Frederick O. BMN 21, D.O.B. 08/04/91 LKA 218 W. 36th St. Wilmington DE 19802

Witness Information / Person(s) Contacted:

Murphy, Kevin WMN c/o 300 N. Walnut St. Wilmington DE

Dimarco, Paul WMN c/o 300 N. Walnut St. Wilmington DE

Shaub, Andrew WMN c/o 300 N. Walnut St. Wilmington DE

Watson, Danielle BFN c/o 300 N. Walnut St. Wilmington DE

Witte, Brian WMN c/o 300 N. Walnut St. Wilmington DE

Boyce, Ronald BMN D.O.B. 12/06/92 1205 B Street Wilmington DE 19801

Wiggins, Jared BMN D.O.B. 09/05/91 103 McCullen Ave New Castle DE 19720

Griffin, Greg BMN D.O.B. 12/28/83 of 1225 Apple St. Wilmington DE 19801

El, Rashad BMN D.O.B. 07/20/87, 119 Stroud St. Wilmington DE 19801

Lois Davis BFN 102 S. Heald St. Wilmington De 19801

Davis, Tony BMN D.O.B. 01/18/65, 102 S. Heald St. Wilmington DE 19801

Portis, Channeisha BFN D.O.B. 09/26/94, 941 Clifford Brown Walk Apt 1, Wilmington DE 19801 (h)302-654-6488

Portis, Pamela BFN D.O.B. 01/30/67, 1110 B Street Wilmington DE 19801

Gray, Shana BFN D.O.B. 11/26/72 430 N. West St. Apt 204 302-357-2193, Wilmington DE

Demby, Katanya BFN D.O.B. 11/23/92, 1113 Beech St. Wilmington DE 19805

Harvey, Darlene BFN D.O.B. 05/18/92, 209 Pilgrim Rd. New Castle DE 19720

Case Summary:

On Sunday February 3rd 2013 at approximately 1550 hours, uniformed Wilmington Police Officer Justin Wilkers was intentionally shot in the face by a suspect fleeing from a vehicle after a vehicle pursuit. Wilkers sustained a gunshot wound to the left side of his face. The suspect vehicle was occupied by five subjects total; three males and two females. All subjects have been identified and one suspect has been identified as having shot Wilkers. The suspect was charged accordingly.

Crime Scene:

The crime scene is in the 1200 blk of Peach St. Wilmington DE 19801. This location is a one block, single lane, residential city street with parking on both sides. The street is orientated east – west, with traffic flowing only westbound. The street was dry and unobstructed.

Physical Evidence:

See reports from the Evidence Detection Unit.

Victim Interview:

The victim, Justin Wilkers, was interviewed twice, once very briefly shortly after the shooting by Patrol Sergeant William Schmid; then again by Detective Sergeant Pigford & Detective Captain William Browne at the hospital a few days later. The brief interview done by Sgt. Schmid is documented in his supplemental report. The later interview will be summarized below. This interview took place on 02/07/13, in Wilkers' hospital room. This was the first opportunity that his writer had to interview Wilkers because of his condition. It should be noted that Wilkers' jaw was wired shut and he still had swelling of his face, however he was conscious and alert and responded to the questions coherently.

Wilkers stated that after the vehicle pursuit, the police vehicle in which he was a passenger, came to a stop behind the suspect vehicle. Wilkers believed that the vehicle was occupied by more than one person but did not know the total number of occupants. Wilkers did not see anyone get out of the driver's side of the vehicle however he did see one suspect get out of the passenger side. Wilkers saw no-one else get out of the passenger side of the vehicle. Wilkers was in the process of getting out of the police car at the same time. Wilkers saw this suspect immediately bring a gun up and immediately fired one round which struck him in the face. After that Wilkers did not see the suspect any longer. Wilkers described the suspect as a taller black male with a little facial hair wearing dark clothing, armed with a black handgun. Wilkers stated that when the suspect fired at him, the suspects body was not facing him but his head was, as well as the gun. Wilkers state that after he was shot he fell to the ground and tried to use his radio to call for assistance. Wilkers was asked if he thought that he would be able to identify the suspect and he said yes. Wilkers stated that he had not seen any newspapers and had not seen a picture of the suspect.

This investigator then left the hospital but returned later the same day with a line-up that contained six pictures, one of which was Frederick Gray. This investigator again spoke with Wilkers. Ofc. Paul Simmonds was present in the room also. Wilkers identified subject #5 in the line-up, which is Frederick Gray. Wilkers was able to initial the line-up and stated that the person who had shot him was number five.

Suspect Interview:

The suspect, Frederick Gray, was taken into custody on Monday 02/04/13 at approximately 2145 hrs. This investigator attempted to interview him however he requested a lawyer. Defendant was charged with the appropriate offenses at the direction of the Attorney General's office.

Witness Interview:

Murphy, Kevin: Wilmington Police Officer. Murphy was interviewed at the Wilmington Police station and the interview was video recorded. Murphy was also interviewed a day later during a walk through of the scene. These interviews will be summarized below and are in no way a verbatim transcription of the interview.

Initial interview:

Murphy was the uniformed driver of the marked police vehicle in which Wilkers was a passenger. The two became involved in a vehicle pursuit and the suspect vehicle came to a stop in the 1200 blk of Peach St. Murphy saw two suspects exit the suspect vehicle and begin to flee on foot. Murphy chased the driver and driver's side passenger into a pedestrian alley where the two separated so Murphy continued to chase the driver. This suspect was later identified as Jared Wiggins. Wiggins was taken into custody after jumping two fences and exiting back on the street in the 1200 blk of Peach St. Murphy stated that the second suspect who exited the driver's side of the suspect vehicle continued running and was not apprehended. Murphy was asked if he heard or saw any gunfire and he stated that he heard several shots as he entered the alley but assumed that it was Wilkers firing. Murphy did not know that Wilkers had been shot until he had

taken Wiggins into custody and noticed Wilkers was hit. Murphy stated that he never saw anyone exit the passenger side of the vehicle.

Follow-up Interview:

On the following day this investigator brought Murphy back to the scene and had him walk through it again. Murphy showed this investigator where he believed that he had stopped the police vehicle and where the suspect vehicle had stopped. Murphy stated that when the suspect vehicle stopped he saw two subjects exit the driver's side. Both subjects exited and the driver immediately ran into a pedestrian alley and the driver's side rear seat passenger ran west on Peach St. toward S. Heald St., but never entered the alley. Murphy stated that he then chased Wiggins until he was able to take him into custody on Peach St.

Dimarco, Paul: Wilmington Police Officer: Dimarco was interviewed at the Wilmington Police station and the interview was video recorded. This interview will be summarized below and is in no way a verbatim transcription of the interview.

Dimarco stated that he was in the rear lot of the Wilmington Police station when he heard the radio transmissions about the vehicle pursuit. Dimarco headed toward southbridge and then into the 1200 blk of Peach St. As Dimarco entered the block from the west (S. Heald St.) side, he saw officers taking one suspect into custody in the block and also saw Wilkers on the ground near the passenger side of his police vehicle. Dimarco went to Wilkers and asked if he was ok and Wilkers responded that he was badly injured. Dimarco stated Ofc. Witte then pulled into the block and exited his patrol vehicle. Dimarco and Witte then loaded Wilkers into the back seat of Wilkers' vehicle and Ofc. Witte drove him to the hospital and Dimarco stayed at the scene. When Dimarco arrived, the suspect had already fled the scene.

Watson, Danielle: Wilmington Police Officer:

Watson was interviewed at the Wilmington Police station and the interview was video recorded. This interview will be summarized below and is in no way a verbatim transcription of the interview. See video for further information.

Watson stated that she and Ofc. Shaub were working together and responded to the call of the pursuit. Watson and Shaub got to the area S. Heald St. and Peach St. and they saw two black males running toward them on Peach St. The two males turned into an alley and Shaub followed. Watson ran into a different alley but met up with Shaub and saw the two black males continuing to flee. Watson saw the shorter of the males jump a fence and saw Shaub continue to chase the taller male through the alley. Watson heard Shaub state over the radio that one subject was running back toward Peach St. and she followed eventually helping Murphy take one subject into custody. Ofc. Watson then held the scene, including the weapon recovered in the street.

Shaub, Andrew: Wilmington Police Officer:

Shaub was interviewed at the Wilmington Police station and the interview was video recorded. This interview will be summarized below and is in no way a verbatim transcription of the interview. See video for further information.

Shaub stated that he and Ofc. Watson heard the radio transmission of the incident and drove to the area of the 1200 blk of Peach St.. They were travelling on S. Heald St.

approaching Peach St., and saw two subjects running west on Peach St. toward them. He described the two subjects as black males, both in dark clothing with one being taller and one being shorter. Watson stopped the police car as quickly as she could and Shaub exited the passenger side in order to chase the suspects. Watson exited the driver's side to chase the subjects as well. Shaub saw the two subjects enter a pedestrian alley that runs parallel to S. Heald St. and he followed. Shaub stated that Watson ran south on S. Heald St. and entered another pedestrian alley in order to try to cut off the suspects. Shaub chased the two subjects through the alley southbound and then into another alley east bound. Shaub saw the shorter subject jump a fence into a rear yard so he believed that Watson would continue to chase him. Shaub chased the taller of the two subjects through the alley but lost the subject in the alley. Shaub stated that when he emerged from the alley onto S. Claymont St. he saw a group of subjects standing on the corner of Peach St. and S. Claymont St. Shaub asked them which way the subject had run and the group refused to answer. Shaub then heard the radio transmission regarding Ofc. Wilkers and ran back to the area where the shots had been fired.

Shaub also moved the suspect vehicle from the lane of traffic to the right side of the street in an effort to clear a path for Officers Witte and Dimarco to take Wilkers to the hospital. However, Ofc. Witte backed out of the block and then headed to toward the hospital.

Also, after the incident was stable Shaub again searched the alleys for anyone involved. Shaub detained two subjects, later identified as Greg Griffin and Rashad El, because he thought that they were in the group of males that refused to tell him which way the suspect had ran so he believed that they knew something about the suspect or his whereabouts.

Witte, Brian: Wilmington Police Officer:

Witte was interviewed at the Wilmington Police station and the interview was video recorded. This interview will be summarized below and is in no way a verbatim transcription of the interview. See video for further information. Witte was interviewed by Det. Sgt. Staats. See supplement.

Witte stated that he arrived on the scene of the shooting and saw that Ofc. Wilkers had been shot. Witte loaded Wilkers into his own police vehicle and drove him to the Wilmington Hospital. Witte did not have information about any of the suspects.

Griffin, Greg:

Griffin was interviewed at the Wilmington Police station and the interview was video recorded. This interview will be summarized below and is in no way a verbatim transcription of the interview. See video for further information.

Griffin stated that he came outside and saw the suspect vehicle make a turn onto Peach St. with the police car behind it. Griffin said that two guys got out, shots were fired and the police officer was on the ground. Griffin was asked to explain his statement in more detail and he said that he saw 2-3 people get out of the car (S.U.V.) but did not know from which side of the vehicle they had exited. Griffin later explained that he was in front of 501 S. Claymont St. when this incident occurred and he did see the police officer get shot. Griffin explained that he saw the shooter leaning forward and shooting behind him at the officer. Griffin demonstrated this as well. Griffin stated that he did not

know which side of the vehicle the subjects got out of but said that they (2-3 subjects) ran toward S.Heald St. Griffin was asked if anyone else shot a gun and he said that there was just one shooter. Griffin stated that he has seen the van (S.U.V.) in Southbridge on at least another occasion and it is usually driven by a younger male.

Rashad El:

El was interviewed at the Wilmington Police station and the interview was video recorded. This interview will be summarized below and is in no way a verbatim transcription of the interview. See video for further information. El stated that he did not see any of the shooting of the officer, or what lead up to it, but may have seen the officers take one subject into custody. El was generally uncooperative.

Tony Philip Davis:

Davis was interviewed at the Wilmington Police station and the interview was video recorded. This interview will be summarized below and is in no way a verbatim transcription of the interview. See video for further information. Davis stated that he was working at his mother's residence of 102 S. Heald St. when he heard sirens, gunshots, and saw a lot of police activity around the house. Davis went to the rear of the house and saw two subjects running in the alley but could not describe them. Davis then went to the front of the house to look outside and then asked his mother if the back door was locked. Davis' mother stated that she did not know so he went to check. When Davis went the rear of the house he saw that the basement door was ajar and then noticed that there was a person hiding in the basement. This person told Davis that he had been in the car that was involved in the high speed chase. Davis stated that in the car were two other guys and two girls. Davis stated that this person (later identified as Ronald Boyce) told him that he ran from the car because he was scared and he had heard gunshots. Davis stated that Boyce then fell asleep on a couch until officers knocked o the door. Boyce was then taken into custody.

Davis stated that from the second floor of the house he observed the subjects running. Davis also stated that he saw two females and one was crying. Davis stated that there was about a 15 minute delay between when he located Boyce and when the officers showed up at the house. Davis stated that Boyce told him that he did not know who the males were and that he was with the females in the car. Davis also stated that Boyce told him that he thought that the police were shooting at them for being in the high speed chase.

Lois Davis:

Lois Davis was interviewed in her home and the conversation was audio recorded. This interview was conducted by Det. Kim Pfaff and Ofc. McAndrew and will be summarized below. See supplement report # 46 and audio tape for further. The following is an excerpt from Det. Pfaff's report:

Davis stated that she heard a commotion out front her residence, and responded outside. Davis stated she observed a girl on the corner crying and extremely upset. Davis stated she asked the female what was wrong, but the female was so upset that Davis could not understand her words. Davis stated she then went back inside her residence to retrieve a coat. Davis advised that when she returned outside again, the female was gone.

Lois Davis stated that a police officer advised her to go inside her residence, and proceeded to escort her to the rear of the residence. Davis stated she entered her residence through an unsecured rear door. Davis stated she went to the front of her residence, never securing the rear door. Davis stated a little while later, her son Tony came inside the residence. Davis stated Tony immediately noticed that the basement door was "cracked", and slightly open. Davis advised that the basement door should not have been slightly open. Davis stated then a black male, exited from the basement door, and was standing in her first floor middle room. Davis stated she did not know the black male.

Lois Davis advised that the black male was not speaking. Davis advised that her son Tony recognized the black male, but did not know any information about the black male. Davis stated she began to lecture the black male on getting his life together. Lois stated at first, the black male was sitting on the north side of the first floor middle room in a chair, and then moved to the south side of the room and sat on a "love seat".

Lois Davis stated her son, Tony, began speaking with the black male. Davis stated her son, Tony, advised that the police were going to start knocking on doors. Davis stated she then heard a knock on the front door of her residence and responded to same. Davis opened the front door to her residence and allowed Officer McAndrew to enter. Davis advised McAndrew that there is this black male sitting in her residence without her consent, and she does not know this person. Davis stated at that time, the black male was taken into custody by officers.

Lois Davis stated the black male, who was later identified as Ronald Boyce, a black male, date of birth 12/06/1992, did not remove any articles of clothing or personal property while inside her residence. Davis stated Boyce had to have entered her residence through the rear door of the residence that was unsecured.

Jared Wiggins:

Wiggins was interviewed at the Wilmington Police station and the interview was video recorded. This interview will be summarized below and is in no way a verbatim transcription of the interview. See video for further information.

Wiggins stated that he was in the white S.U.V. when the police began the chase. Wiggins stated that he does not know who the S.U.V. belongs to and that he was just getting a ride from the occupants. Wiggins stated that there were five total occupants, including him and two girls. Wiggins claimed that he was seated behind the driver with the two girls. Wiggins stated that there were two males in the front seats and he could not describe either except that the driver was brown skinned. Wiggins stated that he does not know any of the other occupants and had not seen any of them before this date. Wiggins stated that he ran from the police because he had a capias for a driving charge. Wiggins stated that he did not hear any gunshots during this incident. Wiggins also stated that there was no conversation in the S.U.V. while they were fleeing from the

police other than he felt that the females in the vehicle were not happy about being involved in the pursuit.

Ronald Boyce:

Boyce was interviewed at the Wilmington Police station and the interview was video recorded. This interview will be summarized below and is in no way a verbatim transcription of the interview. See video for further information.

Boyce was interviewed about this incident and he stated that earlier in the day he had been picked up by two male subjects whom he knows. Boyce later identified Jared Wiggins as being the driver of the white S.U.V. and Frederick Gray as being the subject seated in the front passenger seat. Boyce explained that he was seated in between the two females in the back seat when the police tried to stop the car. Boyce stated that Wiggins refused to pull over and the pursuit began. Boyce stated that when the car stopped he and Wiggins exited the driver's side and Gray exited the passenger side. Boyce said that Wiggins ran into an alley but he and Gray went toward the front of the SUV. Boyce began to explain that he did not know what had happened or who shot the officer but then decided that he wanted to be completely honest and explained that as he reached the front of the SUV he turned and saw Gray raise a gun toward the police officer that was behind him and shoot several rounds at him. Boyce said that as Gray was shooting his head and arm were facing the officer but his body was turned toward the direction that they were running. Boyce stated that he and Gray then ran west on Peach St. and then into an alley on the south side. Boyce said that he was able to hide in the rear yard of a house and the Gray kept running. Boyce said that he then hid inside a house until he was discovered by the police. Boyce stated that at no point did he have a gun and he did not shoot anyone. Boyce was shown two photo line-ups; one contained a picture of Jared Wiggins and the other a picture of Frederick Gray. Boyce identified Gray as the person whom had shot the police officer and Wiggins as the driver of the vehicle.

Channeisha Portis:

Channeisha Portis was interviewed at the Wilmington Police station and the interview was video recorded. This interview will be summarized below and is in no way a verbatim transcription of the interview. See video for further information.

Portis stated that she was a passenger in the white SUV with Boyce, Wiggins, Gray, and Pamela Portis (her aunt). Portis explained that she and Pamela were seated in the rear of the vehicle along with Boyce who was in the middle seat. Portis stated that when the police tried to pull the vehicle over, the driver, Wiggins, refused to stop. Portis stated that Boyce stated to her a few times that he wanted to exit the car and when the vehicle did finally stop on Peach St. she saw Boyce exit the driver's side with a gun in his hand. She also saw Gray exit the passenger side with a gun and both then began to shoot their guns. Portis stated that she believes that Gray shot the police officer and then ran on Peach St. toward S. Heald St. Portis stated that she did not see Wiggins shoot a gun. Portis identified Boyce, Wiggins, and Gray via photoline up. It should be noted that throughout Portis' statement there are inconsistencies and some events that she describes are not supported by the evidence or other statements.

Pamela Portis:

Pamela Portis was interviewed at the Wilmington Police station and the interview was video recorded. This interview will be summarized below and is in no way a verbatim transcription of the interview. See video for further information.

Pamela stated that she and her niece (Channiesha) accepted a ride from three subjects who were in the white SUV. Portis stated that she knew the driver as 'J' and that her niece knew the other subjects. Pamela stated that the police got behind the vehicle and the driver refused to stop. Pamela stated that she was telling the driver to stop but he did not. Pamela stated that the SUV then stopped and all three of the males got out of the vehicle and she heard gunshots. Pamela stated that she thought that the gunshots were coming from both sides of the vehicle. Pamela stated that she only heard shots and did not actually see anyone shooting. Pamela stated that she exited the vehicle from the passenger side. Pamela named 'Freddie' as the front passenger, 'Ron Ron' as being seated in the back seat and 'J' as being the driver. Pamela stated that she ducked when she heard shots and could not tell if it was the police shooting at the suspects or vice versa. Pamela stated that when she looked up she saw police officers coming from all angles. Pamela stated that the two subjects who exited the driver's side ran into an alley and the subject who exited the passenger side ran down the street and then into another alley. Pamela stated that she heard approximately 3,4,5, or 6 shots all in one string. Pamela stated that she believed that the shots were being fired from both sides of the SUV. Pamela identified 'J' as Jared Wiggins; 'Ron Ron' was identified as Ronald Boyce; and 'Freddie' was identified as Frederick Gray. Each identification was done via photo line-up.

Pamela was asked if there was any conversation in the SUV while the police were behind it and she said that the only person that said anything was 'J' who said that he was not going to stop.

Shana Gray:

Shana Gray (mother of Frederick Gray) was interviewed at the Wilmington Police station and the interview was video recorded. This interview will be summarized below and is in no way a verbatim transcription of the interview. See video for further information.

Gray was interviewed approximately 29 hours after the incident and Frederick Gray had been taken into custody prior to this interview. Gray stated that she had not seen her son in a few days and had most recently heard from him on the day prior to this interview via phone. Gray stated that her son had called her several times and told her he was sorry. Shana asked him why he was not calling from his phone (because he had left it in the white SUV) and he just responded that he was sorry. Gray stated that she then received calls from other people and saw a television broadcast that showed the white truck that they (Freddie) had been in and saw that a police officer had been shot. Gray stated that she had seen her son in the white SUV on several occasions prior to this incident.

Gray asked if her son was taken into custody without incident and she was informed that he was not injured. Gray expressed that she was glad that her son was ok and stated that he (Frederick) knew that it was a matter of time and that they don't have any family out of town so this was the best way. Gray was asked what she thought her son meant when he told her he was sorry and she stated that he (Frederick) was sorry because he shot the officer. Gray continued and said that he (Frederick) knew that he had

shot the officer and that the police had his weapon and his finger prints would be on the weapon and that it would match the bullet that would come out of the officer's face. Gray explained that she believed that her son crossed the line when he shot a police officer and that she hopes that he takes a plea.

Katanya Demby:

Katanya Demby was interviewed at the Wilmington Police station and the interview was video recorded. This interview will be summarized below and is in no way a verbatim transcription of the interview. See video for further information.

Demby was brought to the Wilmington Police station at the time of Frederick Gray's arrest because she was with him when he was taken into custody. Demby stated that she and Gray have known each other for some amount of time and that on this date she saw him on the street and the two began to talk. Demby stated that she commented to him about something happening in SouthBridge and Gray did not respond. Demby stated that she and Gray then began to walk together and that is when the police stopped them. Demby stated that she knows that Gray usually hangs out in the Southbridge area but that she did not have any idea that Gray may have been involved in the incident from the previous day. Demby stated that Gray did not say anything about the incident. Demby had no other information about this incident.

Marcus McManus:

Marcus McManus was interviewed at central and the interview was video taped. This interview will be summarized below and is in no way a verbatim transcription of the interview. See video for further information. Mcmanus stated that he knows Gray and has for some time. Mcmanus stated that at some point on the afternoon of 02/03/13 he met up with Gray and Gray wound up returning the McMaunus' apartment for the night. McManus stated that at approximately 5:00pm he let Gray use his phone and Gray continued to have possession of it until the next afternoon when he was taken into custody. McManus stated that Gray did not mention anything to him about the shooting. See video for further.

Darlene Harvey:

Darlene Harvey was interviewed at the Wilmington Police station on 06/26/13 and the interview was video recorded. This interview will be summarized below and is in no way a verbatim transcription of the interview. See video tape for further. Harvery was interviewed because she is the owner of a cell phone that Gray called and texted many times from his phone and then from McMannus' phone once his phone had been found in the suspect vehicle. Harvey's information had been located through the cell phone company under subpoena. Harvey stated that she and Gray are boyfriend/girlfriend and have been for some time. Harvey stated that she and Gray were dating when this incident occurred. Harvey stated that on the evening after the shooting occurred, she received several calls from Gray from McMannus' phone and stated that Gray was upset and that

he told her several times that he wanted to tell her what happened, in person. Harvey also stated that Gray wanted her to pick him up but she did not have a car. Harvey stated that Gray is still upset with her that she did not make it to pick him up on the night that he was arrested. Also, Harvey stated that Gray has never told her about the shooting of the officer and has actually told her that it was not him. Harvey continued and said that Gray feels that he is going to be in jail for a long time and that she is prepared to wait for him for 10 years but no longer than that. Harvey stated that she has told Gray this as well. Harvey denied that she and Gray had ever discussed that case over the phone or in letters but stated that Gray has asked her to make contact with some of his friends for him. Harvey stated that she knows Jared (Wiggins) and Ron Ron (Ronald Boyce) and has actually been in the white SUV on at least one prior occasion. Harvey also stated that Gray's nick name is 'Dirt' and stated that most people on the street call him that. Harvey stated that when she and Gray are together he is a very quiet person and doesn't tell her about anything that he does when he not with her. See interview for complete details.

Investigative Procedure:

On Sunday February 3, 2013 at approximately 1555 hrs. this investigator was notified by Sgt. Ron Mullin that a Wilmington police officer had been shot. Sgt. Mullin relayed that Ofc. Wilkers had been shot in the face and his condition was unknown. This writer was informed that shooting had occurred in the 1200 Blk of Peach St, and that one subject had been taken into custody however, other subjects were still unaccounted for. This investigator then called Detective's Hall, Bucksner, and Vega to respond to the scene, and Det. Gifford to respond the Wilmington Police station. This investigator also notified Detective Captain William Browne, who also responded to the scene. This investigator then contacted Kathy Jennings and Brian Robertson of the Delaware Attorney General's office. This investigator then drove to the scene and was met by Sgt. Mullins and Ofc. Demarco, who walked me through same and pointed out the location of the police vehicle, the suspect vehicle (white Chevy Equinox bearing DE PC474668), recovered firearms, shell casings, and other evidence. See E.D.U supplements for details of the crime scene.

This investigator also learned that Ofc. Wilkers had been the passenger in a marked police vehicle that was being operated by Ofc. Murphy. I was informed that the officers had initiated a traffic stop of the suspect vehicle because of an equipment violation, but the vehicle had refused to stop. The officers had pursued the vehicle which stopped in the 1200 blk. of Peach St. where several subjects had exited. One of the subjects had exited the vehicle and fired a handgun at Ofc. Wilkers and had struck him in the face. I was also informed that the subject who was in custody, Jared Wiggins, had been the driver of the vehicle, and he was currently being treated at the Wilmington Hospital for injuries he sustained while fleeing from the vehicle and being taken into custody by Ofc. Murphy.

This investigator then began to interview the officers who had been involved in this incident and then learned that another possible suspect had been located hiding inside 102 S. Heald St. This subject had been located after Tony P. Davis 01/18/65, who is the son of the owner of the house, called the police to report that there was a person inside

their house who they believed had been involved in the car chase. This subject was identified as Ronald Boyce 12/06/92 and he was also transported to central.

From the interview of Ofc. Murphy, this writer learned that he and Ofc. Wilkers had been working together and on patrol in the SouthBridge area of the City of Wilmington. Ofc. Murphy was driving the marked police vehicle and Ofc. Wilkers was the passenger. The two first observed the suspect vehicle parked at the intersection of C and Buttonwood St.'s and saw that it was occupied by multiple subjects. The officer then pulled over and watched as the vehicle passed them and came to a stop at A and Buttonwood St.'s. As the vehicle stopped the officers noticed that the vehicle's left and right brake lights were not functioning so the officers initiated a traffic stop in the area of A and Townsend St.'s. The vehicle slowed and appeared that it was going to pull over but then began to flee. The vehicle fled south on Townsend St., east on D St., North on New Castle Ave and then veered onto S. Claymont St. and finally turned west into the 1200 blk of Peach St. At this point the vehicle stopped in the street and the police car stopped behind it. Ofc. Murphy indicated that when the vehicle stopped he saw a black male exit the driver's door and another black male exit the rear driver side door and both males began to flee on foot. Ofc. Murphy pursued the driver south bound into a pedestrian alley and then attempted to use his tazer to stop the driver from fleeing. After the tazer was not effective, Ofc. Murphy then observed the suspect flee back toward the street where the vehicle had stopped and the officer did the same. Ofc. Murphy was able to take the driver, later identified as Jared Wiggins, into custody in the 1200 blk of Peach St. Ofc. Murphy indicated that when he entered the alley in pursuit of the Wiggins, he heard gunshots and believed that Ofc. Wilkers had discharged his weapon. Ofc. Murphy stated that he did not realize that Ofc. Wikkers was shot until a few moments after Wiggins was taken into custody.

From the interviews of the other officers we ascertained that Officers Shaub and Watson arrived near the intersection of Peach St. and S. Heald St. and observed two black male suspects, one shorter and one taller, running west on Peach St. toward them. The officers began to chase the suspects on foot into a pedestrian alley that runs parallel to S. Heald St. Officers Shaub and Watson became separated and Ofc. Shaub continued to chase the taller of the two suspects south bound in the alley and then east until he lost sight of the suspect somewhere near where the alley exits onto S. Claymont St. Ofc. Watson indicated that she chased the shorter of the two males into the same alley but entered from a different entrance. Ofc. Watson continued to chase the shorter of the two suspects and at some point exited back onto the 1200 blk of Peach St. and assisted Ofc. Murphy in taking Wiggins into custody.

It appears that when Ofc. Watson entered the alley from S. Heald St. and believed that she was still chasing the original subject who she had seen (Boyce). However she was actually now pursuing Wiggins but from a different direction than Ofc. Murphy. Boyce had already been able to hide from the officers in the cat house and never actually entered the long alley that runs east and west in which Ofc. Shaub was now pursuing the taller of the two subjects. When Ofc. Shaub had exited the alley onto S. Claymont St. he observed several subject standing near the area and made contact with them. Ofc. Shaub asked them where the male had gone and none of the subjects would inform him of the missing suspect's whereabouts. Ofc. Shaub then heard a radio broadcast that an officer had been shot so he then ran back to the 1200 blk of Peach St.

Ofc. Dimarco arrived on scene and observed the location of the suspect vehicle and police vehicle and saw that Ofc. Wilkers had been shot in the face and was now lying in the street behind his open police car door. Ofc. Whitte arrived and, with the help of Ofc. Dimarco, loaded Ofc. Wilkers into Wilkers' car. At this time Ofc. Shaub arrived back at the scene he saw that Ofc. Wilkers was being loaded into a police vehicle and believed that the suspect vehicle was blocking the street. Ofc. Shaub then got into the driver's seat of the suspect vehicle and moved it onto the side of the street, however, this was not necessary because Ofc. Whitte backed out of the street and headed to the Wilmington Emergency Room. Officer Dimarco then remained on scene until this investigator arrived.

After Ofc. Wilkers had been removed from the scene, Ofc. Shaub then performed another area canvas and again located two of the subjects who he had initially saw that refused to point him in the right direction while he was pursuing the taller male suspect. Shaub then stopped the two subjects who were later identified as Rashad El and Gregory Griffin. These two subjects were transported to central and interviewed. See above.

After interviewing the officers, I then began to interview Jared Wiggins. Wiggins gave a statement and claimed that he did not know anyone else who had been in the vehicle. See video for full statement.

This investigator was then informed that a young female had been seen in the area immediately after the shooting and she was crying and had apparently told some residents that she had been in the car during the chase. This was reported to Ofc. McAndrew by Lois Davis, who is the owner of the house in which Ronald Boyce had been located.

This investigator was then able to interview Ronald Boyce and during his statement he told me the names of the male occupants of the vehicle and gave a description of what had taken place. Boyce also stated that there were two females in the SUV and said that they both had the last name of Portis and they were related aunt and niece. While I continued to interview Boyce other detectives began to try to identify the two females. These two females were identified as Channeisha Portis and Pamela Portis and detectives were able to locate them and they were brought to central where they were interviewed. See statements above.

After interviewing the listed subjects the decision was made to charge Jared Wiggins with the offenses of Failure to stop at the command of a Police Officer, Making a False Statement to Law enforcement officers (F), and Resisting Arrest. Boyce was also charged with Resisting Arrest (M).

On 02/04/13 this investigator, along with Ofc. Murphy and D.A.G. Brain Roberston went back to the crime scene and walked the route that Ofc. Murphy believed that he had gone. As he was walking the scene, Ofc. Murphy was explaining how the vehicles had been parked and how he exited his vehicle. Murphy explained that he now believed that after he saw two subjects exit the driver's side of the suspect vehicle, he chased one subject (Wiggins) into the alley and the other subject, (Boyce) had fled toward S. Heald St. Murphy reiterated that as he pursued Wiggins on foot, Wiggins was able to jump two fences and Murphy attempted to tazer him as he fled but it was not effective. Murphy was able to take Wiggins into custody in the 1200 blk of Peach St with the help of other officers.

This investigator also learned from the Delaware State Police ballistics expert, Carl Rone, that the 9mm Glock pistol that had been located in the alley between 1218 and

1216 Peach St. was the weapon used to fire the three spent 9mm casings that were located at the scene; and that although the weapon had an obliterated serial number, Rone was able to raise the number (KAB 478) and believed that the weapon had been reported stolen. This was confirmed the following day when a trace was performed and it was confirmed that the weapon had been reported stolen to the Philadelphia Police Dept NCIC / OCA# 2012-03-063593. Rone also advised that this 9mm was ballistically matched to an earlier shooting incident. Documented under Wilmington Police case number 30-13-2105. This incident occurred on 01/09/13 in the 2100 blk of N. Locust St. and the victim was Michael Harris D.O.B. 08/07/90. Harris reported to the police that he had been walking in the area of the 2100 bk of N. Locust St. when he was approached by two black male suspects who began to shoot at him. Harris reported that the suspects had attempted to rob him but he had fled on foot and that is when he was shot. Harris described the two suspects as being black males, 30 to 35 years old. Harris was not able to identify any suspects in this case and after all leads had been exhausted, the case was suspended.

The suspect vehicle in the shooting of the officer was a white 2007 Cheverolet equinox bearing DE PC474668. This vehicle is registered to Angeline Bloom of 2432 W. 18th St., Wilmington DE 19802. Upon attempting to contract the owner of the vehicle and it was learned that the vehicle is normally operated by David Bloom, who is the brother of the registered owner. David bloom was present at his residence and was transported to central and interviewed by Det. Sowden. Bloom stated that he loaned his vehicle to a person he called 'G' and has done this in the past as well. Bloom identified Jared Wiggins as 'G'. See taped interview and supplement report by Det. Sowden. On 02/07/13 Bloom was again interviewed in reference to this incident and stated that he is a drug addict and that in the past Wiggins has provided him pills but maintained that on this occasion he was paid \$30 to use the vehicle.

After the shooting of Ofc. Wilkers, the suspect vehicle was seized and transported to central where a J.P. #20 search warrant was executed on same. Among other items inside the vehicle were two cell phones. A black and grey Samsung phone was located near the front center console and a blackberry phone was located in the rear seat. During the interview of Boyce he stated that he had left his phone in the vehicle and stated that it was a Blackberry. Wiggins stated that he did not own a phone and during this investigation no cell phone ownership information was ever located. The black and grey Samsung phone is believed to belong to Gray. This belief is based on several factors including: The phone was located next to the center console of the front seat where Gray was seated. A search warrant was executed on the phone and in the contacts section of the phone there is a listing for "First Lady" with the corresponding number being 302-357-2193. This is the same number that Shana Gray gave as her own when she was interviewed. While reviewing the text messages on the phone believed to belong to Gray, there is a message to First Lady that says "Mom u still at kia house." Another message sent from this phone to 'Keem' reads "Keem dis fred 4rm south 302 299 5122." This message is dated 02/02/13 at 5:34pm. Also when interviewing Shana Gray she explained the Frederick did not have his phone anymore and was calling her from another phone (belonging to McManus). This is confirmed in the call log of the phone seized from Gray when he was taken into custody.

This writer was also able to view the police vehicle that had sustained damage consistent with being hit by projectiles. The damage consisted of an impact mark on the front passenger door window surround, damaged/missing front door glass, and a damaged rear quarter panel. See EDU supplements and pictures for further. Based on the location of the impact marks and on the description of how the vehicles had been oriented at the time of the shooting it appears that the front passenger side door of the police vehicle was open when it was hit by gunfire. It also appears that it was probably the first of three bullets fired that had struck Wilkers. This is believed because the damage to the rear quarter panel most likely occurred after Wilkers was hit because he would have already been on the ground when that shot was fired. Combined with the statement from Wilkers that he believed that the suspect had only fired one shot which had struck him (noted below). It is unclear when the window glass may have been damaged. Also, from the orientation of the vehicles during the shooting, the caliber and number of spent shell casings, and lack of any other ballistic evidence (ie. Bullet holes or spent shell casings), it appears that the round that struck Wilkers and the rounds that struck his vehicle were fired from the passenger side of the suspect vehicle. As described in all of the witness interviews, the only person who was seated on or who exited from the passenger side, was Frederick Gray. There is no physical evidence that suggests that any one fired a handgun from the driver's side of the suspect vehicle.

Also, approximately 3 hrs after the shooting, Wilkers made a statement to Sgt. William Schmid which is documented in supplement report #14. A paragraph excerpt from that report is copied below.

At approximately 1845 hours while in the room with Officer Wilkers he again inquired how Officer Murphy was doing. He then advised me that he recalled the incident. He advised that he was involved in a "car chase" and as the Suspect vehicle came to a stop the occupants began exiting. He advised that the Suspect shot him exited the passenger side of the vehicle as he was exiting his patrol vehicle. Officer Wilkers advised that he could see that the Suspect had a gun in his hand and he physically demonstrated, with his right arm extended as if the Suspect held the gun in front of his groin region. He further advised that as he reached to draw his service weapon the Suspect immediately raised the weapon, pointed it at him and discharged it. He then advised, "I went down." I asked Officer Wilkers how many times the Suspect fired the weapon and he advised that he fired once. At this point Officer Wilkers began experiencing what appeared to be severe pain in his jaw and I stopped inquiring to allow him to rest. I remained with Officer Wilkers while he was transported to CT Scan once again and then returned to the trauma area.

On the evening of 02/04/13 after Gray had been taken into custody, this investigator interviewed Marcus McManus. McManus is an acquaintance of Gray's and on the previous date, (the day of the shooting) Gray had approached McManus near his residence of 709 Windsor St. Apt. 3, and the two had hung out together followed by Gray staying at the apartment for the night. McManus stated that he also let Gray use his cell phone (215-800-9753) from about 5pm through the time when Gray was arrested on the following date. A search warrant was executed on the phone and when examining the call log of this phone it appears that Gray did initiate calls from this phone to his mother and to what appears to possibly be a girlfriend (Darlene Harvey). This is believed

because in gray's phone he has a contact labeled as "Wife" with a number of 302-365-4318. This same number was dialed many times from McManus's phone after Gray was reported to be in possession of it. This investigator had the subscriber information subpoenaed and it registered to Darlene Harvey of 209 Pilgrim Rd. New Castle DE 19720.

Also on 02/04/13 this investigator interviewed Katanya Demby. Demby was walking with Gray when he was taken into custody. Demby stated that on this evening she was walking in the area of w. 6th St. and heard someone call out to her. Demby stated that she does know Gray and the two began to walk together when the police arrived. Demby stated that Gray did not make any statements to her regarding the shooting.

On 02/04/13 Gray was arrested and charged with Attempted Murder, Possession of a Firearm by Person Prohibited, Possession of a Firearm During the Commission of a Felony, and Resisting Arrest. At the time of his arrest this investigator briefly spoke to Gray. After reading Gray his miranda rights he asked for an attorney.

Search warrants were then written and executed for Gray's DNA and Gunshot residue collection. Gray was later arraigned for the listed offenses.

A search warrant was conducted at the residence of McManus in an attempt to locate any property that may have been left by Gray but none was located. During this search a cell phone was seized however it was later determined to belong to Tuila McManus and was returned to same.

On 02/06/13 this investigator met with D.A.G. Robertson and Det. Matt Hall in order to discuss another case where Gray had been identified. Case number 30-13-7714

On 02/06/13 a finger print was identified that had been lifted from the gas cap cover of the suspect vehicle. This print belonged to Dajuan Flowers D.O.B. 06/25/92. This investigator began to attempt to locate Flowers by checking his listed address of 113 E. 25th St. however this address was vacant. This address was last confirmed as vacant on 03/04/13 and no other location information is available for Flowers.

On 02/07/13 this investigator and Det. Capt. William Brown went to the Christiana Hospital and were able to speak to Ofc. Wilkers. This interview was audio taped. Wilkers' jaw was wired shut however he answered this investigators' questions as clearly as he was able. During this interview Ofc. Wilkers gave a description of the events and the shooting and he also state that could identify the suspect who had shot him if he saw him again. This investigator then returned later the same date. This interview was also audio taped and was witnessed by Cpl. Paul Simmonds. During this interview Ofc. Wilkers positively identified the photo of Frederick Gray as the person who had shot him.

This investigator was also able to speak with Ofc. Wilkers' wife (Juliet Wilkers) and his mother (Shirley Wilkers). These two were helping to care for Justin during his treatment. I asked both if Justin had seen any news papers, the internet, or had discussed the case with anyone and both stated that he had not. They explained that their main concern was keeping him calm and letting him try to rest and recuperate. Both his mother and his wife indicated that they believed that showing him any media would be counterproductive.

This investigator also began to review video footage from several surveillance cameras that are located near the scene of this shooting. Det. Nowell was able to retrieve footage from cameras located outside the Longshoremen's Hall which is located at 200 S.

Claymont St. and from the Palmer School which is located at 1210 Lobdell St. Det. Nowell advised that this footage shows a white SUV being pursued by a marked police vehicle. This is documented in supplement report # 38. Footage was also collected from the exterior cameras on the Wilmington Office of Emergency Operations. This building is located at the corner of S. Heald St. and New Castle Ave. and also backs up to the 1200 Blk of Peach St. The exterior cameras on the rear of the building show some of the 1200 blk of Peach St. and captured some of this incident.

The footage from these cameras was downloaded and reviewed and shows a white SUV and a marked police vehicle stop in the block however both vehicles and partially obscured by equipment in the rear of the E.O.C. The collection of this evidence is documented in supplement report # 41 written by Ofc. Law. Note, additional footage was also recorded by Ofc. Evans and consists of zoomed views from different cameras on the rear of the E.O.C. which is documented in supplemental report # 54.

The video shows, what appears to be, two subjects, who appear to be consistent in size and race as Gray and Boyce, fleeing west bound on Peach St. A few seconds later the video shows, what appears to be, two additional subjects, consistent in size and race as Channiesha Portis and Pamela Portis also running west bound on Peach St. The video that captures the subjects fleeing can be zoomed and when examining the zoomed view it appears that the first person to flee west on Peach St. (who is reported to be Gray), throws a dark object up and into a pedestrian alley that runs between 1216 and 1218 Peach St. This is the same alley where the 9mm Glock pistol was located. The video also shows Wiggins attempting to jump a fence in the rear yard and then exiting the same alley back onto Peach St. and being taken into custody by Ofc. Murphy. The videos from these cameras were reviewed at different levels of zoom and all are included for review.

On 02/15/13 this investigator was also able to examine the suspect vehicle while it was being held at the police station. This investigator observed that the vehicle had only the third brake light functioning and the right and left lights not functioning. The vehicle also had only three of the four taillights functioning. This examination was done with Det. Matt Hall present. Also on this date a preliminary hearing was held in front of Judge Smalls and the charges against Gray and Wiggins were bound over to Superior Court.

On 02/27/13 the copies of the surveillance footage was turned over to S/A Shawn Haney of the F.B.I. with a request to have it examined. Haney later responded that the video had been reviewed and nothing could be done to enhance the clarity of any of the footage.

On 02/28/13 this investigator spoke to Michaelena Dejesus. Dejesus was interviewed because when this investigator originally checked the number that was associated with the label of "Wife" in Gray's phone, it was linked to Dejesus via a deljis entry. This information was later determined to be outdated. During the interview Dejesus stated that she had not had that phone number for a couple of years and has no idea who Gray is. This investigator later learned that the number is actually registered to Darlene Harvey of 209 Pilgrim Rd.

This investigator also tried to make contact with the resident of 1212 Apple St. because while reviewing the calls made from McManus's phone while it is reported to have been in Gray's possession, there is a call to 302-345-1483. This number is associated with Jared Johnson and the address of 1212 Apple St. Writer made contact

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE


IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)
)
) Case No. 1302002738
)
 v.)
)
)
 FREDERICK GRAY,)


NOTICE OF MOTION

TO: Joseph Grubb, Esquire
Matthew Frawley, Esquire
Deputy Attorney General
Department of Justice
State Office Building
820 North French Street
Wilmington, Delaware 19801

PLEASE TAKE NOTICE that the attached Motion to Dismiss
will be presented to the Court.



Raymond D. Armstrong
Assistant Public Defender



David C. Skoranski
Assistant Public Defender
820 N. French St.
Wilmington, DE 19801

Date: January 16, 2014

Exhibit B

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)
)
) Case No. 1302002738
)
 v.)
)
 FREDERICK GRAY,)
)

MOTION TO DISMISS

COMES NOW, the defendant, Frederick Gray, by and through his counsel, Raymond D. Armstrong and David C. Skoranski, Assistant Public Defenders, and herein motions this Honorable Court for an Order dismissing his case for various violations of Rule 16 and *Brady v. Maryland*. 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In support thereof the defendant avers as follows:

1. On February 4, 2013, Defendant was arrest and charged with Attempted Murder in the First Degree, Possession of a Firearm During the Commission of a Felony, Possession of a Firearm with an Altered or Obliterated Serial Number, and other felony charges.
2. Since defendant's arrest, the State has continuously and consistently failed to provide or has delayed discovery pursuant to Rule 16 and *Brady v. Maryland* in the following ways:

- a. The State did not download the Affidavit of Probable Cause (APC) to the Deljis system thus denying the Defense an opportunity to review such document prior to the Preliminary Hearing on February 15, 2013. In fact, the Defense did not receive the APC until February 11, 2013, which was four (4) days before the Preliminary Hearing.
- b. On February 25, 2013, the defendant formally requested the State to provide discovery pursuant to Rule 16 and *Brady v. Maryland*. However the State did not provide discovery until April 12, 2013. That discovery consisted of the indictment, police reports, a copy of the defendant's criminal history, and nothing more.
- c. On May 22, 2013, the Defendant filed his first Motion to Compel Discovery pursuant to Rule 16 and *Brady v. Maryland*.
- d. On May 28, 2013, Judge Davis held an office conference to determine the status of the case. The State agreed to turn over the remaining evidence.
- e. On July 26, 2013, we received Carl Rone's Forensic Firearms report. The State indicated

that the substance of his opinion was contained in the report.

- f. On August 26, 2013 and approximately 40 days before the first trial date, we received the gun powder residue report and the DNA Forensic Case Report.
- g. On or about September 20, 2013 and only weeks prior to the trial the state provided transcripts of witness statements including transcripts of a witness who identified another individual as a shooter and who stated that she "never saw defendant with a gun." (see voice mail)
- h. After final case review and less than a week prior to trial, the State provided additional discovery that should have been turned over months prior to trial.
- i. On October 1, 2013 only 6 day before trial, the State provided the Cell phone data downloaded from the cell phones recovered from the car, the WILCOM transmissions related to this incident, the search warrants related to this incident and Pictures taken of relevant text messages from the defendants phone.

- j. On October 2, 2013 and 5 days before trial, the State provided the medical records of Officer Wilkers but failed to provide his statements. The State also provided the CV for medical experts.
- k. On October 2013, an office conference was held to determine if the matter was ready for trial. At that conference, the State admitted that they were late in producing discovery and agreed to continue the case, with such continuance being charged to the state. The State agreed to provide complete discovery.
- l. On October 2, 2013, the Defendant filed a request for specific information relating to the State's expert, Carl Rone.
- m. On December 6, 2013, the defendant again filed a Motion to compel outstanding discovery.
- n. On December 12, 2013, prior to the Office Conference, the State informed defense counsels that there were no notes or additional reports created by Carl Rone. Based on such representation, the Defense agreed to withdraw its motion and not to contest Carl Rone's qualification to testify as a ballistic expert in

identifying the bullet fragment, shell casings and firearms discovered at the scene.

- o. On January 2, 2013, 11 days before the second trial date, the State provided the transcripts for the interview with Officer Wilkers.
- p. On January 7, 2014, 7 days prior to the second trial date, the State provided the photo array that should have been provided with the witness statements and police reports.
- q. On January 8, 2014, 6 day prior to the second trial date, the State provided the defendant with the crime scene diagram.
- r. On January 10, 2014, the State informed Defense counsel that a key witness, Ronald Boyce had changed his story and may testify differently; however the State failed to inform Counsel that Ronald Boyce had admitted that he possessed a Firearm. The Statement was not recorded, leaving the defense with no recourse in cross-examination.
- s. On January 13, 2014, the day before trial, the State provided a copy of a zoomed video, not previously given to the defense, taken from a

building near the scene, and a set of still pictures from that video.

- t. On January 13, 2014, the day before trial, the State, after being confronted by defense counsel that the witness Ronald Boyce changed his testimony, admitted that Ronald Boyce informed them that he possessed a .40 caliber firearm.
- u. On January 14, 2014, on the second day of trial, after testimony by Ofc. Murphy, the defense learned of a supplemental report filed by Det. Pigford. This report contained information related to the zoomed video footage already admitted into evidence, the fact that Ofc. Murphy had changed his story of the incident, Ofc. Rone's expert conclusions on the bullets, and additional defendant statements not turned over previously.

Brady v. Maryland and Rule 16 Requires the State to Turn Over Exculpatory Evidence in a Timely Manner

1. The Defendant is entitled to receive any and all evidence that tends to be exculpatory; failure to turn over that evidence in a timely manner is a violation of

defendant's due process rights under the U.S. Constitution.¹

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."²

2. Brady has three components: "(1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the State; and (3) its suppression prejudices the defendant."³ It is the duty of the Prosecutor in each case "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police . . ." and to turn that evidence over to the defense.⁴ In the instant case, there are multiple Brady violations which have occurred, each of which satisfies all three prongs of *Brady*.

3. The State has withheld multiple pieces of evidence, and has repeatedly shown an unwillingness to provide evidence in this case to the defense, prejudicing the

¹ Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

² *Id.* at 1196-1197.

³ State v. Wright, 67 A.3d 319, 324 (Del. 2013).

⁴ *Id.*

defense. This case was originally set for trial in October of 2013. The State provided witness interviews the week prior to that trial date, including an interview with Channeisha Portis in which she identifies a co-defendant Ronald Boyce as a shooter. She indicates that she witnessed Ronald Boyce exit the vehicle with a black 9mm, the same weapon the State alleges was used to shoot the victim. She continues, stating that Ronald discharged the weapon at the officer before running away. This information was withheld from the defense, and was only provided in the week prior to the original trial date.

4. The day prior to the current trial date, the State provided video footage, showing an extreme close-up or zoom, of the incident. This had not been previously provided. The Defense was in receipt of three unzoomed videos showing the incident, as well as one zoomed video, but not the extreme zoomed video that the State later showed at trial.

5. The State also failed to provide a copy of Det. Pigford's supplemental report that was apparently written in February of 2013. He was Report contained the following information that has either not been turnover to the defense or has been turned over during the middle of he trial. This information include,

- a. An interview with Ofc. Murphy in which he contradicts his prior statement and his police report. This report was not turn over until after Ofc. Murphy had begun testifying.
- b. A report from the F.B.I. who had been consulted on the zoomed video footage. An inquiry had been made to them regarding its clarity, showing that the State had their own concerns regarding its clarity. The State not only failed to disclose such information to the Defense, but also failed to disclose that information to Court at the Rule 403 Motion hearing to exclude the video.
- c. An ultra zoomed Video tape that was the subject of the Rule 403 Motion was created in February of 2013 and was never provide to the Defense. The Defense only learned of the existence on the video on January 13, 2014, hours before the hearing and less than a day before trial.
- d. A report from Carl Rone, the State's ballistics expert, who states that he is able to determine Bullet that struck Ofc. Wilkers, and that that bullet most likely ricocheted off the police cruiser. This information was never turnover to the Defense. In fact, the State stated at the

December 12, 2013 office conference that there were not additional notes or reports from this expert. The information concerning the bullet and the ricochet was previously unknown to the defense and not documented anywhere in Ofc. Rone's report.

- e. A recorded interview the Darlene Harvey that was conducted in June of 2013. In that report the defendant is supposedly to have made statements to her concerning the incident. Her interview, containing alleged statements made by the defendant was never turned over.
6. The State failed to disclose that their expert would be testifying to Crime Scene Reconstruction, Trajectory Angles and Firing location. The States discovery report says nothing about Crime Scene Reconstruction, Trajectory Angles and Firing location. In fact, the defendant was not made aware that the Carl Rone would be testifying concerning Crime Scene Reconstruction, Trajectory Angles and Firing location until that such was announced in the State's opening.
7. The first prong of *Brady* is satisfied in each of these three cases. In the first case, the evidence is clearly exculpatory; and there is an indication that a co-defendant

was the shooter, not the defendant. The withheld information from Carl Rone goes directly to the heart of the Charge of Attempted Murder in the First Degree.

8. In the second case, the video had not previously been handed over to the defense. Different 'versions' had been provided, including the unzoomed footage and the single zoomed video, but not the ultra-zoomed footage later shown at trial.

9. In the third case, Ofc. Pigford's supplemental report is replete with information that could be exculpatory or could be used for impeachment purposes. Ofc. Murphy's testimony has inconsistencies previously unknown to the defense and could be used to impeach. The F.B.I. analysis of the video forage shows that the State had concerns about video quality as well which could have been used to impeach their witnesses which laid the foundation for them to admit the video into evidence. Lastly, Ofc. Rone's conclusion that the bullet which entered Ofc. Wilkers was a ricochet could change the trajectory of the bullet, possibly indicating that the shooter was operating from a different location.

10. The second prong of *Brady* is also clearly satisfied in each case because the State failed to hand over any evidence. The State conducted the witness interviews

immediately after the incident, and would have been in receipt of them for nearly 8 months before turning them over, and then only after a motion to compel had been filed. The ultra-zoomed video footage was never turned over, but was shown to the defense prior to trial, and was later shown to the Jury. The supplemental report was provided mid-trial and only after the defendant raised an objection. The F.B.I. report indicated in the supplemental report was never provided, nor mentioned as possible discovery to the defense.

11. The third prong is also met in each case, because failure to promptly provide this information to the defendant has prejudiced his defense. Regarding the witness interviews, the State has been unable to find Channeisha Portis or to provide her to the defense for testimony. Had the defense known earlier that she was a possible exculpatory witness, subpoena's or material witness warrants could have been issued earlier, securing her for trial. Having been shown the ultra-zoomed video the day before trial, the defense was unable to prepare experts to testify on video quality on such short notice. And the supplemental report contains a plethora of information that could tend to be exculpatory and the

defense was given inadequate time to prepare to use that information.

12. The defendant has filed two separate motions to compel the discovery of evidence in this case and a has made several request for additional information. The State provided only the bare minimum after each motion, and failed to alert the defendant to additional possible discovery, including *Brady* material, such as the supplemental report, the F.B.I. analysis of the video footage, and Ofc. Rone's expert conclusions. The State has shown a repeated pattern of behavior in this case of delaying the discovery of information, resulting in exculpatory evidence not being turned over to the defendant.

**The Fifth Amendment of the United States Constitution and
Delaware Constitution Bars Retrial**

13. The defendant requests a dismissal in this case based on the aforementioned conduct. A mistrial may be declared where there is 'manifest necessity' or the 'ends of public justice would be otherwise defeated.'⁵ The defendant believes that the repeated prosecutorial misconduct

⁵ Revel v. State, 956 A.2d 23, 27 (Del. 2008).

prejudices the defense, and a mistrial is warranted as a 'manifest necessity'.

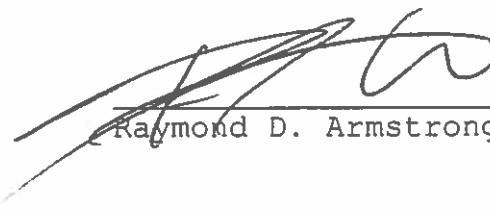
14. Furthermore, double jeopardy under the Fifth Amendment of the U.S. Constitution should attach. While typically if the defendant requests a mistrial, double jeopardy does not attach, there is an exception where the State has 'goaded' the defendant into requesting a mistrial.⁶ "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or prosecutor," threatens the "(h)arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant."⁷ The prosecution has displayed escalating behavior in not providing evidence favorable to the defense, necessitating this motion. Because the conduct of the prosecution has been repetitive and has violated *Brady*,

⁶ Oregon v. Kennedy, 456 U.S. 667, 673, 102 S. Ct. 2083, 2088, 72 L. Ed. 2d 416 (1982).

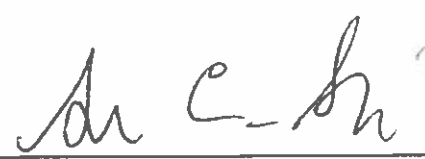
⁷ U. S. v. Dinitz, 424 U.S. 600, 611, 96 S. Ct. 1075, 1081, 47 L. Ed. 2d 267 (1976) (quoting United States v. Jorn, 400 U.S. 470, 484, 91 S. Ct. 547, 557, 27 L. Ed. 2d 543 (1971)).

the defense requests that the case against him be dismissed and further prosecution barred.

WHEREFORE based on the aforementioned reasons the defendant respectfully requests that this Honorable Court dismiss the charges with prejudice.



Raymond D. Armstrong



David C. Skoranski
Assistant Public Defender
900 N. King Street
Wilmington, DE 19801
Phone No. 255-0157

Date: January 16, 2014

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

FREDERICK GRAY,)
)
 Petitioner,) Case No. 1302002738
)
 v.)
)
 STATE OF DELAWARE,)
)

ORDER

AND NOW, TO WIT, this _____ day of _____,
A.D., 2014, the foregoing Motion having been heard and
considered, it is hereby;

ORDERED:

JUDGE

1 that they are unable to contact Chaneisha Portis.
 2 They have a material witness warrant out for her.
 3 They can't find her. We have been looking for her
 since this was turned over to us.

5 THE COURT: Who signed the warrant? I don't
 6 think I did.

7 MR. GRUBB: We don't have a material witness
 8 warrant out for her, Your Honor. At the office
 9 conference with Your Honor in December the defense
 10 indicated they wanted to get a material witness for
 11 her and we discussed it and said that we were
 12 looking for her as well. We don't have a warrant
 13 out for her.

4 THE COURT: Okay. This transcript was
 5 turned over in October?

6 MR. GRUBB: September.

7 THE COURT: Okay.

8 MR. GRUBB: September 20th, to be specific,
 9 Your Honor.

10 THE COURT: Okay.

11 MR. ARMSTRONG: About less than two weeks
 12 before trial. And that this same transcript had
 13 been in the State's possession since February of

31

2013.

THE COURT: Okay. But nothing that was
 turned over yesterday is impacted by this
 transcript?

MR. ARMSTRONG: Yesterday, no. The only --
 and the reason why it's not because we can't find
 her. And so, the pattern is what prevents us from
 continuing with this trial. We don't believe we
 can effectively represent our client at this time.

THE COURT: Anything else?

MR. ARMSTRONG: No, Your Honor.

THE COURT: Okay.

MR. ARMSTRONG: May I have a moment, first?

THE COURT: Yes.

MR. ARMSTRONG: Nothing further, Your Honor.

MR. GRUBB: May I have just one moment, Your
 Honor?

THE COURT: Yes.

MR. GRUBB: All right. First, I read
 through the defense's motion, which we just
 received this morning. And to the extent the Court
 would like a response formally to that, of course,
 we would respectfully request time to do so.

1 I tried to skim through it and I can address
 2 it, specifically, if the Court is so inclined. But
 3 moving the specific arguments made orally by
 4 defense counsel, there are just gross
 5 misrepresentations where the record needs to be
 6 cleared.

7 First, Chaneisha Portis, that was the woman
 8 who gave the statement where Mr. Armstrong read
 9 portions of the transcript into the record.
 10 Chaneisha Portis' transcript and DVD was disclosed
 11 to the defense on September 20th, 2013. It's now
 12 January, 2014. And while Mr. Armstrong
 13 continuously referred to the first trial date,
 14 that's all done. They had an office conference in
 15 October, issues were brought up, issues were ruled
 16 upon. Here we are. That's not relevant to what
 17 happened yesterday, it's not relevant to why we're
 18 here now. It is -- to use one of Mr. Armstrong's
 19 words -- boot strapping.

20 It's also grossly inaccurate to put forth to
 21 the Court that she says Ronald Boyce's the shooter,
 22 period. She says Ronald Boyce is a shooter.
 23 Detective Pigford asks Chaneisha Portis, Who shot

33

1 the cop? Chaneisha Portis's answer is Freddie.
 2 She says he got out of the passenger side all
 3 smooth like and shot the cop.

4 THE COURT: Let's focus on materials that
 5 were turned over yesterday.

6 MR. GRUBB: Yes, Your Honor.

7 THE COURT: Frankly, the continuation of the
 8 trial in October, I believe, cured any prejudice to
 9 the defendant at that time.

10 MR. GRUBB: With respect to what was turned
 11 over yesterday, Detective Pigford's supplemental
 12 report. We thought it was turned over, it was an
 13 oversight. There is no getting around that. That
 14 is something that is on the State. However, the
 15 only additional information that was not previously
 16 provided months ago that is in Sergeant Pigford's
 17 report, was the first -- the second interview, if
 18 you will, with Officer Kevin Murphy. The interview
 19 that had an inconsistency with respect to how many
 20 people he recalled chasing; that's the one
 21 inconsistency there. The State elicited that on
 22 direct examination.

23 Officer Murphy also wrote a report which was

1 previously provided and gave a taped interview,
 2 which was previously provided. It is that one
 3 seven sentence paragraph that was additional.
 4 Where the only real inconsistency is that Officer
 5 Murphy recalled only chasing one individual into
 6 the alley and not two. That's not Jencks material
 7 because Superior Court 26.3(f) tells us that's not
 8 a statement that falls under that category. But
 9 even if it was, we would be in compliance with it.

0 It's not Brady because as the Third Circuit
 1 tells us in United States v. Johnson, citation 816
 2 F.2d 918, that court laid out that when the
 3 government makes Brady evidence available during
 4 the course of a trial in such a way that a
 5 defendant is able effectively to use it, due
 6 process is not violated and Brady is not
 7 contravened.

8 They also cite U.S. v. Peters, citation 732
 9 F.2d 1004, a 1984 First Circuit case, which stands
 10 for the premise that Brady is not contravened where
 11 the government disclosed evidence on the trial's
 12 fourth day and the defendant was able to
 13 cross-examine witnesses on and make full use of the

evidence. I'll come back to that, but that's
 exactly what we have here.

There's also another case U.S. v. Clark,
 citation 538 F.2d 1236, which stood for the premise
 that the disclosure of negative fingerprint report
 evidence to the defense on the trial's third day
 was consistent with Brady where the report was
 later disclosed to the jury.

And they distinguished that from the current
 case because here -- let's bring it to what we have
 with Officer Murphy, there were already
 inconsistencies with Officer Murphy that defense
 counsel has known about for months. His report
 does not gel with his statement to Sergeant
 Pigford; that was known. In fact, it was made
 clear in defense counsel's opening statement as
 well as the tenor of cross-examination that part of
 the defense's theory is that it was a chaotic scene
 and people got things wrong. The defense already
 knew that about Officer Murphy.

All they learned yesterday was that there is
 one additional inconsistency. That was cured by
 Your Honor giving defense counsel an additional

1 two hours yesterday afternoon, they got the full
 2 unredacted report. They had all night last night
 3 and cross-examination is to begin today. It does
 4 not effect the defense, the theory of the case or
 5 the cross-examination because, I imagine, defense
 6 counsel was going to cross-examine Officer Murphy
 7 about his inconsistencies anyway.

8 It was also referenced about some FBI
 9 report. Point blank, Your Honor, I don't know what
 10 else to say other than there is no FBI report.
 11 There never was an FBI report. There never will be
 12 an FBI report.

13 The Wilmington Police Department asked the
 14 FBI if they could enhance the video and they said
 15 no. How that amounts to any discovery violation or
 16 Brady or Jencks or anything, I, quite frankly,
 17 don't know how to answer because it does not exist;
 18 and it does not adversely effect or impact anything
 19 that was already previously disclosed.

20 Going back to the last point counsel made
 21 with respect to yesterday, the video of the video,
 22 well, clearly they knew about the video of the
 23 video because we've already discussed this. It's

1 my understanding it was discussed at the office
 2 conference earlier this week. It's my
 3 understanding that it was discussed amongst
 4 counsel. And, also, there was long
 5 cross-examination from two separate witnesses that
 6 the defense required be present, so we made them
 7 come in and be available to go over what exactly
 8 happened with the video, how it was recorded, how
 9 it was created. And those witnesses have testified
 10 and were subjected to cross-examination on the
 11 issue.

12 So, specifically, with respect to Detective
 13 Pigford's supplemental report, those are the only
 14 things that were not previously known. It was
 15 argued that there's something in there -- or if I
 16 understood it correctly, and if I didn't I
 17 apologize, but it was argued that there was
 18 something in there about Carl Rone. It's worth
 19 mentioning, the defense did file a motion to compel
 20 for Carl Rone's ballistic documentation. If Your
 21 Honor recalls, we discussed this with defense
 22 counsel. Mr. Armstrong said on the record that he
 23 filed the wrong motion, what he meant to file was

1 to get the documentation for the GSR, so

2 Mr. Frawley got that and gave it to him.

3 Your Honor then asked the State to type up a
4 stipulation summary of what was discussed at the
5 office conference. I did that. In that
6 stipulation summary -- and I e-mail exchanged with
7 Mr. Skoranski, we said, there are no issues with
8 the ballistics. The defense has everything they
9 want and they are not challenging the reports.

0 Mr. Skoranski says, well, we still get to
1 cross-examine him, I said, of course, but this is
2 to deal with the motion you wrote. And we all
3 agreed. So now here we are again arguing about
4 Carl Rone and ballistics. They have everything.

5 It was argued that they just now are
6 receiving information. Your Honor, Carl Rone's
7 ballistic report and all accompanying documentation
8 was sent to counsel on July 26, 2013. In that
9 discovery packet on Page 2 of Carl Rone's report he
0 discusses the trajectory analysis. He discusses
1 everything that Mr. Armstrong claims he never knew
2 about. That's in July. So, it's all there.

3 It may not use the words that Mr. Armstrong

4 is using, but he's had the report and everything
5 that Mr. Rone is going to say since July.

6 THE COURT: So you're okay with limiting the
7 testimony to whatever he said in the July report?

8 MR. GRUBB: I'm okay with limiting the
9 testimony to whatever was disclosed and discussed
0 amongst counsel.

1 MR. ARMSTRONG: And that's the --

2 THE COURT: I'll give you a chance.

3 MR. GRUBB: My understanding from conferring
4 with Mr. Armstrong and Mr. Skoranski specifically
5 on ballistics, we asked them, as we're waiting
6 outside to go see Your Honor in December, what is
7 it that you want, what is it that you're concerned
8 about, what is it that you need. The answer was
9 nothing. We don't care about -- a direct quote
0 was, We don't care about Carl Rone. I have no
1 problem with that. We wanted GSR, I sent you the
2 wrong motion. So, I think it's unfair now to limit
3 us because Mr. Armstrong changed his mind. We
4 would have worked that all out. We didn't have an
5 opportunity to do because he said he didn't need
6 anything else. We were more than prepared if Your

1 Honor recalls.

2 Mr. Frawley said we were prepared to discuss
3 what to give him and the reason we didn't respond
4 to the motion to compel is because we thought we
5 gave him everything. Mr. Armstrong's response was,
6 yeah, I don't care about the ballistics, I wanted
7 GSR stuff, which we got and disclosed.

8 THE COURT: Anything else?

9 MR. GRUBB: It was also referenced about a
10 Darlene Harvey interview that they never got. They
11 received that Darlene Harvey interview back on
12 September 20th as well. It was just mislabeled in
13 the discovery letter. It said, Darlene Johnson
14 rather than Darlene Harvey, that's a typographical
15 error. The DVD and transcript that was provided
16 had the correct name, and they've had that since
17 September as well. So, if they watched it then
18 they know who it was and what was said, and it was
19 defendant's girlfriend at the time. So that was an
20 incorrect statement.

21 There's a lot of arguments about when
22 Officer Wilkers' statements were turned over.
23 Well, they are Jencks, they were turned over long

1 in advance of when they were legally required to be
2 produced.

3 And unless Your Honor wants me to
4 specifically address anything from the trial date
5 that was raised by Mr. Armstrong then I have
6 nothing else to add.

7 THE COURT: No.

8 MR. ARMSTRONG: If I may respond, Your
9 Honor?

10 THE COURT: Yes.

11 MR. ARMSTRONG: Start with the last one
12 first. For the record, we have a DVD turned over
13 to us on the 20th for Wilkers' police car at the
14 hospital which are photos, one for pictures of
15 suspect's vehicle.

16 THE COURT: Hold on. Let's just focus on
17 Darlene Harvey, Your Honor.

18 MR. ARMSTRONG: I'm going through because I
19 want the Court to know I have no Darlene Harvey or
20 Darlene Johnson.

21 THE COURT: That's fine. That's all you
22 have to say.

23 MR. ARMSTRONG: Second of all, it's ironic

1 that, again, the State doesn't address the ricochet
2 issue.

3 THE COURT: I thought they --

4 MR. ARMSTRONG: He talked nothing of the
5 ricochet. He talked about the report that was
6 turned over where Carl Rone says that the bullet
7 struck the car first and then struck Officer
8 Wilkers.

9 THE COURT: And if we can --

10 MR. ARMSTRONG: And we --

11 THE COURT: Okay. July 26th report says the
12 bullet struck the car first and then Officer
13 Wilkers.

14 MR. ARMSTRONG: Your Honor, if we can hand
15 up the copy of it, it does not say what the
16 Court -- it says a bullet struck the car, it
17 doesn't say which bullet struck the car.

18 Part of the purpose of experts is to show,
19 is to offer what opinion to testify.

20 THE COURT: Okay. I know that. We don't
21 have to go through this. We're just trying to get
22 to when the ricochet was turned over. You say that
23 that was in the report yesterday?

1 MR. ARMSTRONG: That was in the report where
2 Officer Pigford stated that Carl Rone opines that
3 the bullet struck the car and ricocheted.

4 In the report --

5 THE COURT: Okay. Stop. Stop. So, there's
6 no Carl Rone statement in what was turned over
7 yesterday, it was an officer giving an opinion
8 about what he said?

9 MR. ARMSTRONG: It was an officer referring
10 to a report. And that's how we believe it's
11 couched, that -- of an opinion of Carl Rone, an
12 expert from which he spoke to.

13 And in the discovery on July 26th, the
14 opinion -- there is no opinion. He says the
15 firearm matches the gun. He says the gun -- the
16 gun matches the bullets. He says the bullets are
17 nine-millimeter. He says the gun is a
18 nine-millimeter. He says the guns and the bullets
19 were fired from the same gun.

20 THE COURT: So, are you saying the officer
21 looked at a different report than what was turned
22 over?

23 MR. ARMSTRONG: That's the only thing we can

1 conclude because nowhere in the report is the word
2 "ricochet." Nowhere in the report says that Carl
3 Rone offers the opinion -- the first time we
4 learned that Carl Rone is going to say that someone
5 was standing here, shot the gun, it hit there and
6 went there is in opening statements. The report --
7 if you look at the report -- and we'd like to hand
8 up the July 26th report, the State wants to hand
9 that up to say that they turned it over to us, he
10 says he'll testify consistently to what's in the
11 report. The report just shows pictures and angles,
12 that's it. It doesn't say anything else.

13 I have a 27-page Daubert request that we
14 were going to make on Carl Rone.

15 THE COURT: Okay. But I'm trying -- you say
16 the officer looked at another report?

17 MR. ARMSTRONG: That is our contention, Your
18 Honor, because where else would he get the term it
19 "ricocheted?" Where else would he get the term
20 that he -- in the report he doesn't say it hit --
21 and he says, It hit the car first. The report
22 doesn't say it hit the car first. Nowhere in the
23 report does it say it hit the car first.

1 In the report nowhere does it say there was
2 a ricochet.

3 THE COURT: So where -- we're arguing about
4 a person -- is this person an expert who is going
5 to testify?

6 MR. ARMSTRONG: Carl Rone?

7 THE COURT: No. The officer that said there
8 was a ricochet?

9 MR. ARMSTRONG: No, we're arguing about the
10 fact that --

11 THE COURT: I --

12 MR. ARMSTRONG: No, he's not. He's the
13 Chief Investigating Officer in this case that has
14 sat through the entire trial that has compiled the
15 entire synopsis of the case, that was the subject
16 of why we know there was a second interview with
17 Officer Murphy, the reason why we know there was an
18 interview on the 16th with Ms. Harvey, why we know
19 that Carl Rone has a second opinion, why we know
20 that the State had the video prior to showing it to
21 us on the 13th.

22 THE COURT: Okay. But there's nothing in
23 the report yesterday that says I'm looking at a

1 second report and this is my conclusion.

2 You don't know where he got that opinion
3 from; correct?

4 MR. ARMSTRONG: He says he got it from Carl
5 Rone.

6 THE COURT: Okay.

7 MR. ARMSTRONG: And that's something --
8 we -- no, we would have never agreed to Carl Rone
9 testifying that there was -- he can come with the
10 trajectories and the angles and stuff, that was
11 never in the report. The report only talked about
12 the bullets. And we're okay with the bullets.

13 THE COURT: Okay. Stop. Stop. But he can
14 testify as to the July 26th report and what you
15 guys stipulated to?

16 MR. ARMSTRONG: As to the bullets and the
17 tool marks, yes.

18 THE COURT: Fine.

19 MR. ARMSTRONG: But the problem is the State
20 has already argued that he's going to come in and
21 testify to the strangulations.

22 THE COURT: Mr. Grubb?

23 MR. GRUBB: Your Honor, it's in there. The

trajectory is in there. It says on Page 2, second
paragraph -- and I'm going towards the end for the
relevant parts, The marks direction of travel is...
and then it goes to show it. Second paragraph:
The marks direction of travel is front-to-back.

Third paragraph, Impact mark three is a
defect on the front passenger door to the front
impact number one, no major damage.

It's in there. Mr. Armstrong is not giving
you the full picture.

MR. ARMSTRONG: Actually, the State is not
giving you the full picture.

THE COURT: Stop. Stop. Stop. He can
testify as to what's in his report. The
disagreement is subject to cross-examination.

MR. ARMSTRONG: So, am I also understanding
that he will not be testifying to where persons or
people stood when the --

THE COURT: I don't know. We go through
trial on this point and we make a proper objection
during trial. You have the report. He can testify
accordingly.

MR. ARMSTRONG: I understand, Your Honor.

1 I still think that the Court may be using
2 the wrong analysis in here, because the question --
3 I don't think the Court can take the previous trial
4 and the previous State's demeanor and stuff in
5 isolation. I think the Court has to look at the
6 cumulative effect of everything.

7 THE COURT: The last prong if you look at
8 Brady is its suppression prejudice to the
9 defendant. The prejudice was cured once trial was
10 delayed to allow you to review that documentation.

11 MR. ARMSTRONG: The only problem --

12 THE COURT: The -- the report, as of
13 yesterday, we were talking about a simple paragraph
14 that I gave you time to review that involved a
15 number of people that he chased. That was cured by
16 the time that I gave you overnight to review the
17 documentation.

18 I don't find that there's any second report
19 that -- of Carl Rone that they had to turn over.
20 It's just not clear to me.

21 And the FBI report, I think, is a red
22 herring and that was certainly something that
23 didn't have to be turned over.

1 So for those reasons, your motion is denied.

2 MR. ARMSTRONG: Your Honor, at this point, I
3 think Mr. Skoranski and I move to withdraw as
4 counsel. We do not believe we can effectively
5 represent our counsel and we believe we are
6 providing ineffective assistance and counsel at
7 this time.

8 THE COURT: Your motion to dismiss has been
9 denied. You will continue with trial.

10 Your motion to withdraw is also denied.

11 MR. ARMSTRONG: Your Honor, may we have a
12 break, Your Honor?

13 THE COURT: I was just getting ready to say
14 let's take about 10 minutes.

15 Court stands in recess.

16 (Recess taken.)

17 THE COURT: Just want to supplement that the
18 Court records shows that the interview with Darlene
19 Johnson was turned over September 20th. It's time
20 stamped and clocked in.

21 MR. ARMSTRONG: We don't have it, Your
22 Honor. We made a second request for it today.

23 THE COURT: Okay. It's in there.

1 Honor.

2 THE COURT: Anything else?

3 MR. SKORANSKI: No, Your Honor. I have no
4 other questions prompted out of that.

5 THE COURT: Let's go to sidebar.

6 (Whereupon, a discussion was held at sidebar
7 as follows:)

8 MR. SKORANSKI: Your Honor, I agree that she
9 wasn't handcuffed. They didn't put a gun to her
10 head. She wasn't forced in the classic sense of
11 the term, but she was told she couldn't leave. She
12 didn't want to be there. She didn't want to answer
13 questions. They told her she had to because they
14 were looking for her son. I believe her statement
15 is involuntary.

16 THE COURT: What's the test for
17 voluntariness? I mean, even if a police officer
18 says you don't have to testify, make a statement
19 but you won't have to testify, that's still
20 voluntary, isn't it?

21 MR. SKORANSKI: If they deceive, okay.

22 THE COURT: Yes; isn't it?

23 MR. SKORANSKI: Yes. I agree that would be

1 a voluntary statement because you believed you were
2 going to get something out of it. But in this case
3 I believe she didn't -- it's not the same because
4 in this case she was basically placed under arrest
5 without the handcuffs, told she couldn't leave, we
6 need a statement from you, you need to answer these
7 questions and you could not go. You have to stay
8 and answer these questions. If you're being forced
9 to stay somewhere I don't think that can be
10 voluntary.

11 THE COURT: Okay. How does that square with
12 the fact she said it was voluntary?

13 MR. SKORANSKI: Well, from the voir dire she
14 admitted -- she, to me, details that it wouldn't be
15 voluntary. She might believe it was voluntary
16 but given the details it was not.

17 MR. GRUBB: Two things: The record that
18 we're left with is that she said she talked to the
19 officer without him forcing her to answer any
20 questions, that should do it then and there.

21 However, secondarily it appears as though
22 defense counsel's argument is relying upon the fact
23 when someone is under arrest, not free to go, their

1 statement cannot be voluntary. That is obviously
2 flawed in that people are detained and/or arrested
3 regularly, and this Court and our Supreme Court has
4 found that those statements are voluntary when
5 certain criteria has been met.

6 Under the Black case we are getting guidance
7 from the Supreme Court as to when a statement is
8 voluntary and nothing from voir dire has
9 contradicted the witness's direct answers as to
10 whether or not she was forced to talk and answer
11 questions to the detective.

12 THE COURT: Anything else?

13 MR. SKORANSKI: If I can respond very
14 briefly to that?

15 THE COURT: Yes.

16 MR. SKORANSKI: One of those tests is to see
17 if Miranda warnings were read.

18 THE COURT: One of what test?

19 MR. SKORANSKI: He's talking about when
20 people are under arrest and giving statements.

21 THE COURT: Okay. But that's not at issue
22 here, so I don't know how Miranda applies to this.

23 MR. SKORANSKI: I don't --

1 THE COURT: Because she was absolutely not
2 under arrest.

3 MR. SKORANSKI: She was told she couldn't
4 leave; she was told she had no choice but to stay.

5 THE COURT: To stay. But then she also said
6 she gave the statement voluntarily. And I don't
7 know how we get around that, so, as the Court views
8 it, the statement was voluntary.

9 MR. SKORANSKI: Yes, Your Honor.

10 THE COURT: Do you guys want to switch now
11 or should we wait for the jury to come back in?

12 MR. GRUBB: We can switch now if that's all
13 right with the Court.

14 THE COURT: All right.

15 (Whereupon, the discussion held at sidebar
16 concluded.)

17 THE COURT: I'm going to ask you to step
18 down, but just remain in the courtroom. They are
19 going to play -- just sit in a seat in the back.
20 And we will call you back up.

21 Detective, would you take the stand.

22 You may bring the jury back in.

23 THE BAILIFF: Yes, Your Honor.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE

VS.

FREDERICK O GRAY

Alias: FRED GRAY

DOB: 08/04/1991

SBI: 00489612

CASE NUMBER:

1302002738A

1302002738B

1302003053

CRIMINAL ACTION NUMBER:

IN13-02-0805

ATT MURDER 1ST(F)

IN13-02-0806

PFDCF(F)

IN13-02-0807

PFBPP/INJURY(F)

IN13-02-0809

ROBBERY 1ST(F)

IN13-02-0812

CONSP 2ND(F)

IN13-02-1821

POS WEAP NO SER(F)

IN13-02-0808

RESIST ARREST(M)

COMMITMENT

SENTENCE ORDER

NOW THIS 25TH DAY OF APRIL, 2014, IT IS THE ORDER OF THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged. The defendant is to pay the costs of prosecution and all statutory surcharges.

AS TO IN13-02-0805- : TIS

ATT MURDER 1ST

Effective February 4, 2013 the defendant is sentenced as follows:

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5

- This sentence is consecutive to any sentence now serving.

AS TO IN13-02-0806- : TIS

APPROVED ORDER 1 January 30, 2015 08:01

Exhibit E

STATE OF DELAWARE
VS.
FREDERICK O GRAY
DOB: 08/04/1991
SBI: 00489612

PFDCF

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

AS TO IN13-02-0807- : TIS
PFBPP/INJURY

- The defendant is placed in the custody of the Department of Correction for 6 year(s) at supervision level 5

AS TO IN13-02-0809- : TIS
ROBBERY 1ST

- The defendant is placed in the custody of the Department of Correction for 10 year(s) at supervision level 5

AS TO IN13-02-0812- : TIS
CONSP 2ND

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

AS TO IN13-02-1821- : TIS
POS WEAP NO SER

- The defendant is placed in the custody of the Department of Correction for 8 year(s) at supervision level 5

AS TO IN13-02-0808- : TIS
RESIST ARREST

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
FREDERICK O GRAY
DOB: 08/04/1991
SBI: 00489612

CASE NUMBER:
1302002738A
1302002738B
1302003053

Defendant is to undergo a mental health evaluation and follow any recommendations for counseling and treatment as deemed appropriate by DOC .

Pursuant to 29 Del.C. 4713(b)(2), the defendant having been convicted of a Title 11 felony, it is a condition of the defendant's probation that the defendant shall provide a DNA sample at the time of the first meeting with the defendant's probation officer. See statute.

NOTES

Pursuant to 11 Del. C. 4204(L) Probation is not being recommended due to the Life sentence.

JUDGE CALVIN L SCOTT JR

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
FREDERICK O GRAY
DOB: 08/04/1991
SBI: 00489612

CASE NUMBER:
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SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	555.00
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	300.00
PROSECUTION FEE ORDERED	200.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	7.00
DELJIS FEE ORDERED	7.00
SECURITY FEE ORDERED	70.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	105.00
SENIOR TRUST FUND FEE	

TOTAL 1,244.00

APPROVED ORDER 4 January 30, 2015 08:01

AGGRAVATING-MITIGATING

STATE OF DELAWARE
VS.
FREDERICK O GRAY
DOB: 08/04/1991
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AGGRAVATING

PRIOR VIOLENT CRIM. ACTIVITY
NEED FOR CORRECTIONAL TREATMENT
LACK OF REMORSE
UNDUE DEPRECIATION OF OFFENSE