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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| ERIC C. LLOYD,<br><br>Defendant Below,<br>Appellant,<br><br>v.<br><br>STATE OF DELAWARE,<br><br>Plaintiff Below,<br>Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 460, 2019<br><br>ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE<br>ID No. 1710006739 |

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ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF DELAWARE

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# APPELLANT'S OPENING BRIEF

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## TABLE OF CONTENTS

PAGES

## TABLE OF CITATIONS

**CASES** **PAGE**

**STATUTES AND RULES**



**OTHER AUTHORITIES**

## NATURE OF PROCEEDINGS

On November 13, 2017, A New Castle County grand jury returned a multiple defendant indictment. The lead charge of criminal racketeering alleged nineteen predicate offenses. A final re-indictment, under which the defendant proceeded to trial, was returned on June 14, 2016. (A.24) This indictment included thirty-six counts, of which the defendant was charged in eight.[1]

Defendant Lloyd proceeded to trial with co-defendants Dwayne White and Damon Anderson. On June 14, 2019, defendant was found guilty by a jury of multiple felony counts including criminal racketeering (count one), conspiracy to commit racketeering (count two), conspiracy to deal cocaine (count seventeen), money laundering (count eighteen), and conspiracy to commit money laundering (count twenty). He was found not guilty of drug dealing cocaine (count sixteen). (A.1)

On October 18, 2019, defendant was sentenced to an aggregate thirty years in prison, to be served without the benefit of any form of early release pursuant to 11 *Del. C*. sec. 4204 (k). (A.1523)

[1] Defendant Lloyd was charged in counts one (Criminal Racketeering)(A.24), two (Conspiracy to Commit Racketeering)(A.29), sixteen (Drug Dealing Cocaine)(A.37), seventeen (conspiracy to deal cocaine)(A.37), eighteen (money laundering)(A.38), twenty (Conspiracy to Commit Money Laundering)(A.39), twenty-seven (criminal mischief)(A.42) and twenty-nine (Attempt to Evade or Defeat Tax)(A.43)

Defendant filed a timely Notice of Appeal. (A.1529). This is Defendant's opening brief.

## SUMMARY OF ARGUMENT

1. The trial court erred when it denied defendant's motions to sever his case from that of co-defendant Dwayne White because there was a reasonable probability that substantial prejudice would result from the joinder.

2. The trial court erred when it denied defendant's motion for a mistrial because of the inaccurate and overly prejudicial eyewitness identification of the defendant.

3. The trial court erred when it denied defendant's motion to bar or substantially limit the testimony of, and testimony regarding, attorney Joseph Benson as such testimony infringed on the defendant's sixth amendment right to counsel and was misleading to the jury.

4. The trial court erred when it permitted, over objection, the admission of guns seized from the apartment of Maurice Cooper because the probative value was substantially outweighed by the prejudicial effect.

5. The trial court erred when it permitted, over objection, the entrance of rap music videos in which the defendant was not a participant, because the videos were hearsay without an exception.

6. The Court's sentence in this case violated the defendant's constitutional protection against cruel and unusual punishment.

## STATEMENT OF FACTS

On June 6, 2017, Jashown Banner, a six-year-old child, was struck by a stray bullet. The bullet, meant for target Markevis Stanford, left Banner permanently disabled. Jashown Banner is only able to move his eyes. It is on this harrowing fact that the prosecution framed its opening statement in the trial against Eric Lloyd, Dwayne White, and Damon Anderson. (A.158) Of the three, only Dwayne White was charged with any of the events surrounding the attempted murders of Markevis Stanford, and the shooting of Jashown Banner.[2] (A.24)

Defendant Lloyd was charged in the lead count of the indictment, as well as seven other counts.[3] The defendant was in federal custody during the bulk of the investigation.(A.170) The evidence against him amounted to emails he sent and received while in federal custody, LLCs which he owned, his relationship to attorney Joseph Benson, and the testimony of cooperating witnesses. (A.170 - 172)

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[2] Counts three (attempted murder)(A.30), four (conspiracy to commit murder)(A.31) twenty-two (criminal solicitation murder)(A.40), twenty-three (conspiracy to commit murder)(A.40), and twenty-four (aggravated intimidation)(A.41)

[3] Defendant Lloyd was charged in counts one (Criminal Racketeering)(A.24), two (Conspiracy to Commit Racketeering)(A.29), sixteen (Drug Dealing Cocaine)(A.37), seventeen (conspiracy to deal cocaine)(A.37), eighteen (money laundering)(A.38), twenty (Conspiracy to Commit Money Laundering)(A.39), twenty-seven (criminal mischief)(A.42) and twenty-nine (Attempt to Evade or Defeat Tax)(A.43)

The defendants were indicted together as alleged members of the same drug dealing enterprise. The indictment spanned a period from January 2015 to January 2019. (A.24) The trial itself, however, focused significantly on the events of June 6, 2017, when Jashown Banner was shot. The group of individuals pursing Markevis Stanford, with the goal of killing him, was known as the "Big Screen Boys." The "Big Screen Boys" included Ryan Bacon, Maurice Cooper, Dante Sykes, Teres Tinnin and Michael Pritchett. (A.176)[4]. The Big Screen Boys were a group of four best friends. (A.843) The "Big Screen Boys" and Markevis Stanford had been engaged in a feud dating back to 2015. (A.176) Ryan Bacon and Dion Oliver made a sex tape with Markevis Stanford's girlfriend. As a result, Stanford shot and injured Dion Oliver. In the months leading up to June 6, 2017, the feud escalated. Ryan Bacon, a rap artist, produced a "dis track" against Stanford. In response, Stanford robbed two "Big Screen Boys"; Teres Tinnin and Michael Pritchett. Teres Tinnin was best friends with Dwayne White. (A.1262) Tinnin and Pritchett were also members of a secondary group; "The Four Horseman[5]," of which White was a member. (A.175) As a result of Tinnin and Pritchett being

[4] These individuals were initially indicted along with this defendant and his trial co-defendants. However, their cases were ultimately adopted for prosecution by the Office of the United States Attorney. Maurice Cooper was tried at the State level, but additionally faces charges at the federal level.

[5] The Four Horsemen" were Dwayne White, Rasheed White, Teres Tinnin and Michael Pritchett.

robbed, Dwayne White put up money to support a "check" or "hit" being placed on Markevis Stanford. (A.176 - 177)

On June 6, 2017 the "Big Screen Boys" were actively in search of Stanford, with a goal to kill him. (A.177) Stanford was located by Dion Oliver and Michael Pritchett. Oliver leaned out of a truck being driven by Pritchett, and shot at Stanford. The bullet did not strike Stanford, but instead traveled into a nearby car, striking and permanently disabling Jashown Banner. (A.177) In the aftermath, Dwayne White approached members of the Banner family, offering them twenty-thousand dollars to provide an affidavit exonerating Michael Pritchett. (A.177)

Eric Lloyd was not a member of "The Four Horsemen" nor of "The Big Screen Boys." He was not involved in the recording or production of any music videos. He had no connection to Markevis Stanford. He was not involved in the pursuit of Stanford. He was not involved in funding the bounty against Markevis Stanford. He was not involved in the shooting which resulted in injury to Jashown Banner, and he was not involved in the attempt to bribe witnesses which occurred in the aftermath.

The defendant first moved for severance from trial co-defendant White on April 2, 2019, arguing that the shooting of Jashown Banner fell outside of the enterprise in which the defendant was charged (A.47) The motion to sever was denied on May 7, 2019. (A.59)

Prior to trial, it was learned that counsel for Dwayne White intended to concede guilt to the charges of drug dealing, conspiracy to commit drug dealing and racketeering as supported by the predicate acts, but to deny all involvement in the conspiracy to commit murder and related charges.

As a result, the defendant filed a renewed motion to sever, now raising issues of antagonistic defenses, a desire to call co-defendant White as a witness at trial, and additional support for the argument that the shootings were entirely separate from the alleged enterprise. (A.62) On May 31, 2019, this renewed motion to sever was denied. (Argument A.65 - 90; court's reasoning A.90 - 95)

At trial, the prosecution called three members of Jashown Banner's family to testify; his father, Joshua Potts; his mother, Shaylynn Banner; and his grandmother, Deborah Banner. (A.239, A.337, A.350) These persons served as witnesses to the June 6th shooting, as well as to the subsequent bribery attempts. Neither of these events were disputed by any of the three defendants.

The evidence presented at trial was that Dwayne White individually approached each member of the Banner family in order to offer them twenty-thousand dollars to provide an affidavit exonerating Michael Pritchett. First, he approached Joshua Potts, in person. (A.243) Then he sent text messages to Shaylynn Banner, including pictures of Michael Pritchett so she would know who to exculpate, and a picture of himself, so she would know who was making her the

offer. (A.343) Shaylynn Banner turned these pictures over to Detective Devon Jones. (A.276) Finally, he approached Deborah Banner, in person, and made her the same offer. (A.355) The members of the Banner family knew the individual who contacted them only as "Boop," and had never seen him before or since. (A. 245, A.356) The parties do not dispute that it was Dwayne White who attempted to bribe the Banner family. Dwayne White himself concedes this. (A.1276)

However, at trial, when asked to identify the person that had attempted to bribe him, Joshua Potts pointed out defendant Eric Lloyd for the jury. When asked a second time, to point out the person, Joshua Potts again pointed out Eric Lloyd for the jury. (A.243) Shaylynn Banner was not asked to make an identification in court (A.345). Deborah Banner was not asked to make an identification in court. (A.356)

As a result of this testimony, Defendant Lloyd moved for a mistrial, arguing that this is the exact type of prejudice concern which prompted the motion to sever, and the prejudice could not be cured. (A.388) The Court found that the remedy of a mistrial was "too draconian" and denied the motion, permitting a stipulation to be read into the record. (A.403 – court's ruling) This stipulation did not strike the testimony of Joshua Potts, nor clarify that the testimony was untrue. It was a stipulation between defendant White and the State that White had approached the Banner family and offered them money to exonerate Michael Pritchett. (A.1276)

The shooting of the six-year-old boy prompted an investigation which led to a wire-tap warrant on the phone of Dwayne White. (A.165) This wire-tap allowed the prosecution to link Dwayne White with other persons who had been previously arrested for controlled dangerous substance offenses, now connecting them to White, and the racketeering enterprise. (A.165) Attorney Joseph Benson had represented a number of individuals who, post his representation, were joined into this indictment. Once these persons were linked by Indictment, the prosecution identified Benson as an unindicted co-conspirator and indicated plans to call him as a witness at trial.

As a result, prior to trial, the defendant filed a *motion in limine* to preclude the testimony of or testimony about attorney Joseph Benson. (A.13, Docket No. 114) The motion was granted in part and denied in part.[6]

At trial, Joseph Benson and others testified that Benson had represented multiple defendants whom were charged in the conspiracy, and that he does not, as a practice, represent persons who are willing to engage in cooperation with the prosecution. (A.504, A.508, A.740, A.741, A.742, A.755) Joseph Benson additionally testified that he had represented the defendant. (A.734) Over further objection, a cooperating witness was permitted to testify as to statements made to him by Joseph Benson's secretary. (A.1239)

[6] This motion was filed, argued, and ruled upon under seal on May 23, 2019.

At trial, it was asserted that Lloyd, prior to entering federal custody, passed his business over to Dwayne White. (A.171) There were no wiretap calls introduced between Eric Lloyd and Dwayne White, nor recorded jail calls between the two.

The State asserted that the defendant maintained a foothold in his business through "thousands of emails" he sent while in federal custody. (A.171, A.444). In chambers, the Court had ruled that references to Lloyd's incarceration was permissible for limited purposes: for the prosecution to explain why the defendant did not have legitimate income, to explain why he was not on the wiretap phone calls, and to provide context to his emails.[7] (A. 393)

A series of evidentiary objections were made at trial. The defense objected to the introduction of five rap music videos. (A.416) The videos were mostly made by Ryan Bacon, and often times included other persons charged in the indictment. The defendant was never pictured in any of the videos.

Most specifically, the defendant objected to a music video called, "Coke in My System." In its opening, the prosecution informed the jury that they would hear about a rapper in the enterprise named Nafi White. The prosecutor told the jury they would hear about the defendant's association with Nafi White, and how, when

[7] The specific ruling was made, on record, during a sealed proceeding on May 23, 2019

Nafi White was in the studio creating, "Coke in My System" he gave a special shout out to Eric Lloyd. (A.178) Eric Lloyd was not a participant in the song, nor the video. Nafi White is the step-father of Eric Lloyd's oldest daughter. (A.1382) The court overruled the objection. (A.416, argument; A.422, Court's ruling)

The defense additionally objected to the introduction of numerous guns recovered from the apartment of Maurice Cooper. Cooper was a co-defendant in the initial indictment, but he proceeded to trial separately where he was found not guilty of the racketeering charge, but guilty of the weapons offenses. (A.406, A.1222) The court overruled the objection. (A.1222, argument; A.1223, court's ruling)

On June 14, 2019, the defendant was found guilty of multiple felony counts including criminal racketeering (count one), conspiracy to commit racketeering (count two), conspiracy to deal cocaine (count seventeen), money laundering (count eighteen), and conspiracy to commit money laundering (count twenty). He was found not guilty of drug dealing cocaine (count sixteen). (A.1)

On October 18, 2019, the defendant was sentenced to an aggregate thirty years in prison, to be served without benefit of any form of early release pursuant to 11 *Del. C.* 4204 (k). (A.1523)

Defendant filed a timely notice of appeal. (A.1529)

## ARGUMENT

### I. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTIONS TO SEVER HIS CASE FROM THAT OF CO-DEFENDANT DWAYNE WHITE BECAUSE THERE WAS A REASONABLE PROBABLITY THAT SUBSTANTIAL PREJUDICE WOULD RESULT FROM THE JOINDER.

A. QUESTION PRESENTED.

Is there a reasonable probability that a joint trial caused substantial prejudice to Defendant Lloyd's defense? This issue was preserved by Mr. Lloyd's motion to sever filed on March 20, 2019 and Mr. Lloyd's renewed motion to sever filed on May 29, 2019.

B. SCOPE OF REVIEW.

The standard of review for the Superior Court's denial of a motion to sever is abuse of discretion. *Bates v. State*, 386 A.2d 1139 (Del. 1978) After denial of a motion to sever, a new trial is warranted only if the defendant can show that there is a reasonable probability that a joint trial caused substantial prejudice to his defense. *Id.*

C. MERITS OF THE ARGUMENT

The defendant was not charged with the attempted murders of Markevis Stanford, the conspiracy to commit those murders, nor subsequent bribery attempts. These attempts on the life of Stanford resulted in the shooting of Jashown Banner. The shooting stemmed from an ongoing feud, dating back to 2015,

between Stanford and a small group of "best friends" known as "The Big Screen Boys." The feud between Stanford and the "Big Screen Boys," existed separately and apart from the drug dealing enterprise under which the defendant was indicted.

Still, the prosecution listed the actions of the "Big Screen Boys" as predicate offenses to racketeering, and focused largely on the June 6th shooting. The State engaged in an emotionally charged prosecution – from beginning to end - framed around the shooting of a six-year-old boy.

Resultingly, the defendant was prejudiced. There could be few offenses more shocking to a juror than the severe injury of an innocent child. This prejudice culminated when Joshua Potts, the father of Jashown Banner, through tear filled testimony, twice mistakenly identified Defendant Lloyd as the person who tried to bribe him.

As a general matter, prejudice in this context arises where: (1) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find; (2) the jury may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crime or crimes; and (3) the defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges. *Id.*

In determining whether the trial court abused its discretion, it is necessary to examine the facts in each case. *Younger v. State*, 496 A.2d 546, 550 (Del. 1985). The defendant has the burden of demonstrating substantial prejudice, and mere hypothetical prejudice will not suffice. *Skinner v. State*, 575 A.2d 1108, 1118 (Del. 1990).

a. First Motion to Sever

The Court, in denying the defendant's first motion to sever, relied upon *Taylor v. State*, 76 A.3d 791, 801 (Del. 2013) (*citing Bradley v. State,* 559 A.2d 1234, 1241 (Del. 1989), as well as *Phillips v. State*, 154 A.3d 1130, 1138 (Del. 2017). The Court held that the actions of the defendant and co-defendant Lloyd were allegedly "predicate offenses" of criminal racketeering which are inextricably intertwined, and that, while hypothetically the defendant may have a better chance of being acquitted at trial if tried alone, such speculation did not warrant severance.

The cases relied upon by the Court are highly distinguishable from the case at hand. A full analysis of the *Bradley* factors required severance, and the failure to sever did result in prejudice.

Firstly, the law relied upon by the Court from *Taylor* and *Philips* dealt with severance of charges, rather than severance of defendants. In *Taylor* and *Philips*, the defendants were each charged with both murder and attempted murder as well as gang participation. Each moved for his murder and attempted murder charges to

be severed from his gang participation charges. The defendants each argued that, in trying the matters together, the State was permitted to introduce the defendant's prior bad acts of drug dealing and gang affiliation into his trial for murder. In both *Taylor* and *Philips*, the Court found that the entrance of the evidence of gang affiliation was "inextricably intertwined," to the murder and attempted murder charges because it explained the motive for the homicides. Without the gang affiliation evidence, the crimes would have seemed like random acts of violence.

The analysis required here, where the defendant was never charged with the offense from which he requests severance, and where the State has instead, attempted to admit these acts in trial as "predicate acts" of a racketeering enterprise, is entirely different.

In *H.J. Inc.*, the United States Supreme Court held that in order to prove a pattern of racketeering activity, the prosecution must show that the predicates are related and that they amount to or pose a threat of continued criminal activity. *H. J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). In relying on *Taylor* and *Philips*, which dealt with acts committed by the same defendant, the trial Court failed to conduct a proper analysis under *H. J. Inc.*

Rule 8(b) provides substantial leeway to prosecutors who would join racketeering defendants in a single trial. The rule permits joinder of defendants charged with participating in the same racketeering enterprise or conspiracy, even

when different defendants are charged with different acts, so long as indictments indicate all the acts charged against each joined defendant (even separately charged substantive counts) are charged as racketeering predicates or as acts undertaken in furtherance of, or in association with a commonly charged RICO enterprise or conspiracy. *United States v. Dickens*, 695 F.2d 765, 778-79 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983).

To satisfy the first prong of the *H. J. Inc*. test, that the predicate acts are related, the Government must show both that the racketeering acts relate to each other ("horizontal relatedness"), and that the racketeering acts relate to the enterprise ("vertical relatedness"). Horizontal relatedness exists if the racketeering acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H. J. Inc.*, 492 U.S. at 240. The prosecution may prove the required vertical relationship between the predicate acts and the RICO enterprise by showing either: (1) that the offense related to the activities of the enterprise; or (2) that the defendant was able to commit the offense solely because of his position in the enterprise.

Here, the State did not argue, and would not have been able to successfully argue, that the *H.J. Inc.*, test was satisfied because it could not show that there was a horizontal nor a vertical relationship. The enterprise in question was defined as a

"drug dealing enterprise." There were over fifty individuals originally named or charged with this offense. (A.212) Of those fifty, only eight persons were indicted for any of the charges surrounding the attempts on Markevis Stanford's life; Dwayne White, Ryan Bacon, Maurice Cooper, Dion Oliver, Michael Pritchett, Dontae Sykes, Teres Tinnin and Rasheed White. These persons were all members of a separate and distinct group from the larger enterprise; "The Big Screen Boys" and/or "The Four Horsemen."

The "predicate acts" of attempted murder, conspiracy to commit murder, criminal solicitation of murder, and aggravated intimidation were not acts which had the same or similar purposes, results, participants, victims, or methods of commission, or otherwise were interrelated by distinguishing characteristics; they were separate and isolated events. These predicates were not related to the drug dealing activities of the enterprise and Defendant White was not able to commit these offenses solely because of his relationship to the enterprise.

The State's evidence was that the "beef" with Markevis Stanford began in 2015. Stanford had been friends with the men in the "Big Screen Boys." However, when they began fighting, Ryan Bacon and Dion Oliver made a sex tape with Markevis Stanford's girlfriend. As a result, Stanford shot Dion Oliver. Stanford, in 2017, robbed two other "Big Screen Boys" Michael Pritchett and Teres Tinnin. It was specifically the "Big Screen Boys" that Stanford was targeting, and that

Stanford feared. Teres Tinnin was best friends with Dwayne White. The robbery of Tinnin prompted White to put up money to place a "check" on Stanford's head. During the course of trying to "cash" that check, Dion Oliver, Michael Pritchett, Ryan Bacon, and Teres Tinnin went out in search of Stanford. When Dion Oliver attempted to shoot and kill Stanford, his bullet struck Jashown Banner. (A.175 - 177)

The State contended in argument against the motion to sever, that these offenses, relating to the attempts on the life of Markevis Stanford, were "inextricably linked" to the "enterprise," yet, co-defendant Maurice Cooper was charged with racketeering as a part of the same enterprise, proceeded to trial, and the State did not introduce any of the information related to Markevis Stanford.[8]

Moreover, little was being contested in relation to the attempted shooting of Markevis Stanford and actual shooting of Jashown Banner. No defendant in the group was contesting that the "Big Screen Boys" were trying to kill Stanford, or that Jashown Banner was shot and critically injured. Dwayne White, the only defendant charged in these crimes, was contesting only whether or not he had aided in placing a bounty on the head of Markevis Stanford. Therefore, the injuries to Banner and details of the shooting had little relevance to the case.

[8] The matter of State v. Maurice Cooper is before this court under number 261-2019.

The State's own closing argument emphasized the distance from these actions to the drug dealing purpose of the enterprise and the other defendants. "The evidence in this case has shown that in the late spring into the early summer of 2017, Dwayne White joined in an already violent feud that members of his organization were in with Markevis Stanford. He did so by enhancing an already existing bounty on the head of Markevis Stanford. You've heard evidence that that agreement resulted in Dion Oliver shooting Jashown Banner in the head on June 6, 2017, as he was trying to shoot at Markevis Stanford." (A.1392)

The joinder via predicate acts was improper.

b. Renewed Motion to Sever

During the course of trial preparations, defense counsel learned that it was the strategy of co-defendant White to concede guilt to the drug dealing, conspiracy to commit drug dealing and racketeering as supported by the predicate acts, but to deny all involvement in the murder and conspiracy to commit murder. Defendant Lloyd renewed his motion to sever, arguing antagonistic defenses. (A.47)

The existence of defenses so antagonistic as to force the jury to accept the defense of one defendant only by rejecting the defense offered by the other demand[s] severance." *Bradley v. State*, 559 A.2d 1234, 1241 (Del. 1989). In its survey of Rule 14 cases, Corpus Juris Secundum describes the threshold for severance this way: "Severance will be granted where . . . defenses are shown to

be so mutually exclusive and irreconcilable that a jury will infer guilt from the conflict alone and must disbelieve the core of one defense in order to believe the other defense." 22A C.J.S. Criminal Law § 569 (1989).

While Dwayne White was conceding to the jury that the drug dealing enterprise existed, Defendant Lloyd was denying such existence. The jury could not believe both. Further, the only remedy to Dwayne White's concession, would have been for Defendant Lloyd to have called Dwayne White as a witness at trial, in order to question him as to whether, in the enterprise Dwayne White was conceding, Defendant Lloyd maintained any role, or if Defendant Lloyd had passed the enterprise on to Dwayne White. Moreover, the initial factors should have been reweighed along with this newly provided information in order to determine whether or not there was a substantial risk of prejudice. The renewed motion to sever too was denied. (A.66 - 95)

c. Resulting Prejudice

Substantial prejudice did result from the denial of the severance motion. Firstly, the State's case was overridden with emotionally charged references to the shooting of Jashown Banner. Despite the fact that none of the three defendants was charged with the assault of Banner, none of the defendants were contesting who shot Banner, and that co-defendant White was not contesting that he had attempted to bribe members of the Banner family, the State's entire opening was framed

around Banner. The first words from the deputy attorney general in opening were Jashown's name. (A.157) The prosecutor went on to repeatedly describe the bullet entering Jashown Banner's head; how it "silenced" him, how he needed to be revived multiple times, and how, two years later, he is still on a ventilator and still has a bullet in his head. (A.158 - 164) The prosecution's opening PowerPoint contained two pictures of Jashown Banner; one in his pre-school graduation outfit, and one on the ventilator.

> "You will hear that following the arrest of Michael Pritchett Dwayne White went to the hospital where Jashown was hooked up to feeding tubes and ventilators, not to visit Jashown, but instead to offer the Banner family money." (A.163)

Banner is referenced far more times in opening than Defendants Lloyd or Anderson. Just as the opening started, the prosecution ended its opening on Jashown Banner; on an issue with which this defendant was not charged, and an issue no defendant contested.

> "But no matter the people, the number of dollars, or the strength of the enterprise, this money had limitations. This money could buy a target on the head of Markevis Stanford, but it could not buy where the bullets would land on June 6 of 2017. This money could not buy, as you will hear, the Banner family, and their testimony. June 6 of 2017 was not the beginning and it is not the end. Though that day may have sparked a massive investigation, the final word on this enterprise, and the evidence against Eric Lloyd, Dwayne White and Damon Anderson lies with you, the jury." (A.181)

Throughout the trial the prosecution continued to press on the emotions of the jury: describing Jashown Banner as a "tiny child" and medical personnel needing to use child AED patches because he was so "tiny" (A.233, A.235); describing how Jashown was in a coma for five days, and the doctors wanted his mother to "pull the plug on him" (A.342); and asking how Jashown's sibling reacted to seeing her brother shot. (A.341)

The prosecution called three members of the Banner family to testify to the shooting, as well as to the bribe from Dwayne White. There was no dispute between the parties that Dwayne White was the individual who attempted to bribe members of the Banner family to exonerate Michael Pritchett. (A.400)

Despite that understanding, in the middle of emotional and tear-filled testimony, Jashown Banner's father, Joshua Potts, was asked to identify the man who had attempted to bribe him. Potts identified, not Dwayne White, but Defendant Eric Lloyd. The prosecutor asked Potts if he could see everyone in the court room. Potts indicated that he could, and again wrongly pointed out Defendant Lloyd as the person who had bribed him. (A.243) Shaylnn Banner did not make any identifications of "Boop," (A.345) nor did Deborah Banner. (A.356)

Eyewitness identification is the most damning of all evidence that can be used against a defendant. As stated by Justice Brennan: "eyewitness testimony is likely to be believed by jurors, especially when it is offered with a high level of

confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all. All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (citation omitted)[9]

Here, the predicate offenses related to the shootings should have never been charged as such under *H.J., Inc.*, and evidence of same should not have been admitted under *Bradley*. Defendant Lloyd had nothing to do with the attempts on the life of Markevis Stanford, and the shooting of Jashown Banner. Yet, the trial against him focused far more heavily on these events, and the grief of the Banner family, than any of the evidence actually connected to this defendant.

What the trial did show, was that Defendant Lloyd had a lifetime connection with Defendant White; Defendant White who was willing to bribe a family as they surrounded their son's hospital bed; Defendant White who was willing to fund the mission to take another's life. There could be few things more prejudicial. To have it culminate with the grieving father twice identifying Lloyd as the person who

[9] The Delaware Superior Court has relied upon this exact language in making determinations about eye witness identification in *State v. Holmes*, No. 11050100172, 2012 Del. Super. LEXIS 422, at *3 (Super. Ct. Sep. 19, 2012)

attempted to bribe him demonstrates more than a reasonable probability that the joint trial resulted in substantial prejudice.

## II. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR A MISTRIAL BECAUSE OF THE INACCURATE AND OVERLY PREJUDICAL EYE WITNESS IDENTIFICATION OF THE DEFENDANT.

### A. QUESTION PRESENTED.

Did the defendant suffer egregious prejudice when the State's witness twice, incorrectly, identified Defendant Lloyd as the individual who attempted to bribe the father of a six-year-old who was on life support?

This issue was preserved in defendant's motion for a mistrial, argued on June 5, 2019 (A. 388 - 404 – argument on motion for mistrial and court's ruling)

### B. SCOPE OF REVIEW.

An appellate court reviews the denial of a motion for mistrial after an unsolicited response[10] by a witness for abuse of discretion or the denial of a substantial right of the complaining party. In doing so, an appellate court examines the nature, persistency, and frequency of the outburst. Second, an appellate court considers whether the outburst created a likelihood that the jury was misled or prejudiced. Third, an appellate court examines the closeness of the case. Fourth, an appellate court considers a trial judge's attempt to mitigate any prejudice. *Pena v. State*, 856 A.2d 548, 549 (Del. 2004)

[10] While the identification was made in response to the prosecution's request for an identification, the defendant is aware that this was not the answer the prosecution was expecting or attempting to solicit, and therefore finds this analysis the most appropriate.

## C. MERITS OF THE ARGUMENT

As outlined in the above point, the defendant was twice identified by the father of a six-year-old shooting victim as the person who attempted to bribe the Banner family.

In considering the *Pena* factors, the court erred in denying the motion for a mistrial. First, the court must look to the nature, persistency and frequency of the outburst. This testimony went directly to an emotional issue, which the prosecution made the heart and soul of its case-in-chief. The testimony was eye-witness identification testimony given from a grieving, crying, father. A father, whose son is now permanently attached to a ventilator. This witness twice identified Defendant Lloyd as the individual who attempted to bribe him. The identification was persistent in that, not only did it come twice from Joshua Potts, but no other witness made a competing identification. Neither Shaylnn Banner, nor Deborah Banner were asked to make in court identifications of "Boop."

Secondly, the court considers whether the outburst created a likelihood that the jury was misled or prejudiced. In opening, the prosecutor stated, "You will hear that during the summer of 2017, when a bullet entered Jashown's skull and Dwayne White was attempting to bribe the Banner family, Eric Lloyd was in federal prison. However, before he went to prison, you will hear how he took measures to make sure his business and network were in good hands." (A.170).

From the outset, the prosecution attempted to link Eric Lloyd with Dwayne White when it came to Jashown Banner. The opening worked to imply to the jury that, if Eric Lloyd had not been in federal prison, he would have been involved in the shooting of Banner. Since he placed Dwayne White in charge, he was just as culpable. (A.394) With this improper reference to Lloyd's imprisonment, the jury was misled, and primed to be prejudiced against the defendant.

Few things could be more prejudicial than watching a grieving father point out a man he believed, in some way, placed a monetary value on justice for his child. When Joshua Potts testified that Eric Lloyd had bribed him, the jury had no reason to believe that Lloyd at some point hadn't approached the family, or that the family didn't have other knowledge that Lloyd was directing White to approach them.

Third, an appellate court examines the closeness of the case. Here, the evidence against Eric Lloyd was not overwhelming. Defense Counsel argued to the jury that the prosecution was taking Lloyd's lifetime affiliation with the riverside apartment complex, and prior criminal history and using that to infer current guilt.

Three cooperating co-defendant's testified against Eric Lloyd. William Wisher testified that Lloyd "ran the show" and "passed the torch" to Dwayne White. (A.1133). He testified that Lloyd provided him with a brick of cocaine

(A.1141), and continued to provide him cocaine until Wisher was getting a kilo every three or four weeks. (A.1142) He stated that he received drugs directly from Eric Lloyd and Lloyd would bring them to Wisher's house. (A.1143). Dante Sykes testified that he got cocaine from Eric Lloyd about four or five times a month until Lloyd went to jail. (A.1236). The jury found the defendant not guilty of drug dealing cocaine. Wisher and Sykes, who were facing substantial sentences in state and federal prison, were not credible.

The third cooperating witness, Tyrone Roane, testified that Eric Lloyd had "gotten out of the game" and that his involvement in drug dealing had been over twelve years ago. (A.1101) He further testified that Dwayne White had been Eric Lloyd's "protégé even more than thirteen years ago." (A.1115) Roane testified that he didn't know of any reason why Eric Lloyd should have been charged under the current indictment. (A.1115)

While the prosecution repeatedly told the jury that Eric Lloyd maintained his foothold in the operation through "thousands of emails" he sent from prison (A.171), they only entered approximately thirty emails into evidence. (A. 1355 - 1363). A number of those emails were shown only to demonstrate association or familiarity with other members of the indictment, and weren't demonstrative of any type of directing from inside the jail. (A.1357) The prosecution's own witness

testified that he never reviewed all of the emails and that a large part of the emails were benign emails between the defendant and his friends and family. (A.460).

In opening, the government stated that the jury would hear how Eric Lloyd instructed his crew on how to hide in plain sight by wearing their work uniform. This was never testified to at trial. While Tyrone Roane did testify that a member of the enterprise wore his work uniform to hide from police, there was never any testimony that this instruction came from Eric Lloyd. (A.825 - 827)

The remaining evidence dealt with the defendant's property ownership and limited liability corporations. However, while two LLCs were attributed to the defendant, the prosecution only obtained tax records for one. (A.1373). Further, no clear differentiation was made between money Lloyd may have made prior to the time frame of this indictment, versus during the course of the investigation period.

Fourth, an appellate court considers a trial judge's attempt to mitigate any prejudice. Here the court approved of a stipulation being read into the record. The stipulation specifically stated: "The State of Delaware and defendant Dwayne White hereby stipulate to the following: One, one of Dwayne White's nicknames is Boop. Two, that Dwayne White approached Joshua Potts, Shaylnn Banner, and Deborah Banner with an offer of money in exchange for the exoneration of Michael Pritchett in the shooting of Jashown Banner." (A.1276). The issue here is that it did not instruct the jury that Joshua Potts testimony was incorrect, that they

must disregard his testimony, or that Eric Lloyd did not have anything to do with the events surrounding the shooting of Jashown Banner.

Because the defendant suffered egregious prejudice, which was not cured. The trial court erred in denying defendant's motion for a mistrial.

## III. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO BAR OR SUBSTANTIALLY LIMIT THE TESTIMONY OF, AND TESTIMOY REGARDING ATTORNEY JOSEPH BENSON AS SUCH TESTIMONY INFRINGED ON THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL AND WAS MISLEADING TO THE JURY.

### A. QUESTION PRESENTED.

Did the Court err in allowing testimony by and about defendant's prior attorney, Joseph Benson? This issue was preserved in defendant's *motion in limine* filed under seal on May 23, 2019. (A.13, Docket No. 114). Did the Court further err in allowing hearsay related to Joseph Benson's secretary? This issue was preserved via objection. (A.1239)

### B. SCOPE OF REVIEW.

Normally the decision whether to admit or exclude evidence rests in the discretion of the trial judge, and the decision of the judge can be reversed only for abuse of that discretion. *Capano v. State*, 781 A.2d 556, 586 (Del. 2001).

### C. MERITS OF THE ARGUMENT

The admission of testimony from and regarding attorney Joseph Benson was misleading to the jury, and infringed upon the defendant's sixth amendment right to counsel. A number of the defendants had been arrested and prosecuted independently in the months leading up to this indictment. It was only after law enforcement obtained a wiretap for Dwayne White's phone that prosecutors connected all of the defendants and amassed them into one large indictment. Prior

to the separate defendants becoming co-defendants, attorney Joseph Benson had represented a number of the named co-defendants. Because of this representation, when the defendants were indicted together, Benson was removed by the Court as counsel for defendant Lloyd.

The defendant objected to references to Benson's prior representation of Defendant Lloyd, and representation of the other co-defendants. The defendant raised concerns that allegations were being made that the use of Joseph Benson as legal counsel constitutes evidence of membership in the drug dealing enterprise. The defense objected to this testimony, and resulting inferences, arguing that the result of such testimony would violate defendant's due process rights by implying to the jury that the exercise of one's constitutional right to counsel may be used as evidence of guilt.

The Court granted in part and denied in part, with the Court ruling made during a sealed hearing on March 23rd. Of most relevant issue, the Court ruled that the prosecution could not elicit Joseph Benson's prior representation of Eric Lloyd in context of criminal representation, and could not argue that the defendant had his co-defendants use Benson. Other testimony from and by Benson was permitted.

It was elicited that Joseph Benson; represented Markevis Stanford at his preliminary hearing. (A.504); represented Michael Pritchett (A.504); represented Tyrone Roane (A.741); represented William Wisher (A.741) and that his office

represented Dontae Sykes (A.740). In attempting to assert the attorney client privilege, Benson indicated to the jury that he represented Eric Lloyd. (A.734)

It was also elicited that Benson's office refuses to represent anyone who cooperates. (A.755).

Over objection, the prosecution was also able to introduce statements of Benson's secretary, who did not testify at trial. (A.1239)

Here, the State has created a situation where an impermissible inference of guilt was created by defendant's choice to obtain counsel. The State was implying that hiring Attorney Benson is evidence of membership in the enterprise. Our Constitution forbids such argument. It is improper to submit to a jury that, because a defendant hires an attorney known as a "drug lawyer" or a "gang lawyer" or a "mob lawyer" the defendant may be characterized as a drug dealer, gang member, or mobster.

The assistance of counsel is one of the safeguards of the sixth amendment deemed necessary to insure fundamental human rights of life and liberty. "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will 'not still be done.'" *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963)(citation omitted).

The result of this testimony violated defendant's due process rights by implying to the jury that the exercise of one's constitutional right to counsel may

be used as evidence of guilt. The defense finds this analogous to case law involving impermissible inferences of guilt from a defendant's choice to remain silent. *See Doyle v. Ohio*, 426 U.S. 610 (1976) (improper questioning by the government can constitute impermissible comment on a defendant's right to remain silent even though those statements were couched in the form of a question and not presented in the government's summation or closing remarks. The key inquiry is whether the government's questions created an impermissible inference of guilt from a defendant's choice to remain silent).

Here, the prosecution created an inference of guilt from the defendants' choice to obtain counsel. Especially given that attorney Benson had represented the co-defendant's each separately and prior to the mass indictment joining them.

Additionally, the court permitted the hearsay statements of Joseph Benson's secretary to be admitted, over objection. Cooperating co-defendant Dante Sykes was permitted to testify that Benson's secretary Alice had seen defendant Lloyd distribute cocaine in the law firm office parking lot because she told Sykes, to tell defendant Lloyd "not to do that again." The Court admitted this line of direct examination as a present sense impression. (A.1239 - 1240).

Under Del. R. Evid. 803(1), the requirements for a hearsay statement to qualify as a present sense impression are: the declarant must have personally perceived the event described; the declaration must be an explanation or

description of the event, rather than a narration; and the declaration and the event described must be contemporaneous. The testimony Dante Sykes was permitted to provide did not meet any of these requirements.

The admission of this evidence was an abuse of the trial court's discretion, which prejudice the defendant and confused the issues for the jury.

## IV. THE TRIAL COURT ERRED WHEN IT PERMITTED, OVER OBJECTION, THE ADMISSION OF GUNS SEIZED FROM THE APARTMENT OF MAURICE COOPER BECAUSE THE PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE PREJUDICAL EFFECT.

### A. QUESTION PRESENTED.

Did the court abuse its discretion in allowing evidence of co-defendant Maurice Cooper's guns into the trial against this defendant under the theory the guns constituted evidence of the named "predicate acts." This issue was preserved during the course of trial (A.406, A.1222) with Defendant Lloyd joining Defendant White's objection. (A.411, A.1222)

### B. SCOPE OF REVIEW.

Normally the decision whether to admit or exclude evidence rests in the discretion of the trial judge, and the decision of the judge can be reversed only for abuse of that discretion. *Capano v. State*, 781 A.2d 556, 586 (Del. 2001). A number of district courts have additionally held that, while evidence may be relevant, the admission is erroneous when the evidence is excessively inflammatory. *Lesko v. Owens*, 881 F.2d 44, 51 (3d Cir. 1989)

### C. MERITS OF THE ARGUMENT

The defense objected to the introduction of multiple guns found in the apartment of co-defendant Maurice Cooper. The defense argued this evidence was irrelevant as none of the defendants were charged with utilizing guns generally,

and certainly not the guns recovered from Cooper's apartment. The evidence was highly inflammatory and prejudicial. The State argued that evidence seized from Maurice Cooper's apartment, was admissible because it was alleged in predicate number seventeen, and because it went to the existence of the enterprise. (A.1225)

In order to prove a pattern of racketeering activity, the prosecution must show that the predicates are related and that they amount to or pose a threat of continued criminal activity. *H.J. Inc*., supra at 239.

Here, there was no evidence that the other defendants possessed all of the guns found in Cooper's residence, nor that they were being utilized in any way by the enterprise. In fact, at trial, Maurice Cooper was found not guilty of the criminal racketeering counts, but guilty of the firearms possession.

The evidence of multiple guns seized from Cooper's residence had little relevancy to the charges against these defendants. Any relevancy was substantially outweighed by the prejudicial effect. The Court abused its discretion in permitting the entry of such evidence.

## V. THE TRIAL COURT ERRED WHEN IT PERMITTED, OVER OBJECTION, THE ADMISSION OF RAP MUSIC VIDEOS IN WHICH THE DEFENDANT WAS NOT A PARTICIPANT BECAUSE IT WAS HEARSAY WITHOUT AN EXCEPTION.

### A. QUESTION PRESENTED.

Did the court abuse its discretion in allowing rap music videos created by another alleged member of the enterprise, who was not testifying, and not on trial, into evidence against this defendant. This issue was preserved during the course of trial (A.416 - 423)

### B. SCOPE OF REVIEW.

Normally the decision whether to admit or exclude evidence rests in the discretion of the trial judge, and the decision of the judge can be reversed only for abuse of that discretion. *Capano v. State*, 781 A.2d 556, 586 (Del. 2001).

### C. MERITS OF THE ARGUMENT

The state introduced five music videos created by Ryan Bacon. The prosecution argued that these videos were admissible as proof of the predicate offenses because they talk about "big screening[11]" and "Free Tucker Max[12]",

[11] Big screening was the slang term used to refer to the creation of a sex tape by Ryan Bacon and Dion Oliver with Markevis Stanford's girlfriend.
[12] Tucker Max is the street name for Michael Pritchett, who Dwayne White wished to exonerate.

which are linked to the predicate offenses involving the attempted murders of Markevis Stanford. (A.421)

As argued in Point I, certain alleged predicates, and evidence thereof, should not have been admitted in trial against Defendant Lloyd. All of the rap videos by Ryan Bacon would fall into that category.

Furthermore, the Court failed to engage in the six-part *Getz* test to ensure that the videos were not being admitted for an improper purpose. *Taylor v. State,* supra at 802, citing *Getz v. State,* 538 A.2d 726 (Del. 1988)

Of a separate argument and concern was the admission of the rap video and recording studio audio from the song "Coke in My System." In that video, Nafi White, an unindicted co-conspirator appears to be making crack cocaine. (A.473). He shouts out the name "Butterico." Detective Barnes testifies that he knows Defendant Lloyd to go by the name "Butterico." (A.457). The prosecution highlighted this rap in its opening. (A.178)

Here, the lyrics of "Coke in My System" was hearsay without an exception. In *Taylor v. State,* 76 A.3d 791 (2013) the Supreme Court of Delaware permitted the introduction of rap videos made by co-defendants all charged with gang participation. The Court specifically noted that the videos "specifically reference the animosity between the TrapStars and Pope's Group and the crimes and

violence at issue in the instant case." There, the Court admitted the rap song under the co-conspirator exception to the hearsay rule.

Here, the mention of "Butterico" isn't a statement in furtherance of the conspiracy, and should fail under the Getz test. Given that defendant Lloyd had a prior history of drug dealing, there was no way to know if the shout out dealt with past crimes or current beliefs. It should be noted that Nafi White was the step father to defendant Lloyd's oldest daughter, giving them an independent relationship. (A.1382)

## VI. THE COURT'S SENTENCE IN THIS CASE VIOLATED DEFENDANT'S CONSTITUTIONAL PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

### A. QUESTION PRESENTED.

Did the Court's decision to impose consecutive sentences, resulting in a sentence of thirty years incarceration at level five, without the benefit of any form of early release pursuant to 11 Del. C. 4204 (k), violate the constitutional prohibition against cruel and unusual punishment? This issue was preserved in counsel's argument at sentencing. (A.1479 - 1496)

### B. SCOPE OF REVIEW.

Appellate review of the sentence of a defendant in a criminal case is for an abuse of discretion. *Wehde v. State*, 983 A.2d 82 (Del. 2009). Delaware law is well established that appellate review of sentences is extremely limited. Appellate review of a sentence generally ends upon determination that the sentence is within the statutory limits prescribed by the legislature. *Bissoon v. State*, 100 A.3d 1020 (Del. 2014).

To qualify as cruel and unusual punishment the case must be the "rare case in which a threshold comparison of the crime committed, and the sentence imposed leads to an inference of gross disproportionality." *Crosby v. State*, 824 A.2d 894, 907 (Del. 2003).

## C. MERITS OF THE ARGUMENT

The defendant submitted a detailed sentencing letter (A.1510, docket no. 126) and engaged in oral argument at sentencing. (A.1469) The sentence imposed was grossly disproportionate to the crime committed because the Court relied on the State's arguments, which were unsupported by actual facts at trial. In trial, and in its sentencing letter, the State repeatedly attempted to argue that the defendant was directing the organization through thousands of emails he sent from prison. However, in actuality the bulk of those emails were fully benign, and the state only introduced a handful of emails at trial. As to that handful, only one or two could in any way have been used to infer any type of leadership. (A.1520 - 1522) Further, the defendant grew up in the riverside projects with his co-defendants. Many of them shared family in common. The defendant raises a concern that the defendant's proximity to other persons in the indictment, built from growing up in an impoverished area together, was twisted into something more sinister.

The arguments that Defendant Lloyd maintained "king pin status" were also unsupported. The only evidence of such status came from the testimony of cooperating co-defendants. This testimony was not credible, and was discredited by the jury as the jury found the defendant not guilty of drug dealing cocaine.

The actual evidence was that the defendant has a prior history of drug distribution, for which he was serving time in prison. Any evidence that the

defendant was still involved, was minimal; a handful of emails, an exchange of property, and continued contact with the same persons he'd known his whole life. The words in the State's submission and the words relied upon by the Court to sentence the defendant in the manner which he was sentenced, were not supported by actual evidence introduced at trial, resulting in a disproportionate sentence.

## CONCLUSION

Mr. Lloyd respectfully requests this Honorable Court to reverse the decisions of the trial court which denied his Motions to Sever, motion for a mistrial, and motions to preclude evidence, and requests a remand of this case for new trial. In the alternative, defendant requests a remand for re-sentencing that is not violative of cruel and unusual punishment.

Respectfully Submitted,

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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| ERIC C. LLOYD, | ) | |
| | ) | |
| Defendant Below, | ) | |
| Appellant, | ) | |
| | ) | No. 460, 2019 |
| v. | ) | |
| | ) | |
| STATE OF DELAWARE, | ) | |
| | ) | |
| Plaintiff Below, | ) | |
| Appellee. | ) | |

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION**

1. Appellant's Opening Brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word Office 365.

2. Appellant's Opening Brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 8859 words, which were counted by Microsoft Word Office 365.

Dated: March 10, 2020

/s/ Jan A. T. van Amerongen, Jr.

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