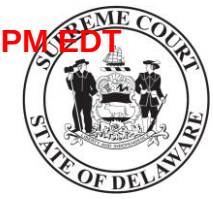
EFiled: Jun 04 2018 11:45PM EDT
Filing ID 62096353
Case Number 547,2017



IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRANDON WAYS,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 547, 2017
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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DATE: June 4, 2018

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NATURE AND STAGE OF THE PROCEEDINGS

On November 14, 2016, Brandon Ways ("Ways"), Angeline Metelus ("Metelus"), and Torontay Mann ("Mann") were charged by Indictment with Tier 5 Possession, Tier 4 Drug Dealing, four counts of Possession of a Deadly Weapon while possessing Illegal Drugs, and Conspiracy in the Second Degree. Super. Ct. Docket Item ("DI") 1. (A1).

On February 12, 2017, Ways filed an "Omnibus Motion to Suppress and Request for a *Flowers* Hearing." (A210-226). All five codefendants joined in the motion. (DI 26; A4). On March 15, 2017, the State filed its response. (DI 17; A2, B1-23). The parties attended an office conference to discuss the outstanding motions and scheduling issues. (DI 18; A3). On March 30, 2017, Ways filed an addendum to the omnibus motion. (DI 22; A3).

On May 5, 2017, the Superior Court ordered the State to "provide the defense with all data generated, compiled or transmitted by all the equipment utilized during this investigation." (DI 24; A4). On May 19, 2017, the Superior Court denied the motion for a *Flowers* hearing.[1] On June 20, 2017, the Superior Court granted the motion to suppress evidence seized pursuant to the nighttime search warrants, and denied the motion to reveal the identity of the confidential

[1] *State v. Ways*, 2017 WL 6947950 (Del. Super. May 19, 2017).

informant.[2]

On July 7, 2017, Ways filed a motion to compel production of GPS data. (DI 31; A5). On September 12, 2017, the parties attended an office conference where the Superior Court addressed the outstanding motions for all defendants. (DI 36; A5). On October 4, 2017, the Superior Court denied Ways' motion to suppress the search of the Jeep. (DI 47; A6). On October 9, 2017, the parties attended their last pre-trial office conference, and addressed, *inter alia*, redactions to the recorded statements. (DI 54; A6).

On October 10, 2017, Ways rejected the final plea offer (with a recommendation of 5 years) on the record (TA3-4), the parties attended an office conference to discuss proposed voir dire questions, (TA7-9), the Superior Court selected the jury, and Ways and Metelus agreed to the stipulations regarding the drug evidence on the record(TA25-5). (DI 55; A6-7). On the fourth day of trial, October 13, 2017, the State rested, and the defense made a motion for judgment of acquittal with respect to each of the three charges for each co-defendant. (B91-93). The Superior Court denied the motion (B93-94), and permitted the State to amend the indictment to reflect that counts 1 and 2 took place in Kent County, not Sussex. (B95-96, 102-03). Ways did not present any evidence in the defense case; Metelus

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[2] *State v. Ways*, Nos. 1611002980, 1611002979 and 1611002987, Brady, J. (Del. Super. June 20, 2017) (ORDER) (A194-201).

presented two witnesses on the first day of the defense case. (TD65). The next day, the defendants renewed their motion for judgment of acquittal, which the Superior Court again denied. (B104). The trial judge had a colloquy with the defendants, and Ways exercised his right to remain silent. (B105-08). Metelus testified in her own defense. (B108)

On October 17, 2017, the seventh day of trial, the jury returned its verdict, finding Ways guilty on all three counts. *Id.* The Superior Court ordered a presentence investigation. (DI 60; A8).

On December 8, 2017, the Superior Court merged the Tier 4 Drug Dealing and Tier 5 Possession convictions, and sentenced Ways to a total of 27 years at Level V, to be suspended after 12 years for 4 years at supervision Level IV, followed by reducing levels of supervision. Sent. Ord. (Op. Br. Ex. A & B). The Superior Court found aggravating factors of undue depreciation of the offense, repetitive criminal conduct and lack of remorse. (DI 69; A8).

Ways has appealed. This is the State's Answering Brief.

SUMMARY OF ARGUMENT

I. DENIED. Ways has not identified any constitutional right *of his* that police violated, and he cannot vicariously assert Metelus's rights. The search in this case was supported by a warrant based on probable cause. Police physically followed Metelus until just south of the Newark airport, where they lost sight of her. If they had not recovered sight of her until she passed the officers waiting for her at the Delaware Memorial Bridge, it would have made no difference, and the heroin would have been inevitably discovered. The second warrant for the Jeep, which police obtained as the Jeep traveled south, did not rely on GPS information from New Jersey.

II. DENIED. The State established venue through the evidence presented in its case in chief, and Ways' challenge was untimely. The mistake alleging that Counts 1 and 2 took place in Sussex County had no effect on Sussex County being the appropriate venue. The Superior Court did not abuse its discretion in finding that the defendants were well aware of the conduct underlying the charges and were not prejudiced by the amendment to the indictment. Ways' claim has no merit.

STATEMENT OF FACTS

Pursuant to an ongoing drug investigation in Sussex County, in October 2016, police obtained a warrant and, on October 14, installed a GPS tracker on a Jeep that they associated with Ways. (A74, 85-100; B29, 57-58). Police had seen the Jeep in the parking lot of the Woodland Mills Apartment Complex, west of Route 13, within the town limits of Seaford. (B30-31). The chief investigating officer ("CIO") had seen Ways enter the vehicle, turn it on, remain in the vehicle for a period of time, turn it off and then return to an apartment in the complex. (B31, 58).

The GPS was programmed to alert officers when the vehicle moved. (B32, 66). On November 4, 2017, police received an alert from the GPS that indicated the Jeep had been moved from the Woodland Mills parking area to the Seaford Walmart. (B30, 33). Shortly thereafter, at about 2 p.m., several officers responded and began physical surveillance of the Jeep. (A42, B33-35).

They saw a Dodge Ram pull up and park right next to the Jeep.[3] (B35, 66). They were familiar with the Dodge and associated it with Mann. (B35-36, 39, 41). They later determined that Mann was driving the Dodge. (B56). Ways got out of the passenger seat of the Dodge and into the driver's side of the Jeep, then got out

[3] The Seaford Walmart had video surveillance of its parking lot, including that designed to capture license plates, which captured and recorded this incident. Those recordings were played for the jury. (B24-28).

and got in the rear driver's side passenger seat, then back to the driver's seat, and repeated this several times.[4] (B36-37, 47-49). At times he appeared to stretch to reach into the very back of the Jeep while positioned on the second row seat. (B37, 42). At one point, Ways removed a green bag, possibly a nylon duffle bag, from the Dodge and placed it in the driver's door of the Jeep. (B46, 59-61).

Ways returned to the driver's seat and drove the Jeep away. (B38). Mann followed him in the Dodge. (A41; B38). Ways first drove north on Route 13, then used a turnaround to turn southbound. Mann did as well. (B50). Ways drove the Jeep a short distance, turned right on Herring Run Road, and then turned into the shopping center that includes the Seaford Food Lion. (B52). Ways parked the Jeep in the Food Lion parking lot. (B52). Mann stopped the Dodge stopped nearby, and Ways threw an empty green nylon duffle bag into the back of the Dodge and walked away. (B52, 64-65, 67-68). Mann drove the Dodge out of the parking lot. (B52).

Mann drove the Dodge southbound on Route 13, turned right onto Route 20 in Seaford, and stopped at a BP gas station on Route 20. (B68). Police observed Mann exit the truck and get gas. (B69). He then drove across to the Hardee's, interacted with some people there, then left and went to the Chandler Heights Apartment Complex. (B70).

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[4] The CIO captured this activity on his cell phone. (B38-40; St. Ex. 8 (DVD)).

At Chandler Heights, Mann interacted outside with a black female, and then entered an apartment. (B70). The officer who had been observing Mann continued surveillance, and crossed paths with Ways again, but this time Ways was driving a gray Jeep Patriot ("the Patriot"). (B71). The officer turned around to follow him. (B71. Another officer saw Ways drive into the Woodland Mills Apartment Complex. (B71). Chandler Heights backs up to Woodland Mills, so the officer went to an adjoining parking lot, looked through broken slats in a fence, and saw Ways entered apartment 101. (B72). Two to three minutes later, Ways left the apartment, got back in the Patriot, and left. (B72).

Police maintained surveillance on the Jeep. (A21). About two hours later, at approximately 4:20 p.m., a Dodge Nitro ("the Nitro") parked a few spots away from the Jeep. (A21, 42). A black female got out of Nitro, walked directly to the driver's side of the Jeep, got in and drove away. (A21-22). The officers did not recognize the woman, so they entered the registration number on the Nitro into the Criminal Justice Information System ("CJIS"), and found that the Nitro was registered to Angeline Metelus ("Metelus"). (A22). They looked at her driver's license photo and determined that Metelus was the woman who had left in the Jeep. (A23-25).

Metelus left the Walmart parking lot, drove south on Route 13, then quickly turned around to go north. (A26). About three to five miles north, Metelus

stopped for three to five minutes at her residence, which was at the corner of Cannon Road and Route 13. (A27, 34). Metelus got back into the Jeep and drove north on Route 13. (A28, 34). She stopped at the Greenwood Royal Farms to refuel, then continued north. (A28, 35).

Before Metelus reached the Royal Farms, the CIO returned to Troop 4 in Georgetown to be the point person in the investigation, while other officers continued visual surveillance on the Jeep. (A29). The CIO continuously monitored the progress of the Jeep by GPS, from Troop 4. (A30).

Metelus continued northbound, from Route 13, to Route 1, and eventually crossed the Delaware Memorial Bridge into New Jersey. (A31). Metelus exited the New Jersey Turnpike at Exit 9. (A49). At this point the officers lost physical surveillance and the GPS malfunctioned. (A49-50). It was approximately 7:40 p.m.[5] (A50). The GPS started working again, the CIO who was reading the GPS at the troop informed those on surveillance of the Jeep's location, and the officers found Jeep on the side of the road with its blinkers activated. (A53-55).

At about 8:30 p.m. Metelus stopped at a residence at 71 Mitchell Street. (A55-58). Metelus left that location about nine minutes later. (B73). While there, a black male with long hair in dreadlocks or braids approached the Jeep. (A59).

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[5] This 20-30 minute period was the only time the officers lost visual surveillance of the Jeep. (A67-68).

When Metelus left the residence, she drove around without any apparent destination, then turned around and went back the same way. She repeated this three times. (A60). Then she stopped on the side of the road for nine minutes, before returning to the same residence at 71 Mitchell at about 9:01 p.m.[6] (A60-61). When Metelus left Mitchell Street, she got onto the Garden State Parkway, and returned to Delaware. (A31, 66-67).

Traffic was light, especially once in Delaware, to the degree that police constituted most of the "traffic" around Metelus in the Jeep. (A69). Police stopped the Jeep at the traffic light at the end of the Puncheon Run connector, which connects Route 1 to Route 113. (A69). So they would not continue to block the roadway, they moved the Jeep to the car dealership across the highway. (A71). Several units responded, and several officers searched the vehicle. (A71). They were aware there may be an aftermarket trap compartment in the Jeep and were aware that Ways accessed the back of the vehicle, so they focused on that area. (A71). The bomb team was present because sometimes these compartments are booby-trapped to cause injury to officers or rival drug dealers. (B74).

Once the bomb team determined that the compartment was safe, the officers

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[6] During this time, police had not set up stationary surveillance due to the risk of being discovered by counter-surveillance; however, they did limited drive-by surveillance while the Jeep was stopped on the side of the road, and at other points. (A62-63, 66).

tried to open it. They swept over the dash and front area of the passenger compartment with a magnet, hoping to find the mechanism that unlocks the compartment. (B74). Once they ran the magnet over the center console near the seat belt receptacle, the piston began to open the trap in the back of the Jeep. (B74-75). Police opened the compartment all the way and observed a large number of logs and half logs of what they believed to be heroin.[7] (B75). The substance field-tested positive for heroin. (A75). Knowing they needed to transport the Jeep to Troop 4 in Georgetown, the police closed the trap and an officer drove the Jeep to Troop 4, escorted by the other units. (B77). At the Troop, the Jeep was stored in a secured lot, and the drugs were stored in the evidence locker pending transport to the Controlled Substances Lab in the Division of Forensic Sciences. (A76-77; B77-78).

Police searched Metelus, and they did not find any drugs or paraphernalia on her. (B85-1). She had no criminal history and a valid driver's license. (B86). The

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[7] This was captured on video. (B75-76; St. Ex. 14). Individual packets, or "bags" of heroin are bundled together in lots of 10-13 to form a "bundle," which is commonly bound by a rubber band, and about 10 of those bundles makes a "log," which is usually wrapped in newspaper or some other material, and about 10 of those logs are put together in a "sleeve" or "block." (B79). A block, therefore, would typically contain 1,250 bags of heroin. (A80). A user might normally purchase a bundle for personal use. (B80). There were 63 full blocks in the Jeep, plus partial blocks, which totaled over 78,000 bags, which contained approximately 1,300 grams of heroin. (B81-82). State's Exhibit 18 is a photo of the heroin.

CIO testified that drug dealers often use "mules" to transport either drugs, drug money, or both (as here), in order to distance themselves from the actual drug trafficking. (B62. Due to the amount of money involved, mules typically are aware they are transporting drugs. (B89-90). It was not uncommon to search a mule and find no drugs. (B63).

After the traffic stop, Metelus was transported to Troop 4 and interviewed. (B87). Metelus asked several times what type of drugs were found in the Jeep, and never admitted she knew there were drugs in the Jeep. (B88).

The Jeep's hidden compartment was complex. (B53). To open it, one had to turn on the vehicle, then perform a series of functions. (B53). The compartment contained a hydraulic piston that received a signal from a transmitter, and the piston opened the compartment if the correct combination was entered. (B54). The CIO is familiar with these type of hidden compartments from past drug investigations. (B55).

At trial, the parties stipulated to the fact that the drugs found were heroin, and to the quantity found, as follows:

(1) "[T]he substance seized from the Jeep Cherokee was heroin."
(2) "[A]pproximately 78,797 bags of heroin were seized from the Jeep Cherokee."
(3) "[T]he heroin seized from the Jeep Cherokee was weighed and the total weight of the heroin was in excess of 1325 grams."
(4) "[T]he State need not present a chemist or witness from the Division of Forensic Science for questioning or introduction of the above-stipulated evidence, including the drug report and the physical evidence."

(5) "[T]he heron was for distribution rather than for personal use.
(6) "[D]espite the above-mentioned stipulation, the State intends to introduce the physical evidence, which was tested by the Division of Forensic Sciences."

(B91; Ct. Ex. 1).

At trial, Ways presented no evidence in his defense, but put the State to their burden of proof. Metelus presented two witnesses. One was Metelus's hairstylist, who testified that Metelus and Jurontay Roberts ("Roberts"), whom she knew as "J Rob," were dating, and she had seen them interact in the salon. (B97-99). A private investigator hired by Metelus visited the area in question in New Jersey, and testified that, based on the GPS data, Roberts met Metelus at Hip Hop Sneakers, which was near both the Pit Stop Barbecue and the residence at 17 Mitchell Street. (B100-01).

Metelus's defense was that she knew nothing of the drugs, and drove to New Jersey to have dinner with Roberts. (B99). She testified that she borrowed the Jeep from Mann to drive to New Jersey to see Roberts because she had car troubles. (B115). Metelus testified that she knew Roberts from Chandler Heights, and denied any knowledge of drug dealing. (B109-114).

I. WAYS' CLAIM THAT GPS TRACKING OF THE VEHICLE WHILE IT WAS IN NEW JERSEY VIOLATED THE STATE AND FEDERAL CONSTITUTIONS HAS NO MERIT BECAUSE WAYS HAS NOT ESTABLISHED ANY VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

Questions Presented

Whether a defendant can seek to have evidence suppressed based on another person's privacy interests. Whether a defendant who denied ownership or control over the subject vehicle, and did not occupy the vehicle when it was monitored out-out-of state and subsequently stopped by police, can assert that the State violated his constitutional rights and seek suppression of evidence where he does not explain what aspects of *his personal* constitutional rights the government violated.

Scope and Standard of Review

This Court "review[s] . . . alleged constitutional violations *de novo*. [The Court] also appl[ies] *de novo* review to the Superior Court's legal conclusions when reviewing the denial of a motion to suppress. '[The Court] review[s] the Superior Court's factual findings to determine "whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous."'"[8] This Court reviews questions not preserved below for plain error.[9]

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[8] *Wheeler v. State*, 135 A.3d 282, 295 (Del. 2016) (quoting *Bradley v. State*, 51 A.3d 423, 433 (Del. 2012) (additional citations omitted)

"Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[10]

Argument

Ways argues that this appears to be the case to answer the questions this Court left open in *Lewis v. State*.[11] Op. Br. at 18. Not so—this case does not get past the threshold issue the United States Supreme Court discussed in 1978 in *Rakas v. Illinois*, that defendant has no cause to assert a Fourth Amendment violation unless his own property rights were violated.[12] This case involves two separate search warrants related to the Jeep that Ways' co-defendant, Metelus, was driving when police stopped her, searched the vehicle, and found 75,000 bags of heroin. The first search warrant was to place a GPS device on the Jeep. The second search warrant was to stop and search the Jeep for evidence of drug dealing. Ways continuously has maintained that he did not own or control the Jeep, and he was not in the vehicle when it was stopped.[13] (B116-41). Ways

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[9] Supr. Ct. R. 8; *Hardin v. State*, 844 A.2d 982, 990 (Del. 2004).

[10] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[11] 2018 WL 619706, at * 5-6 (Del. Jan. 29, 2018).

[12] 439 U.S. 128 (1978).

[13] In closing, Ways' counsel argued, *inter alia*, "Now, having failed to show any evidence that Mr. Ways had any ownership or control over that blue Jeep

claims that the GPS tracking of the Jeep while it was out-of-state violated the State and Federal constitutions, but he fails to explain how *his* constitutional rights were violated. They were not. Ways cannot rely on an alleged violation of Metelus's privacy interests to obtain relief by way of suppression of evidence.[14] The Superior Court did not abuse its discretion in denying Ways' motion. This Court can affirm on different grounds than those relied on by the Superior Court.[15]

The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."[16] Article I, section 6 of the Delaware Constitution provides, "The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place . . . shall issue . . . unless

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Cherokee, does the State expect you to convict him based on the testimony of the police that he occasionally used the car? Because if that's where we are going with this . . . the evidence is also woefully lacking." (B119). Later, counsel argued, "Despite all of that GPS data, the police don't have any proof that Brandon Ways had anything to do with that blue Jeep Cherokee, except on two occasions when they told you told you they briefly saw him in the car prior to November 4." (B122).

[14] *See Hannah v. State*, 591 A.2d 158, 162-63 (Del. 1991) (citing *Rakas*, 439 U.S. at 143)).

[15] *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

[16] U.S. Const. Amend. IV.

there be probable cause."[17] Section 2301 of Title 11 states that no search shall be made "unless such search is authorized by and made pursuant to statute *or* the Constitution of the United States."[18]

Recently, in *Byrd v. United States*,[19] the United States Supreme Court explained that "[w]hether a warrant is required is a separate question from . . . whether the person claiming a constitutional violation 'has had his own Fourth Amendment Rights infringed by the search and seizure which he seeks to challenge." The *Byrd* Court cited *Rakas*, in which it had explained:

> "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections.[20]

Ways' claim fails because he has not established any personal right to him that the State allegedly violated. He cites no case in which a court has recognized that a defendant had a constitutionally protected privacy right in a vehicle where the

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[17] Del. Const. art. 1, § 6.

[18] 11 *Del. C.* § 2301 (emphasis added).

[19] *Byrd*, 138 S.Ct 1518, at II (May 14, 2018) (page citations not yet available)

[20] *Rakas*, 439 U.S. at 133–34 (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1974) (additional citations omitted) (explaining the nexus required while declining to apply the concept of standing).

defendant did not own, control, or occupy a vehicle. He does not even assert the argument. Instead, (without explicitly stating) Ways bases his claim on the vicarious assertion of Metelus' expectation of privacy, as Metelus was the one who drove the vehicle when it was followed in New Jersey. Ways' claim fails for failure to establish any violation of his personal rights.

Even if Ways established a sufficient nexus to the Jeep to assert a constitutional claim, the claim would fail because the police obtained a search warrant based on probable cause to track the vehicle using GPS, and a second warrant to stop the vehicle. In *Dorsey v. State*, this Court stated, "This Court has consistently held that exclusion of evidence is the required remedy for a violation of the Delaware Constitution's protections against searches and seizures *without probable cause.*"[21] Here, there was a finding of probable cause to place the GPS on the Jeep, and thus no violation of the Delaware or federal constitutions. The United States Supreme Court has emphasized that the federal exclusionary rule is not constitutionally mandated. In *Davis v. United States*, the Court explained:

> Exclusion is "not a personal constitutional right," nor is it designed to "redress the injury" occasioned by an unconstitutional search. Real deterrent value is a "necessary condition for exclusion," but is not "a sufficient" one. The analysis must also account for the "substantial social costs" generated by the rule. Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing

[21] 761 A.2d 807, 814 (2000) (emphasis added).

> on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a "last resort." For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.[22]

Exclusion of evidence in this case, where there were two warrants issued upon determinations of probable cause, would serve no purpose.

Ways argues that police should have obtained a separate search warrant in New Jersey, without establishing (or alleging) that New Jersey's constitution provides greater protections to him than the Delaware or United States constitutions. He has not described any additional protection that a New Jersey warrant would have provided him, a Delaware resident who was not alleged to have been present in New Jersey and therefore, was not subject to GPS tracking there. Ways argues that Delaware's law enforcement officers "infringed upon the sovereignty of New Jersey," without acknowledging that New Jersey law enforcement officers assisted in following the Jeep. (A227) ("Two or three New Jersey units assisted the Delaware officers, joining them in the area just south of the Newark Airport . . . ."). To the extent that Ways asserts that Delaware officers violated his rights in New Jersey, New Jersey is the appropriate forum for that

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[22] *Davis v. United States*, 564 U.S. 229, 237-38 (2011) (finding exclusionary rule did not apply to automobile search incident to arrest where "police conduct[ed] a search in objectively reasonable reliance on binding judicial precedent.").

claim. Ways has not explained why this Court has an interest in interpreting Delaware law to protect him from an alleged unreasonable search in New Jersey that did not manifest in any physical interaction with Ways while in New Jersey (and was authorized by a warrant supported by probable cause in Delaware), where Delaware has a greater interest in protecting its own citizens from violations of its own laws—in this case, defendants bringing 75,000 packets of heroin into this State for unlawful distribution.

Were Ways able to establish a violation of his constitutional protections, suppression is not the remedy for two main reasons: (1) the inevitable discovery doctrine applies; and (3) the exclusionary rule is not constitutionally mandated.

The evidence here would have been discovered even if police had not used GPS to track the Jeep while it was in New Jersey. Under the inevitable discovery doctrine:

> If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense.[23]

As the State explained in the Superior Court, approximately eight law enforcement units were involved in physically tracking the Jeep into New Jersey. (A227).

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[23] *Nix v. Williams*, 467 U.S. 431, 444 (1984) (footnote omitted).

They maintained visual surveillance on the Jeep until after it exited the turnpike, just south of Newark Airport. (A227). Approximately three units were stationed at or near the Delaware Memorial Bridge (which Metelus crossed to go to New Jersey), awaiting Metelus's return to Delaware. (A227). If the officers had not used GPS to relocate Jeep after they lost sight of it in northern New Jersey, the additional units waiting at the bridge would have been able to resume surveillance when the Jeep approached to cross back over the bridge into Delaware. The second search warrant that officers obtained that night to search the Jeep does not rely on any information obtained from GPS tracking in New Jersey. ("Metelus was followed to a location known for high drug trafficking." (A151-3). As a result, even if the GPS tracking data from New Jersey were suppressed, which it should not be, the visual surveillance up to Newark, the Jeep's return to Delaware via the bridge, and the heroin seized in the vehicle is still admissible evidence.

The facts in the affidavit supporting the second search warrant end with Metelus driving the Jeep to a high drug area in New Jersey, and the officer's expectation that she will return to Delaware. There was probable cause to believe that the vehicle contained heroin. The Delaware officers' actions could be independently justified as fresh pursuit.[24]

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[24] *See* 11 *Del. C.* §§ 1932 and 1935; *State v. Cochran*, 372 A.2d 193, 196 (Del. 1977).

Ways' analogy to the Superior Court's denial of the nighttime warrant fails. The Superior Court made that ruling based on the specific requirements of the nighttime search warrant statute, section 2308 of Title 11, finding that, although the officers sought authority to search at night, the form of warrant for a nighttime search was not used, and the warrants themselves did not provide authority for a nighttime search.[25] The warrants stated that the search could be conducted "in the daytime, or in the nighttime if the property to be searched is not a dwelling house."[26] Unlike nighttime warrants, there is no Delaware statute specific to GPS warrants that details the procedures to be followed and the standards that must be satisfied.[27] The only applicable statute are the search warrant statutes,[28] which

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[25] *State v. Ways*, Nos. 1611002980, 1611002979 and 1611002987, at 5-7, Brady, J. (Del. Super. June 20, 2017) (ORDER) (A198-200).

[26] *Id.* at 7. (A200).

[27] A GPS is a "tracking device." *See* 18 *U.S.C.* § 3117(b); 11 *Del. C.* § 2401(5). When the federal government enacted the Electronic Communications Privacy Act of 1986 ("ECPA"), it excluded "tracking devices" from the scope of the wiretap and electronics communications laws by excluding them from the definition of "electronic communications." *See* 18 *U.S.C.* § 2510(12)(c). Instead, the ECPA added a provision for tracking devices to the federal search warrant statute, 18 *U.S.C.A.* § 3117. There, the government specifically authorizes a court issuing a tracking device search warrant to allow "the use of that device within the jurisdiction of the court, and outside that jurisdiction if the device is installed in that jurisdiction." 18 *U.S.C.A.* § 3117(a).

Delaware updated its electronic communications statutes in 1999 to reflect the changes in ECPA. In so doing, it deleted former section 1336 (the former wiretap statue), and replaced it with Chapter 24 of Title 11, "Wiretapping, Electronic Surveillance and Interception of Communications." 72 *Del. Laws* ch. 232, § 1. (1999). The Synopsis to the enacting legislation states that "These

have not been amended materially since 2005, when the General Assembly added section 2309A related to bank funds and criminal proceeds.[29] Way's argument is misguided.

Ways' reliance on Pennsylvania law also is misplaced. In *Commonwealth v. Cole*, the Pennsylvania Superior Court determined that an officer from Maryland who used cell phone tracking data to follow the defendant to Harrisburg, Pennsylvania, did not violate Pennsylvania law.[30] The court interpreted its Municipal Police Jurisdiction Act broadly because "the General Assembly recognized that constructing impenetrable jurisdictional walls benefited only the criminals hidden in their shadows."[31] The court found:

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changes are necessary to become current with the emerging technology...." *Id.*

When it did so, the legislature excluded tracking devices from the definition of "electronic communications" found in 11 *Del. C.* § 2405, but unlike the federal government, it did not update the search warrant statutes to address tracking devices.

[28] In *State v. Diaz,* the Superior Court declined to apply the additional wiretap warrant requirements in section 2407 to GPS tracking warrants. 2013 WL 6225103 (Del. Super. Nov. 26, 2013).

[29] *See* 75 *Del. Laws*, ch. 106 (2005). The form affidavit, application and warrant has not been updated since 2002. *See* 73 *Del. Laws*, ch. 314 (2002).

[30] 167 A.3d 49 (Pa. Super. 2017). The court is not clear about the form of this technology. It refers to "GPS tracking data," "historical cell phone tracking data," and "cell phone tracking evidence." *Id.* at 58, 59, 60. From the recitation of facts, it appears that the officer was using real time cell phone tracking when he followed the defendant to Harrisburg.

[31] *Id.* at 61.

> [W]e are not convinced . . . that [the Maryland officer] violated the MPJA by merely making observations outside of his own jurisdiction. It is simply not tenable to apply the MPJA every time an investigation takes an officer outside of his home jurisdiction, whether it is to interview a witness, investigate a tip or, as in this case, to conduct surveillance which, at least in part, did require a warrant or court order. Such an interpretation of the MPJA is inconsistent with its purpose; it neither promotes justice nor public safety. . . This is especially true when an officer's extra-jurisdictional actions do not involve the direct exercise of police powers, such as effectuating searches, seizures, temporary detentions, and/or arrests.[32]

The court then addressed the separate issue of whether Pennsylvania authorities were required to obtain their own court order before they could use the cell phone live tracking information generated by Maryland, where Maryland authorities had tracked defendant into Pennsylvania based on a Maryland court order.[33] The court found that a second Pennsylvania order was not necessary, because: (1) the Maryland order was not a deliberate attempt to circumvent Pennsylvania law; (2) there was no evidence that Maryland's standards in issuing the order were lower than Pennsylvania's; (3) defendant's expectation of privacy in his cell phone location information did not change when he crossed into Pennsylvania; and (4) to strictly construe the wiretap law in this case is to strictly interpret whether defendant met his burden to show that authorities violated the act.[34] Where Pennsylvania Courts have permitted an out-of-state warrant to provide probable

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[32] *Id.* at 62.

[33] *Id.* at 65.

[34] *Id.* at 66-68

cause in a similar situation in Pennsylvania, reference to Pennsylvania law and its Constitution does not support the argument that the state constitution provides its citizens greater protection than the federal constitution with respect to GPS warrants.

Ways' reliance on the 2009 Ohio case of *State v. Jacob*[35] also is misplaced. Op. Br. at 22. More recently, in *State v. Campbell*, the Ohio Court of Appeals addressed a case involving a cell phone ping that located the phone in Boston, Massachusetts:

> Campbell also argues that the trial court erred in denying his motion to suppress because the pinging occurred outside of Ohio when Campbell's family was located in Massachusetts and on their way back to Ohio. However, there has never been settled law in Ohio that use of a GPS or pinging must stop at the Ohio border. The record indicates that the BURN unit applied for the search warrant in Ohio and performed the activity necessary to ping the phone within this jurisdiction. On August 1, 2014, the Ohio Legislature amended Crim.R. 41 by adding a section on tracking devices. The new section, Crim.R. 41(A)(2), provides *"the warrant may authorize use of the device to track the movement of a person or property within or outside of the court's territorial jurisdiction, or both."* While this rule may not have been in effect at the time BURN agents pinged the phone in this case, the rule change nonetheless demonstrates the clear intent of the Legislature, and codified the realistic application of search and seizure common law to tracking technology across state lines that was in effect at the time of the pinging in this case.[36]

Ohio law does not support suppression in this case.

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[35] 924 N.E.2d 410 (Ohio Ct. App. 2009).

[36] *State v. Campbell*, 2014 WL 6725967, at *3, n.1 (Oh. Ct. App. Dec. 1, 2014) (emphasis added).

Like the Ohio legislature, the Delaware General Assembly has expressed its desire to expand Delaware's jurisdiction as widely as possible. It has done so in sections 204 and 2736 of Title 11, as reflected in the Code Commentary to section 204. Section 2736 of Title 11 states:

> If any criminal offense is begun in this State and completed elsewhere, it shall be deemed to have been committed in this State, and may be dealt with, inquired of, tried, determined and punished in this State in the same manner as if it had been actually and wholly committed in this State.

Section 204(a) states, *inter alia*:

> Except as otherwise provided in this section a person may be convicted under the law of this State of an offense committed by the person's own conduct or by the conduct of another for which the person is legally accountable if: (1) Either the conduct or the result which is an element of the offense occurs within Delaware.

The Code Commentary explains that "This section makes the Criminal Code applicable to criminal conduct and results which occur in Delaware, . . . to conduct within the State leading to an offense in another jurisdiction which is also an offense in Delaware, . . . and to any out-of-state conduct which is expressly made criminal as such by Delaware law, provided that law is within the legislative jurisdiction of Delaware."[37] It explains that "the intention of this section is to extend Delaware's criminal jurisdiction as widely as it constitutionally may be extended." In *Bright v. State*, the Delaware Supreme Court reviewed Section 204

[37] Commentary to the Delaware Criminal Code of 1973, § 204.

(a)(1) and 2736, and the commentary, and noted that, "like a number of other states, Delaware has enlarged its criminal jurisdiction by statute."[38]

GPS cases are analogous to wiretap cases, as both involve inherently mobile devices and both are monitored remotely. In *State v. Brinkley*, the Superior Court denied a suppression motion where a wiretap recorded a conversation that occurred while the defendant was in another state.[39] The Superior Court found that the *interception* of the signal occurred where the signal was being monitored, which was within the state, and therefore, within the court's jurisdiction, and interpreted the wiretap statute as carrying out this intent.[40] The Superior Court reasoned:

> Cellular telephones are now ubiquitous and by their nature are highly mobile. These attributes create unique challenges for law enforcement that were not present when the wiretap statutes were first passed decades ago. Law makers have attempted to compensate for

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[38] *Bright v. State*, 490 A.2d 564, 566-67 (1985).

[39] *State v. Brinkley*, 132 A.3d 839, 851 (Del. Super. 2016).

[40] *Brinkley*, 132 A.3d, at 844-45. Section 2407 of Title 11 states that a wiretap order:

> may authorize the interception of communications sent or received by a mobile telephone *anywhere within the State* so as to permit the interception of the communications regardless of whether the mobile telephone is physically located within the jurisdiction of the court in which the application was filed at the time of the interception; however, the application must allege that the offense being investigated may transpire in the jurisdiction of the court in which the application is filed.

11 *Del. C.* § 2407(c)(3)(emphasis added). The Delaware Superior Court found that "'anywhere within the State' modifies 'interception,'" and held that "a wiretap order is lawful when it authorizes the interception of signals within the State without regard to the location of the communications devices." 132 A.3d, at 850.

> the developmental speed and widespread use of these emerging technologies, and it is with this intent that the statute must be interpreted. Under Brinkley's proposed interpretation, foiling law enforcement efforts to gather evidence under a wiretap order would simply require suspects operating in Delaware to simply cross into Maryland, Pennsylvania, or New Jersey to communicate before returning to Delaware to perform a criminal act. Requiring law enforcement to obtain warrants from each state would place an undue burden upon agencies seeking to infiltrate organizations that may cross state lines on a regular basis. The logistical problems and costs involved in maintaining multiple listening posts, each operating under the supervision of a different judge, would render the wiretap statute impotent.[41]

Numerous jurisdictions have reached the same conclusion. In *Davis v. State*, the Court of Appeals of Maryland determined that Maryland law enforcement officers have jurisdiction over a cell phone wiretap "intercepted" by police listening in Maryland, where the defendant used a cell phone in Virginia, which was registered to a Virginia resident at a Virginia address, to call another person in Virginia.[42]

In *United States v. Cosme*, the District Court for the Southern District of California found that officers had jurisdiction over cell phone calls intercepted while the subject placed the call in Mexico.[43] The court reasoned that "[t]he intercepted conversations in this case were first heard and were only heard by law enforcement officials within the Southern District of California and all

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[41] *Id.* at 846.

[42] *Davis v. State*, 43 A.3d 1044, 1055-56 (Md. 2012).

[43] *United States v. Cosme*, 2011 WL 3740337, at *10 (S.D. Calif. Aug. 24, 2011) (quoting 18 *U.S.C.* § 2510(4)).

conversations were intercepted within the authority conferred by § 2518(3). Defendants . . . *are not exempted from the valid wiretap order by making their plans across the border.*[44] The *Cosme* court based its reasoning, in part on the reasoning in cases in the 2nd, 5th, 7th and 9th Circuits, each of which determined that an "interception" occurs at the listening point (some found it also occurred at the place where the call is placed and/or the place where the call is received).[45]

Recently, in *Dahda v. United States*, the United States Supreme Court interpreted the federal statute addressing suppression of wiretap evidence.[46] The parties had agreed that the wiretap "Orders could not legally authorize a wiretap outside the [court's] 'territorial jurisdiction.'"[47] One listening post was outside the issuing court's jurisdiction (in Missouri), but that evidence was not used at trial.[48] The government argued "that an intercept takes place *either* where the tapped telephone is located *or* where the Government's 'listening post' is located" and the wiretap is lawful so long as one or both of those locations are within the issuing

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[44] *Id.* at *10 (emphasis added).

[45] *Id.* at *9 (citing *United States v. Luong*, 471 F.3d 1107, 1109 (9th Cir. 2006), *United States v. Rodriguez*, 968 F.2d 130, 136 (2d Cir. 1992); *United States v. Ramirez*, 112 F.3d 849, 852 (7th Cir. 1997) and *United States v. Denman*, 100 F.3d 399, 403 (5th Cir. 1996)).

[46] 138 S.Ct. 1491 (2018).

[47] *Id.* at 1499.

[48] *Id.* at 1496.

court's jurisdiction.[49] The Supreme Court affirmed the decision denying the defendants' motion to suppress. In doing so, the Court noted:

> [A] listening post within the court's territorial jurisdiction could lawfully intercept communications made to or from telephones located within Kansas or outside Kansas. Consequently, every wiretap that produced evidence at [defendants'] trial was properly authorized under the statute.

In this case, the GPS tracker was primarily monitored by the CIO from Troop 4, in Georgetown. Under the rationale noted in *Dahda* and the other wiretap cases cited above, so long as the GPS monitoring took place within the Superior Court's jurisdiction, the court had authority to issue the warrant, and police did not exceed the authority granted under the warrant.

Ways has not asserted any constitutional right *of his* that was violated, and cannot vicariously assert Metelus's rights. The search in this case was supported by a warrant based on probable cause, and police monitored the GPS from within the State, which resulted in no jurisdictional issue. Further, police physically followed Metelus until just south of the Newark airport, where they lost sight of her. Had they not relocated her with GPS, they would have encountered her when she reentered Delaware, thus, police would have inevitably discovered the drugs. The second warrant for the Jeep, which police obtained as the Jeep traveled south, did not rely on GPS information from New Jersey. Ways claim has no merit.

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[49] *Id.* at 1495.

II. THE SUPERIOR COURT APPROPRIATELY DENIED WAYS' MOTION FOR JUDGMENT OF ACQUITTAL, AS THE STATE PROVED VENUE.

Question Presented

Whether the Superior Court erred in finding that the State proved venue where Superior Court Criminal Rule 18 provides that when multiple crimes are charged appropriately in the same indictment, prosecution can occur in any of the counties in which the crimes are alleged to have been committed.

Scope and Standard of Review

This Court reviews questions of law and alleged constitutional violations *de novo*.[50] The Court reviews *de novo* the decision to instruct the jury on a particular theory of law, and it reviews the determination "to give a 'particular' instruction (that is, an instruction is given but not with the exact form, content or language requested) for an abuse of discretion."[51]

Argument

The Superior Court did not err in denying Ways' motion for judgment of acquittal, because the State established venue, Ways' raised his argument too late, and the Superior Court amended the Indictment to correct the location of the crime. Ways reasoning is flawed because he conflates establishing venue with the effect

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[50] *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010).

[51] *Wright v. State*, 953 A.2d 144, 148 (Del. 2008).

of an obvious error in the Indictment that misstated the county in which Counts 1 and 2 were alleged to have occurred.

A "claim that the indictment was defective will be unavailing unless the indictment cannot, by the most liberal construction, be said to have impaired notice on [the defendant]."[52] Superior Court Criminal Rule 7(c) requires:

> The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney general. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule or regulation or other provision of law which the defendant is alleged therein to have violated.[53]

In *Malloy v. State*, the Delaware Supreme Court explained:

> The courts of this State have consistently viewed an indictment as performing two functions: to put the accused on full notice of what he is called up on to defend, and to effectively preclude subsequent prosecution for the same offense. These purposes are fulfilled if the indictment, as required by Rule 7(c), contains a plain statement of the elements or essential facts of the crime.[54]

The "'essential facts' . . . are those that will 'clearly inform the defendant of the precise offense charged, so that he may prepare his defense and will be protected

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[52] *Malloy v. State*, 462 A.2d 1088, 1093 (Del. 1983).

[53] Super. Ct. Crim. R. 7(c).

[54] 462 A.2d at 1092.

against later prosecution for the same offense.'"[55] In *Wright v. State*, this Court found the indictment valid where it "identifies the crime; states where and when it allegedly occurred; and describes the elements of the crime."[56]

Venue, on the other hand, dictates the place of prosecution. Superior Court Criminal Rule 18 states:

> Except as otherwise provided by statute or by these rules, the prosecution shall be had in the county in which the offense is alleged to have been committed. When two or more offenses that may be charged in the same indictment or information pursuant to Rule 8(a) are alleged to have been committed in more than one county, the prosecution may be had in any county in which one or more of the offenses is alleged to have been committed.[57]

In this case, the original indictment alleged that all three crimes took place in Sussex County; therefore, Sussex County was the appropriate venue.[58] And once Counts 1 and 2 were revised to allege Kent County and Sussex Counties, leaving Count 3 in Sussex County, Sussex County was still the appropriate venue.[59] And the offenses were appropriately joined under Superior Court Criminal Rule 8.

The Superior Court correctly found that the court had venue, and that Ways was not prejudiced:

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[55] *State v. Phillips*, 2004 WL 909557, at *4 (Del. Super. Apr. 21, 2004) (denying bill of particulars).

[56] 2011 WL 51415, at *1 (Del. Jan. 6, 2011).

[57] Super. Ct. Crim. R. 18.

[58] *Id.*

[59] *Id.*

> So, jurisdiction is not the issue. Venue is. Under Rule18 and under Rule 12, I find that it's both been waived and also that it's an invalid claim . . . .
>
> There is no question in my mind that there is no prejudice to the defense in this matter. If the Court needs to decide to change venue, which I don't think I do, under Rule 18 and Rule 12, you've waived it, and it's not jurisdictional. It's venue. This court has statewide authority, and so my view is that, one, it's waived. But even if it isn't, that Rule 18 provides you are fully on notice of all the conduct that was charged, where it occurred, when it occurred, how it occurred. You have full discovery on this matter.
>
> Your competency with regard to command of the facts and the law has been established by the record in this trial, and there is no way that there's any prejudice to the defendant by having this case go forward.

(B94). The Superior Court correctly found that, at all times, Ways was aware that police executed the search warrant on the Jeep on the Puncheon Run connector near Dover, in Kent County. As such, the drugs never made it to Sussex County to be possessed there, which was the location alleged in the original indictment for Counts 1 and 2. Ways argues that the mistake in naming Sussex County as the location of Counts 1 and 2 renders Sussex County the improper venue. To the contrary, it was a scrivener's error that, as the Superior Court correctly found, caused no prejudice, because Ways had adequate notice of the charged offenses. Further, the State amended the indictment to correct the error before the defense presented its case.

This situation is analogous to the requirement that the State prove timing to establish that an offense is not outside the section 205 statute of limitations. The

Indictment alleges that "on or about" a particular date, or between two dates, the defendant committed the alleged acts. The State must prove these time frames to the extent that it clearly satisfies section 205, but not so specifically that the actual dates are elements of the offense—this Court has repeatedly stated "time when the crime occurred is not an essential element of the offense."[60] In *Clark v. State*, the defendant planned to argue that he should be acquitted based on the alleged timing inaccuracies in the Indictment.[61] But, the Superior Court gave the legally correct jury instruction that time is not an element of the offense.[62] This Court "conclude[d] that the trial court acted well within its discretion in responding to Clark's tactical decision by giving the jury instruction.[63] The Superior Court's actions in this case were likewise appropriate.

In any event, Ways failed to timely raise the venue issue; therefore, he waived it.[64] Superior Court Criminal Rule 12(b) requires that defects in the indictment must be raised before trial. In *Brown v. State*, this Court found that "'Such a long delay in raising the issue suggests a purely tactical motivation of incorporating a convenient ground of appeal in the event the jury verdict went

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[60] *Clark v. State*, 2006 WL 1186738, at *1 (Del. May 2, 2006).

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Brown v. State*, 729 A.2d 259, 263 (Del. 1999) *overruled on other grounds by Priest v. State*, 879 A.2d 575 (Del. 2005).

against the [defendant].'"[65] The Court held, "that because Brown failed to raise this contention in a pre-trial motion, it was not properly preserved for appeal and thus was waived."[66]

The State established venue through the evidence presented in its case in chief, and Ways' challenge was untimely. The mistake in the Indictment had no effect on Sussex County as the appropriate venue. The Superior Court did not abuse its discretion in finding that the defendants were well aware of the conduct underlying the charges and were not prejudiced by the amendment to the indictment. Ways' claim has no merit.

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[65] *Id.* (quoting *Malloy v. State*, 462 A.2d at 1092) (additional quotation omitted).

[66] *Id.* (citing *Malloy,* 462 A.2d at 1092).

CONCLUSION

The judgment of the Superior Court should be affirmed.

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DATE: June 4, 2018

CERTIFICATE OF SERVICE

I, Abby Adams, being a member of the Bar of the Supreme Court of Delaware, hereby certify that on June 4, 2018, I caused the attached document to be served by File and Serve to:

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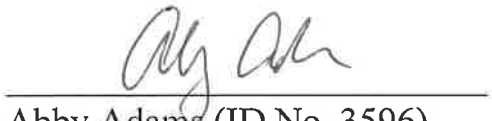

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRANDON WAYS,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 547, 2017
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 8,841 words, which were counted by Microsoft Word 2016.

Dated: June 4, 2018

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