



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JHAVON GOODE,

Defendant-below/
Appellant,

vs.

STATE OF DELAWARE,

Plaintiff-below/
Appellee.

No.: 276, 2015

Court Below:
Superior Court of the
State of Delaware,
in and for Sussex County,
Delaware

C.A. No.: 14-04-0681 thru
0682, 14-04-0685

APPELLANT'S OPENING BRIEF ON APPEAL

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NATURE AND STAGE OF PROCEEDINGS

On October 9, 2014, the State of Delaware filed an amended indictment against Jhavon R. Goode, (“Goode”). The charges included one count of Assault in the First Degree, one count of Possession of a Firearm During the Commission of a Felony, and one count of Carrying a Concealed Deadly Weapon.¹

Prior to trial, Goode filed a Motion in Limine seeking to exclude from introduction at trial a photo used by the victim for identification of the defendant. The trial court denied the motion.

The case went to trial on January 12, 2015 through January 15, 2015. A jury found Goode guilty on all charges.

Prior to sentencing, Goode filed a Motion for Judgment of Acquittal or in the alternative a Motion for a New Trial. Goode argued that the State offered insufficient evidence to sustain a verdict of guilt. The motion was denied and Goode was sentenced to 5 years at supervision level 5 for the PFDCF charge, 8 year at level 5 for the Assault, and 5 years at level 5 for the CCDW.

This is his Opening Brief in support of a timely-filed appeal.

¹ On October 13, 2014, the lower court granted a motion to sever on other charges against Goode.

SUMMARY OF ARGUMENT

1. The trial court should have never admitted the unreliable eyewitness identification at trial which likely led to misidentification.

2. The State violated their discovery obligations when they did not provide the identity of the individual who provided the “show up” photograph to the victim. Defendant was unable to cross-examine the critical witness.

3. The State’s evidence consisting primarily of unreliable witness identification is insufficient evidence to sustain a guilty verdict.

4. The trial court’s response to the jury’s request for a clarification on the reasonable standard was deficient. The trial court’s decision to reread the standard jury instruction on reasonable doubt did nothing to clarify the jury’s confusion.

5. The trial court’s denial of Goode’s continuance request at sentencing in order to conduct testing on the gun was in error.

STATEMENT OF FACTS

A. Mr. Terry is Shot by an Unknown Man during an Attempted Drug Deal.

On April 9, 2015, at around 5:30 pm, Jason Terry, a twice convicted drug dealer, went to 105 Montgomery Street in Milford to sell seven grams of marijuana to some unknown individuals. (A-29) (A-30) The area of 105 Montgomery Street was a known area for people drinking alcohol and hanging out at all hours of the night. (A-18)

At the time of the shooting, there were a lot of individuals hanging out at that vicinity. (A-19) At least 8-10 people were on the porch at the time of the shooting. (A-20) Witness Michael Doughty recognized Jhавon Goode as one of the individuals hanging out that day. (A-21) Doughty did not see Goode with any kind of weapon. (A-22)

Upon arriving, Terry was told that two men in the backyard were looking to purchase marijuana. (A-32) Terry reported coming from the basketball courts, yet on video he was seen coming from the complete opposite direction. (A-35) Terry had never met the two men before. (A-32) One of the men was sitting in a car and the other was standing behind the house. (A-33) The man standing up pointed to the man in the car indicating he wanted to buy marijuana. The individual in the car was hunched over with one hand under his shirt. (A-34)

The man in the car indicated he wanted the marijuana. (A-35) At that point, Terry quoted him a price. (A-35) Prior to making the sell, the man in the car pulled out a weapon and cocked the gun back. (A-36) Terry asked the man, “You’re getting ready to rob me for seven grams of marijuana”. Terry was shot twice, dropped the marijuana, and began to run. (A-37) Terry suffered injuries to his right and left arms. (A-39) Terry was lying in a semi-conscious state on the sidewalk when police found him. (A-9) No money or drugs were taken from Terry after the shooting.

When police arrived, the scene was very chaotic. (A-23) At least 15-20 people were on the scene mulling about. (A-25) Officer Wyatt of the Milford Police provided first aid to Terry until an ambulance could arrive. (A-23) After the ambulance arrived, police scoured the grounds to gather evidence. (A-24) Police found two shell casings in the backyard. (A-24) Despite the number of potential witnesses around, police were unable to get statements from anyone. (A-26) Police didn’t investigate further or detain any individuals. (A-27) Although footprints were found, no casts were taken. (A-11) The shell casings were sent to Dover Police Department for processing of fingerprints. No finger prints were found of any value. (A-12 to A-13) There was no way to make an analysis as to the casings matching the bullets. (A-14) At trial, Detective Horsman testified that the shooter was probably standing 6-foot to the left or 6 feet to the right of where the casings

were found. (A-15) However, the shell casings were found more than 15 feet from the vehicle where the shooting occurred.

B. Terry Tells Police that He Could Not Identify the Man that Shot Him.

As a result of the shooting, Terry was hospitalized for 7-8 days. (A-40) Det. Horseman first visited Terry on April 10th. When initially visited by police, Terry told police he did not know who shot him and could not identify the individual the man in any substantive way. (A-40) (A-48) (A-10) (A-76) Det. Horsman wrote in his police report that Terry was “unable to provide writer with any detail of the incident.” (A-10)

Terry initially lied to police saying that he was shot while going to visit someone. (A-31) After first testifying at trial that the meeting and shooting only took about a minute, Terry changed his testimony and said he was probably back there for several minutes trying to make the drug deal. (A-49)

C. Terry Identifies Goode after being Told this was the Man who Shot You.

While at the hospital, Terry’s female cousin, Raye Boone, showed him a picture of a man who supposedly shot him. (A-41) Boone said she heard there were men going around town bragging about shooting Terry. (A-41/2) (A-42/2) Boone showed Terry the picture and said, “this is the person we think who shot you”. After being told this was the man who shot him, Terry identified the defendant Jhavon Goode as the shooter. (A-43/2)

On April 11, Det. Horsman visited Terry again. Terry produced the picture to Det. Horsman. (A-42) At trial, Terry could not recall the color or make/model of the vehicle the shooter was sitting in. (A-44) The photo was from Jhavon Goode's Facebook account. (A-16 to A-17) Det. Horsman received the photo via email from an anonymous source. (A-17)

Prior to trial, the identity of Raye Boone was never disclosed to the defendant. During Goode's preliminary hearing, the police represented that the individual who gave the photo to Terry was an anonymous source. They referred to Boone as a "he" but in reality it was Ms. Boone. (A-77)

After the shooting, Terry was charged with drug dealing and delivery of drugs charge. (A-45 to A-46) Part of Terry's plea agreement in the case was to testify at Goode's trial. Terry qualified as a habitual offender exposing himself to life in prison, although he wasn't sentenced as one. (A-47)

E. The Jury's Confusion regarding Reasonable Doubt.

During deliberation, the jury sent a note to the Judge reading:

"We need more clarity beyond what is stated on reasonable doubt" (A-50 to A-54)

In response to the jury inquiry, the Judge simply re-read the presumption of innocence/reasonable doubt instructions to the jury. (A-53 to A-54) About a half

hour later, the jury returned with a jury verdict of guilty on all counts. (A-55 to A-56)

F. Gun is Found after Trial.

After the trial was completed, the alleged gun used in the shooting was found by police. (A-78) Sentencing was delayed in the case pending a motion for a new trial to be filed by Goode's counsel. (A-79) After the hearing, a motion for a new trial was never filed. On May 29, 2015, another sentencing hearing was scheduled. Goode's counsel requested to have the hearing continued so testing could be conducted on the gun. (A-80) The requested for a continuance was denied. (A-81)

ARGUMENT

I. THE STATE’S USE OF UNRELIABLE EYEWITNESS IDENTIFICATION EVIDENCE UNDER IMPERMISSABLY SUGGESTIVE CIRCUMSTANCES LIKELY LED TO MISIDENTIFICATION.

QUESTION PRESENTED:

Was Goode denied his right to a fair trial when the trial court permitted the State to introduce an eyewitness identification which was impermissibly suggestive and likely led to a misidentification? (A-57 to A-69)

STANDARD AND SCOPE OF REVIEW

This Court will review constitutional violations de novo. See *Super.Ct. Crim.R.7(f); Flonnory v. State*, 893 A.2d 507, 535 (Del. 2006). In addition, the Court’s review shall be de novo because trial counsel objected to the identification prior to trial.

MERITS OF THE ARGUMENT

Under the Fourteenth Amendment, a State shall not “deprive any person of . . . liberty . . . without due process of law.” The requirement of due process embodies certain core principles of fairness, including the principles which limit the use of unreliable eyewitness identification evidence in criminal trials. In a series of cases from *Stovall v. Denno*, 388 U.S. 293 (1967), to *Manson v. Brathwaite*, 432 U.S. 98 (1977), the United States Supreme Court cited its concerns for “fairness as required by the Due Process Clause” in recognizing

safeguards against the use of unreliable eyewitness identification evidence.

Braithwaite, 432 U.S. at 113. The primary concern with identifications is with reliability, not with the regulation of police misconduct.

In *Braithwaite*, the Court adopted a test looking to the “totality of the circumstances” test, in which “reliability is the linchpin in determining the admissibility of identification.” See also *Mays v. State*, 815 A.2d 349 (Del. 2003), *Richardson v. State*, 673 A.2d 144 (Del. 1996). If the Court determines under the totality of circumstances that a line-up is impermissibly suggestive, but nonetheless reliable, evidence of the confrontation will not be excluded at trial. *Id.* As noted in *Clark v. State*, 344 A.2d 231 (1975), the two determinative questions are (1) Was the confrontation ‘unnecessarily suggestive?’ and (2) was there a ‘likelihood of misidentification’?

In *United States v. Wade*, 388 U.S. 218 (1967), the Court made extensive findings, and concluded that eyewitness identifications are particularly untrustworthy and uniquely resistant to correction at trial, with a resulting “high incidence of miscarriage of justice.” *Wade*, 388 U.S. at 228. The Court noted that “Usually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress.” *Id.* In this context, the witness’s recollection is vulnerable to distortion or suggestion. *Wade*, 388 U.S. at 228-29.

Moreover, correction of such influence is difficult because “once a witness has picked out the accused,” the witness “is not likely to go back on his word.” *Id.* In those circumstances, “though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability.” *Id.* at 235.

Finally, the Court recognized that, in addition to its unique potential for unreliability and resistance to effective challenge at trial, eyewitness identification evidence may have such a powerful effect on jurors as to make the result of the trial a foregone conclusion. “The trial which might determine the accused’s fate may well not be that in the courtroom but that at the pretrial confrontation . . . with little or no effective appeal from the judgment there rendered by the witness – ‘that’s the man’.” *Wade*, 388 U.S. at 235-36. Based on these concerns, the Court held that due process protects a criminal defendant against being convicted on the basis of eyewitness identification evidence arising from “impermissibly suggestive” circumstances if the evidence is “very substantially likely to lead to misidentification.” *Brathwaite*, 432 U.S. at 116.

Although *Perry v. New Hampshire* determined that the Due Process Clause in the Federal Constitution does not require a preliminary judicial inquiry into the reliability of eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement. 132

S.Ct. 712 (2012) As the Court stated in *Perry*, it suffices to test reliability of eyewitness identification through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at post indictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement.

For testimony concerning an out-of-court identification, the essential consideration is whether the confrontation was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. *Neil v. Biggers*, 409 U.S. 188 (1972), *Clark v. State*, 344 A.2d 231 (1975).

Prior to *Perry*, courts were divided as to whether government action is not required for pretrial encounter to affect admissibility of in-court identification. This Court should accept the view that government action is not required for pre-trial encounter to affect admissibility of in-court identification.

In *Thigpen v. Cory*, 804 F.2d 893 (6th.Cir. 1986), the court held that the fact that the police do not cause all of the pretrial confrontations between the witness and the defendant does not mean the pre-trial identification collectively cannot be found to be unduly suggestive or to have tainted the in-court identification. The court explained that the deterrence of police misconduct is not the basic purpose for excluding identification. Rather, it is the likelihood of misidentification that violated the defendant's right to due process.

In State v. Atwood, 171 Ariz. 576, 832 P.2d 593 (1992), the court held that a pre-trial identification does not have to be the result of state action before the court will consider suppressing an in-court identification. The court decided “reliability” is the lynchpin in determining the admissibility of identification testimony.

In *Com. V. Jones*, 423 Mass, 99, 666 N.E.2d 994 (1996), the court held that government participation in a pretrial identification is not required before the court will consider suppressing an in-court identification. The court stated that if a witness was involved in a highly suggestive confrontation with a defendant and that witness’ in-court identification of the defendant had no basis independent of that confrontation, the admissibility of the witness’ proposed testimony identifying the defendant should not turn on whether government agents had a hand in causing the confrontation. The court reasoned that the evidence would be equally unreliable in each instance.

In *People v. Walker*, 97 Misc.2d 171, 411 N.Y.S.2d 156 (County Ct. 1978) the court held that a pre-accusatory identification process that is conducted by nonpolice personnel and its possible taint on subsequent identifications is the subject to the same tests of reliability and suggestiveness as that which courts have traditionally imposed on identification procedures conducted by law enforcement officials.

Here, Terry's pre-trial identification of Goode was impermissibly suggestive. It was an essentially a photographic "show up" line-up performed. Show-ups generally are inherently suspect and widely condemned. See *Neil*. "Show-ups" can be a valuable and practical tool in apprehending criminals when they occur immediately after the crime. *Watson v. State*, 349 A.2d 740 (Del. 1975)

Terry was shown a photo of Goode several days after the crime and after he told police that he could not identify the assailant. "Show-ups" are much more likely to be accepted by the Court when they occur immediately after the crime is committed when the recognition of the person is fresh in the victim's mind. See *Watson*. As quoted in *Watson*, a victim's ability to identify a person or face "fades rapidly with time."

Boone' unduly influenced Terry's identification. Boone showed Terry a single photo of Goode from Facebook and told him this was the man who shot you. Apparently, Boone had heard about some men bragging about the shooting around town. After being told by Boone that he was the man who shot him, Terry was convinced that Goode was the shooter and subsequently told the police and gave them the picture. The police never conducted any other photo identification procedures to confirm the assailant's identification.

In addition, the trial court never considered the numerous inaccuracies in the other portions of Terry's testimony. Terry testified at trial that he was coming

from the basketball court, yet on video he was seen coming from the opposite direction. Terry initially told police he was visiting a friend where he was shot but eventually admitted to going to the residence to conduct a drug deal. Terry initially testified that the confrontation with the shooter took place in under a minute but then later conceded after viewing the evidence from the video that the confrontation took several minutes.

Initially Terry told police he didn't know who shot him. He could not give police any details of the shooter other than the fact that he was a black male. Terry couldn't recall other basic facts such as the color of the car and gun. Det. Horsman noted in his police report that Terry was "unable to provide writer with any detail of the incident". Terry was only able to identify Goode after he was shown a picture by his cousin, Raye Boone, who in essence, conducted the photo identification which led to Goode's conviction.

Unlike the protection against misidentification listed in *Perry*, Goode had no opportunity to cross-examine Boone at all, let alone vigorously cross examine her. She was not identified by the State and therefore the protections of Goode's due process rights against misidentification as outlined in *Perry* did not exist in this case. In addition, Goode proposes that even if the Federal constitution does not have a due process right against misidentification when law enforcement is not involved than our State Constitution has such a right under the expression "Law of

the Land” which means the same as “due process of law”. The phrase ‘due process’ in the federal Constitution and the phrase “law of the land”, as used in the State Constitution have substantially the same meaning." *Goddard v. State*, 382 A.2d 238 (Del. 1977) As stated above, the deterrence of police misconduct is not the basic purpose for excluding identification. Rather, it is the likelihood of misidentification that violates the defendant’s right to due process.

This Court has previously made protections pursuant to Due Process under the State Constitution broader than the protections under the United States Constitution. For example, this Court declined to follow the U.S. Supreme Court holding in *Arizona v. Young*, 488 U.S. 51 (1988) establishing a “good faith” test concerning law enforcement officials regarding preservation of evidence issues. In *Deberry*, this Court stated that fundamental fairness, as an element of due process, required the State’s failure to preserve evidence that could be *favorable* to the defendant to be evaluated in the context of the entire record. Indeed, evidence in the context of criminal cases are generally governed by state, not federal constitutional law. See *Hammond*.

Terry’s identification as initiated by Boone was a violation of Goode’s due process rights in the State Constitution. All of the concerns previously expressed by this Court and the United State Supreme Court regarding improper

identification apply here regardless of whether the State conducted the identification.

II. THE STATE’S FAILURE TO DISCLOSE THE NAME OF RAYE BOONE DEPRIVED GOODE OF EVIDENCE WHICH HE WAS ENTITLED TO UNDER SUPERIOR COURT RULE 16(b) AND *BRADY V. MARYLAND* AND IN VIOLATION OF THE CONFRONTATION CLAUSE.

QUESTION PRESENTED

Was Goode denied his due process right to a fair trial when the State failed to disclose the identity of Raye Boone? As the issue was not raised in the trial below, the interests of justice require this Court to review the issue as it applies to Goode’s constitutional rights to a fair trial.

STANDARD AND SCOPE OF REVIEW

This Court will address the issue under the plain error standard of review. Under plain error, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. *Dutton v. State*, 452 A.2d 146 (Del. 1982).

MERITS OF THE ARGUMENT

Evidence that is favorable to the defendant (exculpatory) and could impact the outcome of the defendant’s case (material) is often called “Brady material” because of the seminal 1963 U.S. Supreme Court case, *Brady v. Maryland*, 373 U.S. 83 (1963) In that case, the Supreme Court established a rule that prosecutors must disclose “Brady material” to the defense. The failure to disclose such material is a “Brady violation,” a violation of the U.S. Constitution.

This Court has recognized that the "obligation to preserve evidence is rooted in the due process provisions of the fourteenth amendment to the United States Constitution and the Delaware Constitution, article I, section 7. *Deberry v. State*, 457 A.2d 744 (Del .1983) "[U]nder Superior Court Criminal Rule 16(b), a defendant need only show that an item `may be material to the preparation of his defense' to be discoverable." *Id.*

Superior Court Criminal Rule 16(b) allows a defendant "to inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, copies or portions thereof which are within the possession, custody or control of the State...."

The State's failure to preserve and or learn Boone's identity amounts to a violation of their duty to preserve evidence. In *Hammond v. State*, 569 A.2d 81 (Del. 1989), this Court concluded that it would continue to rely on the following three-part analysis "pursuant to the `due process' requirements of the Delaware Constitution,":

"[I]f the duty to preserve evidence has been breached, a Delaware court must consider `(1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence, considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence used at trial to sustain conviction.'" *Id.*

The Delaware constitution guarantees that an accused shall have the right to "meet the witnesses in their examination face to face." *Del. Const.*, art. I, § 7. *Van Arsdall v. State*, 524 A.2d 3 (Del. 1987) This right necessarily includes the right to cross-examine; indeed, "the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." 5 J. Wigmore, *Evidence* § 1395 (3rd ed. 1940) (emphasis in original).

Here, the State never supplied the identification of Raye Boone who orchestrated the pre-trial photo identification which led to the conviction of Goode. In fact, the State misidentified Boone as a male during Goode's preliminary hearing. The State also never supplied the email from Raye Boone to Detective Horsman which is clearly tangible evidence within their possession.

Boone's participation was essential to the State's case. Boone conducted and conversed with Terry during his identification of Goode. Boone showed Terry a picture of Goode on her cell phone and told him that this was the guy who shot you. In addition, Boone informed Terry that a bunch of guys in the neighborhood were bragging about the shooting. Boone also emailed Det. Horsman a copy of the picture. Although Boone did not testify a trial, her words and actions were expressed through both Terry and Det. Horsman, amounting to inadmissible hearsay.

Goode's counsel was unable to interview Boone prior to trial. Likewise, Goode's counsel was unable to cross-examine Boone at trial about her interactions with Terry during the identification. Goode's counsel was unable to examine her cell phone or the actual photo reviewed. There is no doubt that Boone's participation in the photo identification was essential to Goode's conviction. Instead, the State referred to Boone as an anonymous witness and even addressed Boone as a male when they knew she was a female. Furthermore, the email from Boone to Det. Horsman was never provided to Goode's counsel. As a result of the State's actions and failure to disclose Boone's identity, Goode was denied his right to a fair trial.

Here, there is no evidence of bad faith other than the State referring to Boone as a male, when she was in fact a female. However, it was extremely negligent on the part of the State to not obtain the name and identity of a critical witness. The State was well aware that the identification of Goode was the sole basis of their case against Goode.

Boone's identity and participation was critical to the case. There is no other source that can substitute for counsel's ability to investigate and question Boone's participation in the identification process.

As stated previously, absent Boone providing the photo of Goode to Terry, the State would not have a case.

IV. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE GUILTY VERDICTS AGAINST GOODE.

QUESTION PRESENTED

Was there sufficient evidence to convict Goode when the sole evidence against him was a impermissibly suggestive photo identification? (A-70 to A-75)

STANDARD OF REVIEW

The Court's review shall be de novo because trial counsel objected to the issues at trial.

MERITS OF THE ARGUMENT

In determining whether the Trial Court abused its discretion, we must examine the facts in each particular case. *Bates v. State*, 386 A. 2d. 1141 (Del. 1978), *Jenkins v. State*, 230 A.2d 262 (1967) The federal constitutional right to due process of law requires that the State prove beyond a reasonable doubt every fact necessary for a criminal conviction. *In re Winship*, 397 U.S. 358 (1970). A conviction predicated on evidence insufficient to permit a reasonable juror to find that the State has proven beyond a reasonable doubt every element of the particular offense charged and that the defendant is the perpetrator of that offense violates the Fourteenth Amendment to the U.S. Constitution. *Jackson v. Virginia*, 443 U.S. 307 (1979). Where the State has offered insufficient evidence to sustain a verdict of guilt then a motion for judgment of acquittal should be granted. *State v. Biter*, 119 A.2d 894 (Del. 1955)

The State's evidence at trial relied on almost exclusively on the identification of Goode through a picture that was provided to the victim on a cellphone. No additional direct evidence was offered to support Goode's guilt. Only one additional witness testified that Goode was present at the scene at the time of the crime. That witness did not testify that he saw the shooting or saw Goode with a weapon of any kind. This witness also left the scene at the actual time of the shooting. With no corroborating evidence to support the victim's identification and no tangible physical evidence linking Goode to the crime, the evidence is insufficient to support Goode's conviction beyond a reasonable doubt.

IV. THE JURY’S REQUEST FOR CLARIFICATION ON THE REASONABLE DOUBT STANDARD DEMONSTRATES JURY CONFUSION REGARDING REASONABLE DOUBT.

QUESTION PRESENTED

Was the Trial Court’s response to the jury question regarding the reasonable doubt standard adequate to avoid jury confusion? (A-70 to A-75)

STANDARD OF REVIEW

The Court’s review shall be de novo because trial counsel objected to the issue at trial.

MERITS OF THE ARGUMENT

After several hours of deliberation the jury had requested clarification on the standard of reasonable doubt. The trial judge assembled the jury and re-read the reasonable doubt instruction from the jury instructions. Within approximately thirty (30) minutes that jury returned a verdict of guilty on all counts considered.

From the very question, it can deduced that at least some members of the the jury did not and could not understand and properly apply the concept of “reasonable doubt”. The very subject matter of the question indicates that a reasonable doubt existed. The trial judge failed to give any additional clarification on the application of reasonable doubt. Therefore, the jury was left with an incomplete or worse, incorrect, understanding of the concept of reasonable doubt,

undermining confidence in the jury's verdict. Along with the other issues previously raise, the interests of justice requires reversal.

V. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CONTINUANCE REQUEST IN ORDER TO CONDUCT TESTING ON THE GUN.

QUESTION PRESENTED

Did the trial court improperly deny Goode's continuance request at sentencing? (A-80 to A-81)

STANDARD AND SCOPE OF REVIEW

Since counsel timely objected at trial, this Court should review the issues de novo. *Pennwell v. State*, 977 A.2d 800 (Del. 2009)

MERITS OF ARGUMENT

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. *Del. Super. Crim.R.33*.

After the trial was completed, the alleged gun used in the shooting was found by police. Sentencing was delayed in the case pending a motion for a new trial to be filed by Goode's counsel. After the hearing, a motion for a new trial was never filed. On May 29, 2015, another sentencing hearing was scheduled. Goode's counsel requested to have the hearing continued so testing could be conducted on the gun. The requested for a continuance was denied.

Here, Goode's counsel's request for a continuance should have been granted in order to conduct testing on the weapon. Rather than grant the continuance, the trial judge proceeded to sentencing. The discovery of the alleged firearm fits within

the definition of newly discovered evidence and the continuance should have been granted.

CONCLUSION

For the reasons and upon the authorities cited here, Appellant Goode submits that his convictions and sentences be reversed.

/s/ André M. Beauregard

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