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Case Number 372,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KARIEEM J. HOWELL Defendant -Below Appellant, v. STATE OF DELAWARE, Plaintiff-Below, Appellee.	))))))))))	No. 372,2020 COURT BELOW: In the Superior Court, In and For New Castle County, I.D. 1802010652

APPELLANT'S AMENDED OPENING BRIEF

Joseph A Hurley
1215 King Street
Wilmington, DE 19801
302-658-8980
I.D. 326

Dated: March 9, 2021

TABLE OF CONTENTS PAGE

TABLE OF CASES	PAGE
UNITED STATES V. SELLERS, 645 F.3d 830 (7th Cir 2011)	11,12
WAINWRIGHT V. STATE, 504 A.2d 1096 (Del. 1986)	17
WARD V. STATE, 2020 WL 5785338 (Del. Sept. 28, 2020)	23
WEAVER V. MASSACHUSETTS, 137 S.Ct. 1899, 1911 (2017)	1

COURTS REMOTENESS SUPPORT

CASE NAME	TIME DELAY
Andreavich v. State 2018 WL 3045599 (Del June 19, 2018	Sept 14, 2016 - Jan 5, 2017 113 Days
Torres v. State 979 A2d 1087 (Del 2009)	Oct 21, 2006- Oct 26, 27 2006. Nov 1, 2006. 4 Days
State V. Hynson 1992 WL 53419 (Del Feb 24, 1992)	Aug 8, 1989- Aug 10, 1989. Aug 14, 1989 4 Days
Karieem Howell	Nov 5, 2016- Feb 16, 2018 468 Days

EXHIBIT "A"

NATURE OF THE PROCEEDINGS[1]

On February 21, 2018, the Defendant was arrested after search warrants had been executed, on February 16, at two New Castle County residences and each of which was associated, in some fashion, with the Defendant. The Defendant entered a plea of "not guilty" at arraignment on September 14, 2018. In a timely fashion, the Rule 16 discovery was initiated by the receipt of a response, by "Hurley" on or about September 28, 2018. The discovery process continued, intermittently, up through and including the day before trial was scheduled to begin on March 12, 2019. On October 24, 2018, a Protective Order was signed by a Superior Court judge prohibiting the release of the materials provided by the State to Hurley. The discovery response, filed by the State, described certain cellphone extractions as "voluminous". Trial was scheduled to begin in January but had to be rescheduled because the State filed its second superseding indictment shortly before that date.

Trial began on March 12, 2019 and ended on March 18, 2019 when the jury returned its verdict. The Defendant was found guilty of Drug Dealing, Conspiracy 2nd Degree, Possession of a Deadly Weapon with an Obliterated Serial Number and Possession of Drug Paraphernalia. Sentencing occurred on October 9, 2020 and a

[1] The transcripts are assigned "T" designations consistent with the dates of the respective Trial dates, e.g.; "T12" refers to transcript of proceedings occurring on March 12, 2019; "T13" refers to proceedings on March 13, 2019; "T14" refers to proceedings on March 14, 2019; and "T18" refers to proceedings on March 18, 2019.

timely appeal was filed on November 5, 2020. This is the Defendant's Opening Brief in Support of his Appeal and which, in turn, is based upon multi-faceted bases.

SUMMARY OF ARGUMENTS

I. THE DENIAL OF DEFENDANT'S CONTINUANCE REQUEST WAS AN ABUSE OF DISCRETION RESULTING IN REVERSIBLE ERROR IMPLICATING THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND THE EFFECTIVENESS OF COUNSEL.

II. THE ARBITRARY REFUSAL OF THE TRIAL COURT TO REFUSE THE DEFENDANT'S REQUEST TO BE SITUATED IN THE COURTROOM WHERE HE AND THE JURY HAD OPEN VIEWS OF ONE ANOTHER REPRESENTS CONSTITUTIONAL ERROR.

III. THE FAILURE OF THE TRIAL COURT TO PROPERLY INFORM THE JURY, IN A CLEAR AND UNDERSTANDABLE MANNER, OF THE APPROPRIATE APPLICABLE PRINCIPLES OF LAW CONSTITUTES REVERSIBLE ERROR.

IV. THE COURT COMMITTED REVERSIBLE ERROR BY PERMITTING THE INTRODUCTION OF EVIDENCE OF OTHER BAD ACTS RESULTING IN UNFAIR PREDJUDICE OF PREDISPOSITION.

V. THE TRIAL COURT PROVIDED A FLAWED INSTRUCTION REGARDING THE ELEMENTS OF "KNOWINGLY" POSSESSING A WEAPON WITH AN OBLITERATED SERIAL NUMBER..

VI. THE EVIDENCE INTRODUCED AT TRIAL WAS INSUFFICIENT TO ESTABLISH ALL OF THE ELEMENTS OF THE OBLITERATED WEAPON COUNT BEYOND A REASONABLE DOUBT.

VII. THERE WAS INSUFFICIENT EVIDENCE OF THE WEIGHT ELEMENT OF COUNT III, THEREFORE REVERSAL IS APPROPRIATE.

VIII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN MULTIPLE AREAS OF THE LAW WHILE TRIGGERING ACTIVATION OF THE "CUMULATIVE ERROR" DOCTRINE.

STATEMENT OF THE FACTS

On February 16, 2018, a search warrant was executed at 12 Bradbury Court ("Bradbury"), the home of Sharon Howell ("Sharon"), Defendant's mother, as well as 23 Aldershot Court ("Aldershot"), Defendant's home address.[2]

At Bradbury, a search of the basement area revealed a large number of plastic transparent bags, and all of which, but one, were empty with no indication of use and with several having black markings of letters and numbers handwritten on their outer surface.[3] At least one of the bags had remnants of marijuana.[4] Also found was a vacuum bag sealer[5], a digital scale[6], a money counter[7], and a wooden monogram consisting of Defendant's nickname initials, "R E E M".[8]

Malique Howell ("Malique"), Defendant's brother, was present in the basement area of Aldershot as was a .9mm handgun lying on the floor with an

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[2] (T13-53; A-52).

[3] (T13-60,61,64; A-54,55,56).

[4] (T13-60; A-54).

[5] (T13-60; A-54).

[6] (T13-60; A- 54).

[7] (T13-60; A-54).

[8] (T13-59,65; A-53,57).

obliterated serial number[9], a total of three ounces of marijuana contained in three separate bags[10], a plastic bag vacuum sealer[11], more than $2300 in USC[12], $50 and $100 money bands[13], and .9mm ammunition[14].

A box designed to contain a digital scale was located and the box and digital scale bore the fingerprints of Malique.[15]

On February 22, 2018, a search warrant was executed at the home of Brian Caldwell ("Caldwell") and which revealed nine ounces of marijuana contained in multiple bags and one bag which bore the exact same black markings as found in the basement of Bradbury, $11,000 USC, a handgun and a shotgun.[16]

Caldwell was interviewed and indicated Defendant was his supplier of marijuana and the most he had ever purchased was between one and two pounds.[17] As a result of a Cooperation Agreement, later signed, Caldwell was permitted to

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[9] (T13-143; A-75).

[10] (T13-158; A-90).

[11] (T13-142,143; A-74,75).

[12] (T13-149,150; A-81,82).

[13] (T13-150; A-82).

[14] (T13-101,102; A-68,69).

[15] (T13-101,102; A-68,69).

[16] (T13-141-158; A-73-90).

[17] (T13-197-199; A-96-98).

plead guilty to Possession of Marijuana, thus avoiding mandatory prison, and his sentencing was delayed until after his trial testimony performance could be evaluated in Defendant's trial.[18]

Malique admitted he had purchased the .9mm gun found in the basement where he exclusively resided with the consent of the Defendant while pleading guilty, specifically, to Drug Dealing and Possession of a Weapon with an Obliterated Serial Number[19].

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[18] (T14-202; A-121).

[19] (T14-7 [Ex.9]; A-102).

I. THE DENIAL OF DEFENDANT'S CONTINUANCE REQUEST WAS AN ABUSE OF DISCRETION RESULTING IN REVERSIBLE ERROR IMPLICATING THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND THE EFFECTIVENESS OF COUNSEL.

A. Question Presented.

Did the Defendant's request for a continuance, based upon a Rule 16 dereliction on the part of the State, represent an abuse of the Court's discretion necessitating a reversal of the decision below?

The Defendant preserved his right of appeal by making the request, providing the underlying reasons and arguing against the Court's ruling. (T12-4-20; A-17-33, (T12-4,5,6,7; A-33a,33b,33c,33d); (T-13-3-20; A-34-51).

B. Scope and Standard of Review.

The standard of review is one of abuse of discretion. *Ray v. State*, 587 A.2d 439, 441 (Del. 1991). The ultimate test is whether or not the ruling of the Court was clearly unreasonable or capricious. *Bailey v. State,* 521 A.2d 1069, 1088 (Del. 1987). While there are no mechanical tests for measuring arbitrariness that violates due process, the reasons presented, and the deficiency of the reasons must not be ignored. See *Riley v. State,* 496 A.2d 997, 1018 n.27 (1985) (citation omitted).

C. Merits of the Argument.

With the applicable legal standard of the Defendant being required to demonstrate prejudice such as resulting in substantial impairment of the Defendant's ability to defend himself, the factual background is as simple as it is sad vis-à-vis failure of the Court to provide the Defendant with a "fighting chance" to defend himself. *State v. Damon,* 578 A.2d 700, 708 (1990) cited in *Secrest v. State*, 679 A.2d 58 (Del. 1996). Otherwise stated, the burden on the Defendant was to demonstrate the evidence which would be available if the continuance was granted was relevant and competent, that a continuance would make its procurement likely, that due diligence was used to obtain the evidence for trial and the length of the continuance sought was reasonable. *United States v. Robertson,* 15 F.3d 867, 873 (9th Cir. 1994), cited in *Secrest* (supra).

A "thumbnail" sketch of the pertinent facts demonstrates substantial prejudice:

1. The trial date was approximately one year from the date of the alleged offenses and the State had not sought indictment until five months elapsed after the date of arrest. (Docket, A-2): The State had indicted not only once, not only twice, but on three separate occasions between the date of the first indictment and the date of the final indictment which was presented so close to the first scheduled trial date that the trial date had to be continued until the actual trial date of March 12, 2019. (In other words, the State was solely responsible for any prior delay.)
2. Because of technical deficiency in requiring the data from Caldwell's cell phone and resulting miscommunication and misunderstanding among representatives of the State, Defense Counsel had been mistakenly told

both in writing and verbally that the Caldwell cell phone data was not available and relied upon that pronouncement.

3. In the course of Defense Counsel's final pretrial preparation, he encountered a single reference in one sentence which contradicted the good faith belief and statements made by the State Prosecutors assigned to the case.
4. This discrepancy was noted on March 7, 2019 and immediately brought to the attention of Prosecutor Kenney who was still under the impression that, for technical reasons, data on the Caldwell cell phone was inaccessible. In a way not understood by Defense Counsel, that call prompted some form of communication that demonstrated the inaccurate belief held by the Prosecution. Immediate arrangements were made for Defense Counsel to meet with the Prosecutors in the Department of Justice on Monday, March the 11th so that the Prosecution could provide the technical assistance necessary to access the data. That effort proved unsuccessful and after Defense Counsel had departed, Prosecutor Cooksey called Defense Counsel and indicated that the flaw had been corrected and that Cooksey would deliver a flash drive to Defense Counsel's office that same day, the day before trial was scheduled to begin. That pledge was satisfied at 5:30 p.m.
5. Defense Counsel labored on that investigation until approximately midnight while not being able to come close to completing the investigation that was required of a competent attorney because of the time limitation.
6. One of the Motions presented by Defense Counsel, before jury selection, on the morning of March 12th was a Motion to continue the trial because of this significant issue, but without there being anyone that was at fault because of unforeseen technological issues. The trial judge expressed criticism of Defense Counsel because of the filing of several Motions and when the subject matter of a continuance was raised, without having any factual basis for doing so, the trial judge had already made up her mind as to the fate of the continuance request using the words, "Have you been advised that there is a request for a scheduling or partial rescheduling?" "No, we are not rescheduling this trial." (T12 – 6; [Confidential Conference]; A -19). Recognizing the negative attitude of the trial court, counsel agreed that delaying the start of the trial, other than jury selection, until March 13th would provide sufficient time to repair the damage of the untimely production of critical evidence.
7. Having realized, given the additional time to review the contents of the cell phone, that it was impossible to effect a proper review under the, then,

current trial schedule, the defendant requested a rescheduling but only for two weeks. Although the Prosecutors specifically agreed with the difficulties and circumstances "on the ground" (Defense Counsel's words) the State objected and the trial court, ignoring, the magnitude of the materials as announced by counsel and without articulating any significant prejudice to the State or the Court or the public that would result from a two week continuance denied the request. [Hurley indicated a critical problem with going forward after describing the discovery response as "late, late, late, eleventh-hour discovery production of a critical witness. We are at a disadvantage for a fair trial." And the Cooksey response was, "I don't necessarily disagree with anything Joe said."] (T13-10;A- 41).

8. The flash drive, Court's Exhibit 5, contained the altered text messages occurring between the Defendant and Caldwell, the alteration being the deliberate deletion of Caldwell's responses to the Defendant's remarks so that only one side of the conversation was evident. This deliberate deletion presented the problem of depriving Defense Counsel of the context of the many conversations that were contained and, given the time restrictions, and the length of time since the conversations, Defense Counsel was inadequately equipped to understand the full context as the trial proceeded. These text messages represented the "knife to the heart" of the Defense. Although the entire chain of the messages was not presented in the testimony, the court exhibit makes all available and even only relying upon the testimonial identification of some of the text messages, demonstrates an incredibly prejudicial situation when there has been no time or opportunity to understand context and explain.

Finally, "only God knows", well, and Caldwell, what other potential impeachment evidence was present and could not be located by Defense Counsel because of the Court's arbitrary denial of a continuance when the circumstances and common sense demanded such occur.

This case represents a case in the mold of *Carlson v. Jess,* 526 F.3d 1018 (7th Cir. 2008) where the Court of Appeals denounced the trial judge's denial of a

continuance request, "Upon expeditiousness for its own sake." In *U.S. v. Sellers*, 645 F. 3d 830 (7th Cir. 2011) the Court warned that "...a court that sacrifices a Sixth Amendment right without viewing the circumstances of the case as a whole acts arbitrarily". Id., *836. The *Sellers* court also criticized failure of the trial court to inquire how much additional time would be needed to adequately prepare and that failure to question suggested, "... that the district court unreasonably viewed any delay as unacceptable". Id., *838.

The reasoning of the Court in, supposedly, balancing the interest of both parties, was begun after the judge had, somewhat rudely, interrupted Hurley's rejoinder to the Prosecutor's remarks beginning with, "There is no attorney... (T13-14, A-45) followed by a midsentence interruption, "Mr. Hurley, I've heard enough. The request for a continuance is denied for the following reasons..." (T13-15, A-46). The reasons described were:

a. Defense Counsel "had all afternoon yesterday" to examine the more than 15,000 items that the Court had never even seen while making that pronouncement.
b. If trial concluded early on the 13th, that would provide additional time for inspection.
c. "Substantial prejudice" results because the State agreed to lift the protective order believing trial was going to begin on the 13th (The State never offered that as a reason for objection) and there was no attempt to elaborate on how that would make any difference that would approach "substantial prejudice".

The Defendant contends that with regard to arbitrariness in denying the continuance this matter is RES IPSA LOQUITUR.

II. THE ARBITRARY REFUSAL OF THE TRIAL COURT TO REFUSE THE DEFENDANT'S REQUEST TO BE SITUATED IN THE COURTROOM WHERE HE AND THE JURY HAD OPEN VIEWS OF ONE ANOTHER REPRESENTS CONSTITUTIONAL ERROR.

A. Question Presented.

Was the refusal of the Trial Court to afford the Defendant an unobstructed view of the jury a violation of his constitutional rights to due process and/or right of presence during trial?[20]

The Defendant preserved right of appeal by making a reasonable request to make courtroom arrangements including the possibility of transferring to a different courtroom, to enable the jury to have an unobstructed view of the Defendant and vice versa based on arbitrariness on the part of the Court.
(T13-16 – 18; A – 47 – 49).

B. Scope and Standard of Review.

The Supreme Court reviews claims of violation of Constitutional rights *de novo*.[21]

C. Merits of the Argument.

The Due Process clause of the Fifth Amendment of the United States Constitution as applied to Delaware, under the Fourteenth Amendment affords the right to a "fair trial", as does the 6th amendment, and which courts have extended to the condition of "presence". In *Bustamante v. Eyman*, the court specifically, in discussing the right to be present, made reference to the physical presence of the

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[20] *United States v. Gagnon,* 105 Sup. Ct. 1482 (1985) (per curiam) and Supr. Ct. Crim. Proc. 43.

[21] *Chambers v. State,* 93 A.3rd 1233 (Del. 2014).

defendant allows the defendant to "be seen by the jury".[22] The concept of the Defendant's presence was delineated in *Crosby v. United States*, where the court referring to presence as interpreted in to common law said, "This canon was premised on the notion that a fair trial could take place only if the jurors met the Defendant face-to-face…".[23] Further, this court has recognized the importance of the jury's observation of the defendant in *Bradshaw v. State*, where the absence of the Defendant, during a portion of the trial was "observable by the jury" as the court went on to indicate that such absence "is an operative fact that raises the issue of prejudice."[24]

The Defendant contends that the denial foisted upon the Defendant by the Court's arbitrary denial of the simple and reasonable request is a structural error where it is not necessary for the Defendant to demonstrate an articulable prejudice. As such, automatic reversal is mandated.[25] (T13 – 16-18; A-47-49)

The word "presence" includes, *inter alia*, a face-to-face confrontation between witness and defendant, an opportunity for the jury to observe the demeanor of the witnesses and, what is more often overlooked, the opportunity of

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[22] 456 F.2nd 269, 274 (9th Cir. 1972).

[23] 113 S. Ct. 748 (1993).

[24] 806 A.2nd 131 (Del. 2002)

[25] *Cabrera v. State,* 173 A.3rd 1012 (Del. 2017) citing *Weaver v. Massachusetts,* 137 S. Ct. 1899, 1911 (2017).

the jury to view the defendant's demeanor as the testimony unfolds. Any experienced trial attorney or courtroom observer is well-aware of the proclivity of the jury to, periodically, as a witness is testifying, shift the visual attention to the Defendant while observing how he is reacting to what is being said about him or against him. The principles of due process do not disappear if unfair when prejudicial courtroom arrangements exist.[26] The courtroom objected to, and found quite satisfactory by the trial judge, was such that one-half of the twelve persons who would decide the Defendant's fate were not able to even know he was in the courtroom as the testimony unfolded because his presence was blocked by a mobile podium on wheels and which wheels, obviously, were placed on it in order to avoid the exact situation that was occurring under the proverbial "nose" of the trial judge.

The Defendant admits to a dearth of supportive material because situations such as this just don't occur because they are so easy to correct yet the Hurley-originated request was denied without explanation other than offering some less than helpful suggestions that Defendant could stand during Hurley's opening statement or would be seen if he chose to testify.

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[26] See Gagnon cited *Supra,* note 20.

Despite the dearth of cases, there are a few worthy of note, including *State v. Farrell-Quigle*, which calls for "close judicial scrutiny" when there is a procedure of trial that may adversely affect the rights of the accused.[27] Also, *Estelle v. Williams*, urging courts to utilize reason and common human experience in evaluating the effects of a particular procedure.[28] In addition, *State v. Baeza*, warns that "inherent prejudice is found where the practice in question may have a direct impact on the jury's perception of the Defendant."[29]

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[27] 477 P.3rd 208 (Ida. 2020).

[28] 96 S. Ct. 1691 (1976).

[29] 383 P.3rd 1208, 1211 (Ida. 2016).

III. THE FAILURE OF THE TRIAL COURT TO PROPERLY INFORM THE JURY, IN A CLEAR AND UNDERSTANDABLE MANNER, OF THE APPROPRIATE APPLICABLE PRINCIPLES OF LAW CONSTITUTES REVERSIBLE ERROR.

A. Question Presented.

Did the Court's instruction regarding how the effect of Caldwell's entering into a Cooperation Agreement should be weighed in assessing his credibility satisfy Delaware's requirement that the jury be given correct statement of the law as well as the Fifth Amendment's protection of a fair trial?

Failure to Object to Procedure depriving Defendant of a substantial, serious basic and apparent right that jeopardize fairness and integrity constitute "plain error". *Wainwright v. State, 504 A.2d, 1096 (Del. 1986).*[30]. Obviously, Providing the Jury with a misstatement of the applicable Law is the epitome of plain error.

B. Scope and Standard of Review.

"We review jury instructions *de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party." [31]

C. Merits of the Argument.

Obviously, accomplice testimony and cooperating witness testimony are subject to scrutiny not attendant to the testimony of a neutral witness and, specifically, accomplice testimony must be scrutinized for a potential bias and unreliability.[32] The Defendant had an unqualified right to a correct statement of

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[30] *Wainwright v. State,* 504 A.2d, 1096 (Del. 1986).
[31] *Dennis v. State,* 41 A.3rd 391 (Del. 2012).
[32] *Purnell v. State,* 106 A.3rd 337 (Del. 2014).

the substance of the law.[33] Juries are presumed to follow the trial judge's instructions.[34] Indeed, curative instructions are presumed to be followed as well.[35]

The instruction that was given clearly was not a correct statement of the law. In fact, it is properly characterizable as the opposite of what the law provides.

Caldwell was the proverbial "star" witness for the State. He testified that the Defendant supplied him with drugs (marijuana) in February 2018.

The Court instructed, not asked, not suggested, but instructed the jury to ignore completely the Caldwell "evidentiary grenade", the jury was told, "You may Not consider this agreement in weighing the witness's credibility."[36] (Emphasis Supplied). The illogic of the Trial Court, in light of *Purnell*, indicating that bias in the context of getting a deal was component to consider while, in any way, approving the trial court in this matter in indicating that once the agreement has been made, that should not enter into the jury deliberations in terms of credibility is beyond fantastic.

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[33] *Hamilton v. State,* 82 A.3rd 723 (Del. 2013).

[34] *Id.*

[35] *Edwards v. State,* 320 A.2nd 701, 703 (Del. 1974).

[36] (T14-92; A- 117).

As noted, the failure to object in a timely matter relegates the standard of review to that of plain error.[37] To meet this standard, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.[38] The defects must be apparent on the face of the record and must be basic, serious and fundamental as well as clearly depriving the accused of a substantial right or which show manifest injustice.[39]

Dismantling the key focus of cross-examination clearly meets the standard of plain error.

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[37] *Robertson v. State*, 596 A.2nd 1354 (Del. 1991).

[38] *Dutton v. State,* 452 A.2nd 127, 146 (Del. 1982).

[39] *Bromwell v. State,* 427 A.2nd 884, 893 n.12 (Del. 1981).

IV. THE COURT COMMITTED REVERSIBLE ERROR BY PERMITTING THE INTRODUCTION OF EVIDENCE OF OTHER BAD ACTS RESULTING IN UNFAIR PREJUDICE OF PREDISPOSITION

A. Question Presented.

Did the Court err in allowing the nature and magnitude of other bad acts as evidence?

The right to Appeal was preserved by the Pre-Trial Motion of Objection. (Ct. Dock. March 12, 20201 (A – 8; T -14-76-85; A – 106-116).

B. Scope and Standard of Review.

The Court effects a *De Novo* review as to relevancy and an abuse of discretion review as to admissibility. *Capano v. State*[40] but see *Chavis v. State*.[41]

C. Merits of the Argument.

The search warrant at Bradbury allowed the findings of evidence in the basement of the residence of Loretta and Sharon:

a. Reem wooden Monogram – Basement. (T13 – 59; A-53)
b. Picnic Table identified as drug package and resale location – Basement. (T13 – 60: A-54)
c. Vacuum bag sealer. (T13- 60; A-54)
d. Freezer bags. (T-13-60; A-54)
e. Small pieces of marijuana. (T13- 60; A-54)

[40] 781 A2d 556 (Del 2001)
[41] 235 A3d 696 (Del 2020)

f. "Probably more than 100 empty bags all labeled with a black marker." (T13- 61; A-55). All of the located bags were empty. (T13-112; A-70)
g. Handgun in Sharon's bedroom. (T13- 68; A-58)
h. Shotgun – Bedroom. (T13- 115; A-71)
i. DPL bill, addressed to Defendant at Bradbury. (T13- 132; A-72)

A search of the Aldershot residence revealed the following:

-Search on February 16, 2018 yielded:

a. 1 bag containing 28 grams of marijuana (1oz.) (T13-141; A-73)
b. $1300 on Coffee Table (T13 -141; A-73)
c. Next to couch was .9mm gun with obliterated serial number (T13-143, 144; A-75,76)
d. A grinder (T13-147; A-79)
e. Digital scale (T13-147; A-79)
f. Box of .9mm ammunition (T13-148; A-80)
g. 2300 USC in closet (T13-149; A-81)
h. App. 57g of marijuana (T-13-149,150; A-81,82)
i. 24,000 USC in Defendant's closet (T13-153; A-85)
j. Empty Money bands – denomination of $50, $100 (T13-150,151; A-82,83)

The Caldwell residence revealed the following:

- Baggies for Repacking. (T13-191; A-91)
- Bag marked P-28 in black. (T13- 192, 193; A-92,93)
- Toxicology report shows 2 totals of 335 grams (T13- 195,196; A-94,95)
- Firearms (T13-19; A-50)
- $11,000 USC (T13-19; A-50)

Caldwell said Defendant was supplier and would buy a pound at a time.

(T13-198; A-97). He, at most, purchased two pounds from Defendant. (T13-

199; A-98).

A cell extraction from Caldwells cell revealed strong corroborating evidence for his claim of purchasing the marijuana on February 13, 2018 at Bradbury. (T13-202-204; A-99,101)

While the above represents a fair summary of the physical items seized as evidence including weapons, cell phones, drugs, money and paraphernalia related to drugs, the State also had the testimony of Caldwell who testified that he had been a drug dealer for a couple of years and that the marijuana found at his house in identically marked Bradbury bags, on February 22nd was the result of a purchase that he had made from the Defendant within a short period of time before that date. He offered the details of obtaining the approximate two pounds that he had purchased and offered a text message or messages to substantiate his claim that he had communicated with Sharon regarding collecting the marijuana from her home with the Defendant's approval. (T13-202,203; A-99,100).

Finally, there were several text messages involving the Defendant which suggested drug dealing transactions.

The trial court applied a *Getz* analysis, as should have been the guidepost used, however, other than parroting the words of D.R.E. 404, specifically, "intent, knowledge and common plan", (T14-76-86; A-106,116) did not add an explanation which would put "meat on the bone" in connecting these events to any issue that

was present in case where the Defendant denied being involved completely and the flawed *Getz* analysis employed by the Court will be addressed at this time.

The *Getz* platform consists of six separate planks and the first of which is for the Court to determine the materiality of the proffered evidence to the ultimate fact at issue. The ultimate fact was whether, on or about January 16, 2018, Defendant engaged in drug dealing. Did the contents of the texts created in 2016 have the logical tendency to demonstrate that he was doing the same thing, engaged in the same activity, a year and a half later? Phrased differently, did the texts make it more likely that he was dealing marijuana a year and a half later and/or possessing a firearm with an obliterated serial number. *Ward v. State*, 2020 WL 5785338 (Del. Sept. 28, 2020). The second plank, of *Getz,* is to determine the logical tendency to prove the drug dealing allegation of February of 2018 to a greater degree than the evidence before the jury without the addition of the 2016 communications. The third plank, after the application of the first two planks the question to be asked reduces itself to, "Does the fact that Defendant was actively involved in drug dealing of marijuana in the fall of 2016 make it more probable that he was engaged in similar activity in the first months of 2018? Even though the standard of "probability" is not particularly formidable, the best that one could say is "maybe" in response to the question posed. Of course, there could be no criticism if that same person were to say, instead, "depends – maybe not". Each of

those opposite conclusions dismisses probability as having been breached in this case based upon the application of logic and common experience.

The next plank "remoteness" is the "grand slam" of the various planks to be considered. The trial Court, obviously, had accomplished legal research regarding the *Getz* analysis before entering the courtroom and hearing the argument of the parties. The only plank that her research addressed, however, was the remoteness issue and which demonstrates the significance of this issue in the mind of the Court. The Court cited three different cases alleging them to be legal support for the ruling that she would make. Ignored, however, and for reasons unknown since there was no commentary indicating how the cases consisted of rather short timeframes involving the 404 activity contrasted with the timeframe of the criminal activity under consideration. The actual underpinnings of the three cases cited by the Court were in such contrast to the temporal duration in the instant case that they, figuratively, "jump off the page" and would have one suspect there would be some explanation given how the significant temporal differences between the support cases and the present case could, or should, be ignored. (See Exhibit "A")

The appropriate legal proposition was stated almost thirty years ago and was captured in the language of *Lloyd v. State*, 1991 WL 247737 *3 (Del. Nov. 6, 1991) followed by *Allen v. State,* 644 A.2d 982, 988 (1994). *Lloyd* told us that evidence was too remote to maintain legal vitality "...where there is no visible,

plain, or necessary connection between it [the 404 evidence] and the proposition eventually to be proved." Here, it is obvious that there is no necessary connection given the passage of time nor is there any visible or plain connection particularly when one imagines how life changes in thirty years witnessed by what the disbelieving eyes of the majority of the American public are seeing unfold in their democracy while, necessarily, thinking about the proverbial "good old days". The point is "things change". In *Allen*, the Court noted that, "A lengthy time lapse can render the evidence legally irrelevant. Temporal remoteness depreciates or reduces the probative value of the evidence". (Citation omitted) The Trial Court chose three cases (T14-83; A-113) as authority for discounting remoteness. No attempt was made to "rescue" that reliance notwithstanding the considerably different time frames. (See Exhibit "A"). This Court was emphasized in the commentary in *Allen*,... this Court has warned of the need for the trial court to *carefully* examine offers of proof..." This admonition is in accord with the opinion of the renowned Edward Imwinkelried urging "scrutiny" in exercising discretion in the 404 context. Id. *Allen v. State,* 644 A.2d 982 (Del. 1994).

Had the defense been presented in terms of "yes, I had marijuana, but I never intended to distribute it to anyone, it was for my own use", then intent was an issue and that is "What did Defendant intend to do with the marijuana?" Unfortunately for the flawed analysis, Defendant never admitted even having the marijuana or

knowing anything about it, thus assuming that he was involved in marijuana dealing eighteen months before does not reveal a facet of intention given the defense offered. *Similarly*, if the Defendant was heard to say, "Yeah, I had bags at mom's, but I don't know the first thing about distributing marijuana and packaging it and marketing it", then at least, there would be some hint of logical connection with knowledge. What could the trier of fact learn upon hearing and reading the 2016 conversations that gave insight into the knowledge of Defendant in February of 2018. Parroting words is not tantamount to judicial reasoning.

It is with that actual array of evidence the State pleads with the Court, "please, we need more". The need of the State for more evidence through "bad acts" was negligible, the prejudicial effect of the Defendant was insurmountable to defend.

Although the State will argue that the judge's limiting instructions "saved the day" if one accepts the proposition that the instruction was less than adequate because it discussed the use of the evidence as evidence of intent and knowledge and the efficiency or the efficacy of which has already been discounted, That "ain't so."

The Court's reliance upon the State's reliance on a common plan exception was misplaced and erroneous. *Getz* teaches the common plan exception occurs, when the unusual is happening, in two factual situations neither of which were

present in this case. In addition, mere repetition does not a common plan make. *Getz* supra.

In summary, with regard to the *Getz* analysis, the State failed to meet its burden of materiality (an independent logical relevance), while providing evidence of criminal disposition, a wall of remoteness and the need for the probative value of the disputed evidence against its obvious unfairly prejudicial effect. (Exhibit "B")

For reasons not clear, the Court did not engage in what is commonly known as the *DeShields* analysis. *DeShields v. State,* 702 A.2d 502 (Del. 1998). *DeShields* was put in place, by the federal drafters of Rule 404, in order to avoid what has happened in this case; i.e. "... a mechanical or routine acceptance of other crime evidence..." One of the comments mentioned in *DeShields* is an effort by the Court to lessen the potential inherent prejudice of the Other Bad Acts. In this particular case, the Court permitted the State to "hammer" a hailstorm of "nails" of criminal disposition without any thought of restricting the number. Query? Was there any additional value, at permitting more than one or two of the texts be entered into evidence? (30 was a bit much, a/k/a prosecutorial overreach, pure and simple). Would two not have been sufficient to make a point to be made? *DeShields* proposes, as an alternative to the devastating effect of this genre of evidence by considering, "...the availability of alternative forms of evidence"

(citation omitted) and which is listed as one of the defining factors as, "the availability of less prejudicial proof".

Offering several of the factors enunciated in *DeShields* the error perpetuated by the Court's ruling eviscerated the fairness of the trial when one considers, the 403 balancing, which the trial court did not consider, and in particular, "the proponent's need for the evidence, [zero] inflammatory or prejudicial effect of the evidence, [tremendous] similarity of the prior wrong to the charged offense" [identical] and, so importantly, the "independent logical relevance of the 404 evidence". [absolutely none]. (See Exhibit "C")

Finally, in a manner that would "seal the deal" in terms of identifying the perpetrators and activities occurring at, either or both, Bradbury or Aldershot the Prosecution introduced several text messages occurring between the Defendant and his brother which rather clearly demonstrate conversations regarding illegal drug activities and which were, then current, from December 2017 through March of 2018. (T13-75, 78, 79, 84, 85, 87, 90, 91, 96; A-59-67).

Of course, there were text messages from Caldwell to Sharon on the date he testified that he took possession of the marijuana found in Sharon's home, with the container marked as described, and which messages corroborated the meeting between Caldwell and Sharon, acting as the Defendant's delivery emissary.

The above cited information provides the highlights of the formidable case the State was able to present without introducing the testimony that is in controversy.

It is most appropriate to avoid minimizing the importance of the remoteness factor under the present facts.

Evidence is too remote in time "only where there is no visible, plain, or necessary connection between it and the proposition eventually to be proved." *Lloyd v. State*, 1991 WL 247737, *3 (Del. Nov. 6, 1991); see also *Allen v. State*, 644 A.2d 982, 988 (Del. 1994). ("A" lengthy time lapse can render the evidence legally irrelevant. Temporal remoteness depreciates or reduces the probative value of the evidence. " (citation omitted).

It is to be remembered that there has to be "independent logical relevance" and that simply having repetition of the same crimes over and over and over and over again simply becomes "evidence of other crimes of the same or similar character as the charged offenses without evidentiary value..." see *Chaviz v. State*, supra . The typical pattern is for the prosecutor to stand up and offer evidence of Other Bad Acts and parrot mode of, intent, plan and knowledge without being challenged by the Court on each of the cited explanations. Here, the Court simply parroted the same material without offering any incisive correlation, with the facts

before It as to how those words reflected on evidence that had value beyond that which was admissible in any event.

As noted, The Court did not bother to take the time to effect what has become routinely called a *DeShields* analysis.*27 In *DeShields,* the Court cites an authority, Professor Graham Lilly, who concluded that the federal drafters of the rule did not contemplate a mechanical or routine acceptance of other crime evidence and listed as one of the factors, "...the availability of alternative forms of evidence." In this particular instance, would not the State's case had been served by restricting the number of text conversations that were to be introduced instead of "hammering the nail" multiple number of times with the hammer being held 18 months before but with each "bang" of the hammer, a "nail" criminal disposition being struck reducing the Defendant to a "serial drug dealer" non pareil! It was that treatise that became the foundation for what is now known, under Delaware law, as a *DeShields* analysis, but, obviously, it was not necessary in this case since the trial court assumed the Bench, before hearing argument, and having already decided the issue by researching cases which, in retrospect, are not particularly meaningful guideposts in support of admissibility of the controversial evidence. Had that "thoughtful numeration", as described by the *DeShields*' court, been considered by the trial court the salient factor would have been considered in form

evidence; the availability of less prejudicial proof and the inflammatory or prejudicial effect of the evidence.

In the present case, the cooperating witness would give clear testimony, supported by text messages, that he had arranged to receive a pound of marijuana and twelve ounces of which was found at his residence. The actual purveyor was Sharon Howell because the Defendant was not available. Text messages were available showing that the two were intent on meeting one another. The empty bags it was testified as containers for marijuana were found in her residence and many had a distinctive mark, P-18, placed on them with a black marker and (what a coincidence) one of the bags found at the Caldwell residence had an identical designation. Caldwell was found to have $11,000 and admitted to be a drug dealer and Howell had $24,000 in United States currency in his home and denied being a drug dealer. Does that evidence strike the casual observer as a weak case in sore need of providing evidence of more than ten criminal conspiracies of drug dealing a year and a half in the past? The trial court didn't ask that question, but the answer, it is contended, is apparent. This was not, by any means a weak case based only on circumstantial evidence. In addition, the defendant's mother pled guilty to drug dealing and lived at that residence where Caldwell said he had gone, and the defendant's brother pled guilty to the same. Sounds airtight? With regard to the availability of less prejudicial proof, that concept was captured in the

question asked above in why it was necessary to permit the State to list every single text message it had and wouldn't it have been sufficient to allow them to choose one or two texts so as to reduce the inflammation? Finally, when it comes to the "similarity of the prior wrongs of the charged offense" it couldn't be any worse for the defendant who found himself being judged for what he had done in the past, in the distant past, and gotten away with, rather than what really was at issue before the jury.

The interested observer must ask what was the "independent logical relevance" of showing a so called "history" of drug dealing between the two? If two people have murdered eight people a year and a half or two years before being captured murdering a ninth, what logical relevance is there in showing the previous eight had occurred unless, of course, accident was the defense. Here, the defense was not "accident" or "mistaken identification", it was "Caldwell's not telling the truth". How does the fact that a year and a half before when there were obvious drug transactions occurring between them does that, in any way, shed light on Caldwell's truthfulness in March of 2019?

When the defense is "I didn't do it" how does the Court's reliance upon "intent" offer any relevant consideration? If the defense was "I didn't intend to sell it, I want it all for myself", then, putting the remoteness factor aside, at least there would be independent logical relevance. And the Court cites "knowledge"

knowledge of what? How does the fact that one participated in drug transactions eighteen months before giving them some kind of magical knowledge as to how to sell marijuana, "You give me the money and I give you the weed"! Judicial parroting is not judicial deliberation. A most salient example of the demonstration is found in the words of the Court in ruling that the conversation regarding the obliterated serial number is admissible and found in the words:

"It seems to be introduced for a purpose sanctioned by Rule 404 (b) and that is the defendant's knowledge and intent to possess *that particular firearm.*

I don't think it's too *remote* for the reasons that I have already identified. There is a necessary *connection* between that evidence and the proposition to be proved."

The "Achilles heel" of that finding is seen by examining the evidence the Court was permitting in finding not only its relevance , materiality, but, particularly, in finding that it was not "too remote": Query, how can a judge possibly assess remoteness when the question, the only question, establishing time of expression, was "Did you ever have any conversations with the Defendant about purchasing a firearm?" (T14-125; A-119).

The Prosecutor urged the Court to permit entry, in part of extraordinarily prejudicial evidence without justification. **Reversal** is mandated!

V. THE TRIAL COURT PROVIDED A FLAWED INSTRUCTION REGARDING THE ELEMENTS OF "KNOWINGLY" POSSESING A WEAPON WITH AN OBLITERATED SERIAL NUMBER.

A. Questions Presented.

Did the Trial Court provide legally erroneous and deficient instructions regarding the mental element of Count V? A Plain error analysis is appropriate in light of the failure to object to a inaccurate Jury instruction.

B. Scope and Standard of Review.

De Novo review applies to questions or errors of Law. *Smith Kline v. Merck, 766 A.2d, 442 (Del. 2000).*

C. Merits of the Argument.

11 Del. C. §252 states the applicable Law regarding States of Mind in its indication that State of Mind provision applies to all material elements defining a crime. The Mental State of knowingly precedes the elements of possession and the element of there being an obliterated serial number. The Court stated the elements correctly but did not explain knowing in the context of this Statute, but simply said the word had been somewhere earlier in the proceeding. (T18-140; A-124). In fact, that definition that occurred 11 pages and approximately 2,000 words earlier. (T18-129; A-122). Whatever the case, the early instruction fails to take into account the compound nature of the knowledge vis-à-vis knowledge of the missing serial number.

the case, the early instruction fails to take into account the compound nature of the knowledge vis-à-vis knowledge of the missing serial number.

firearm and the serial number had been obliterated and the Defendant acted knowingly.

Now the first semblance of an inconsistent verdict is because in Count I, there was reasonable doubt as to whether he possessed the firearm that he was found guilty of possessing in Count V – inconsistency at its finest. He could not be guilty of possessing the firearm and not guilty of possessing the firearm at the same time and same place under the law.

The instructions were complicated and lengthy, and it is simply not clear, beyond speculation, as to the jury's decision requiring reversal of Count V.

VI. THE EVIDENCE INTRODUCED AT TRIAL WAS INSUFFICIENT TO ESTABLISH ALL OF THE ELEMENTS OF THE OBLITERATED WEAPON COUNT BEYOND A REASONABLE DOUBT.

A. Question Presented.

Was the evidence introduced sufficient to establish guilt of the Defendant beyond a reasonable doubt?

The Defendant preserved his right of appeal by filing a motion for acquittal pursuant to Del. R. Crim. Proc. 29.

B. Scope and Standard of Review.

When the Court reviews the evidentiary basis for a conviction, the Court must determine "whether any rational trier of fact, viewing the evidence in the light most favorable to the [prosecution] could have found the essential elements of the charged offense beyond a reasonable doubt.[42]

The Standard of Review is a *de novo* review.[43]

C. Merits of the Argument.

The Defendant claims there was insufficient evidence to demonstrate his possession of the weapon and/or his knowledge of the number obliteration The State's case rests on the following facts[44]:

1. It was located in the basement of Defendant's house, but in an area where Malique had assumed exclusive occupancy; (T13-143: A-75)
2. The absence of any testimony of the Defendant's knowledge of the criminal obliteration or any other form of evidence establishing such knowledge;

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[42] *Jackson v. Virginia,* 99 S. Ct. 2781 (1979); *Robertson v. State,* 596 A.2nd 1345, 1355 (Del. 1991); *Forest v. State,* 721 A.2nd 1271, 1279 (Del. 1999).

[43] *Davis v. State,* 453 A.2nd 802, 803 (Del. 1982) (*per curiam*).

[43](T13-143; A-75).

3. The absence of any evidence to indicate direct possession on the part of the Defendant;
4. The absence of any evidence that the Defendant had ever satisfied the legal requirements of constructive possession in having an intention to exercise dominion or control over the weapon even if he knew this particular weapon was in the basement at that time;
5. Malique's admission to the police that he had purchased the gun which was his, found in his area of control of the premises and fortified by his entry of a guilty plea earning him three years in prison. [45](T14-46,47,48; A-103-105.)

In an effort to cure this obvious "weak link" the State refers to an isolated conversation between Defendant and Caldwell, as alleged by Caldwell, without indicating where, when or any linkage between the subject matter of the discussion and the particular weapon located on February 16[46]: (T- 14-126; A-120.)

> Q: "Did you *ever* have any conversations with the Defendant about purchasing a firearm? (emphasis supplied).
>
> A: Yes.

Shortly thereafter, the Defendant clarified he was referring to a "dirty" weapon with Caldwell giving his interpretation that the word "dirty" meant a weapon without a serial number. Query: who could dispute that if the conversation even happened that "dirty" did not refer to "stolen"?

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[45] (T- 14-46-48; A-102-105).
[46] (T -14-126; A-120).

These are fatal deficiencies of proof and no rational juror could conclude that Defendant was speaking of the handgun found in the basement in 2018 in light of the fact that Caldwell testified that he and the Defendant were acquainted since the time they were children.[47] (T-14-96; A-118).

[47] (T-14-96; A-118).

VII. THERE WAS INSUFFICIENT EVIDENCE OF THE WEIGHT ELEMENTS OF COUNT III, THEREFORE REVERSAL IS APPROPRIATE.

A. Question Presented.

Did the State submit evidence Sufficient to satisfy a finding of guilt to the charge of drug dealing of 4000 grams or more by proof beyond a reasonable doubt?

The defendant failed to object to the instruction under scrutiny, therefore, the Court must engage in a plain error review. See *Wainwright*, Cited *supra,* * 17. A finding of insubstantial evidence satisfies plain error requirements.

B. Scope and Standard of Review.

The legal analysis is premised upon a *de novo* review when an error of law is alleged to have been committed. See *Smith Kline*, Cited *Supra,* *34.

C. Merits of the Argument.

The State's evidence is based solely on Caldwell's guessing at the total number of bags he saw in pile and the police admitted was a guess.

Nick Nasty alleged delivery was bereft of any time frame and caused a fatal variance and cannot be considered.

The State must have produces evidence to satisfy a reasonable Jury Trial that all elements of any charged defenses were proven beyond a reasonable doubt at the time of the offense charge at the time and date charged in the indictment. (T18-137; A- 123).

The State's evidence, on this point, was skeletal, at best:

At some time from the birth of the Defendant until February 22, 2018 Defendant dealt as much as 25 pounds of Marijuana to Abdul and Nick Nasty. On a separate occasion, Caldwell saw at Defendant's residence 100

pounds of Marijuana, "No, scratch that. No scratch that, 130 pounds, No, scratch that, 140 pounds."[48]

The lack of sufficiency of the results of Caldwell's "Guessing game" added to the imprecision of the "where and when" aspect of the "Nasty" dealing is not of a nature to be relied upon as proof by a rational juror. See *Jackson V. Virginia*, Cited *supra* *36.

[48] Quotations are writers.

VIII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN MULTIPLE AREAS OF THE LAW WHILE TRIGGERING ACTIVATION OF THE "CUMULATIVE ERROR" DOCTRINE.

D. Questions Presented

Because of the multiplicity of legal errors should reversal be premised on the cumulative error doctrine.

Failure to Object to a Trial Procedure depriving Defendant of a substantial, serious, basic and apparent right that jeopardize fairness and integrity constitutes "plain error". See *WainWright, Supra* * 17.

E. Scope and Standard of Review

The Court considers Legal error by effecting a *De Novo* review. See *Dennis,* *30.

F. Merits of the Argument

Cumulative error must derive from multiple errors that caused "Actual Prejudice." (*Abbatellio v. State*)[49] (*Citing Michaels V. State*)[50]. This case is a textbook reincarnation of a classic example:

1. The State did not fulfill its discovery responsibilities in a timely fashion resulting in Defense counsel having fewer than ten hours to review 15,000+ cell phone items including deletions which should have been

[49] 2020 WL 764 7926 (Del Dec. 22, 2020)
[50] 970 A2d 223 (Del. 2009)

objected to because of deliberate deletions in critical areas and which will be Rule 61 fodder if Reversal is denied.

2. The Court without expressing a meaningful rationale rejected a request for a delay of two *weeks.*
3. The Defendant was denied his request requiring constitutional visibility between the Jury and Defendant at Trial.
4. The Court delivered a limiting instruction that misstated the Law regarding a critical witness.
5. A flawed instruction was given insofar as "knowingly" was not properly defined in context.
6. Significantly devastating 404(b) evidence was permitted of a unimaginable and totally unnecessary magnitude.
7. The State failed to properly prove the 4,000-gram requirement in one of the Drug Dealing counts.

This accumulation of errors represents the antithesis of a fair trial and the "cure" is found in what has become known as the "cumulative error" doctrine. *Morse v. State*, 120 A.3d 31 (Del. 2015). There must be a rational demonstration of multiple errors which, in concert, result in "actual prejudice", "as is the case, now, before this Court.

CONCLUSION

Without offering overstatement, this case represents a pervasive unfairness that can be remedied only through the Legal vehicle of **REVERSAL**

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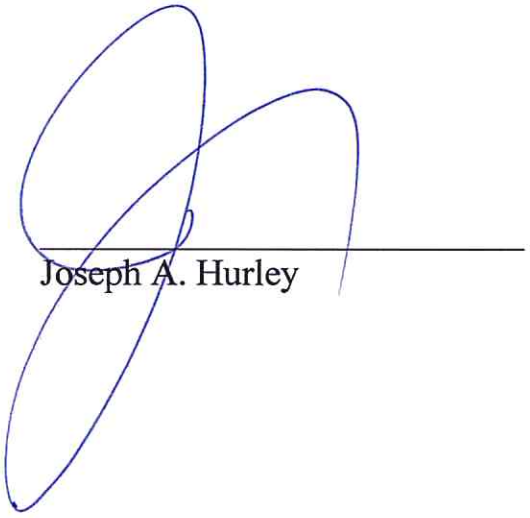
Respectfully Submitted,



Joseph A. Hurley

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

VS.

KARIEEM HOWELL

Alias: KARIEEM J HOWELL

DOB: 11/21/1995
SBI: 00787244

CASE NUMBER:
N1802010652

IN AND FOR NEW CASTLE COUNTY
CRIMINAL ACTION NUMBER:
IN19-01-0388
DDEAL TIER 4(F)
IN19-01-0395
POS WEAP NO SER(F)
IN19-01-0389
CONSP 2ND(F)
IN19-01-0397
POSS DRUG PARAP(M)

COMMITMENT
Nolle Prosequi on all remaining charges in this case
ALL SENTENCES OF CONFINEMENT SHALL RUN CONSECUTIVE
SEE NOTES FOR FURTHER COURT ORDER-TERMS/CONDITIONS

SENTENCE ORDER

NOW THIS 9TH DAY OF OCTOBER, 2020, IT IS THE ORDER OF THE COURT THAT:

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

AS TO IN19-01-0388- : TIS
DDEAL TIER 4

Effective March 18, 2019 the defendant is sentenced as follows:

- The defendant is placed in the custody of the Department of Correction for 20 year(s) at supervision level 5

- Suspended after 4 year(s) at supervision level 5

- For 2 year(s) supervision level 4 DOC DISCRETION

- Suspended after 6 month(s) at supervision level 4 DOC DISCRETION

- For 18 month(s) supervision level 3

STATE OF DELAWARE
VS.
KARIEEM HOWELL
DOB: 11/21/1995
SBI: 00787244

- Hold at supervision level 5

- Until space is available at supervision level 4 DOC DISCRETION

AS TO IN19-01-0395- : TIS
POS WEAP NO SER

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

- Suspended after 1 year(s) at supervision level 5

- For 18 month(s) supervision level 3

The level 3 probation is concurrent to any level 3 under criminal action number IN19-01-0388

AS TO IN19-01-0389- : TIS
CONSP 2ND

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

- Suspended for 1 year(s) at supervision level 2

Probation is concurrent to criminal action number IN19-01-0395 .

AS TO IN19-01-0397- : TIS
POSS DRUG PARAP

The defendant is to pay a fine in the amount of $300.00 plus all surcharges and fees (see attachment).

- The defendant is to pay financial obligations on this charge.

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
KARIEEM HOWELL
DOB: 11/21/1995
SBI: 00787244

CASE NUMBER:
1802010652

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

Obtain and remain gainfully employed.

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

Defendant shall be evaluated for substance abuse and follow recommendation for treatment, counseling and screening.

Forfeit all weapons,ammo & money

Have no contact with Harrison Dorsey

Have no unlawful contact with Sharon Howell

Have no unlawful contact with Malique Howell

For the purposes of ensuring the payment of costs, fines, restitution and the enforcement of any orders imposed, the Court shall retain jurisdiction over the convicted person until any fine or restitution imposed shall have been paid in full. This includes the entry of a civil judgment pursuant to 11 Del.C. 4101 without further hearing.

NOTES

The charge for DDW/Ag.Factor (IN19-01-0387) merges for sentencing purposes with IN19-01-0388.

JUDGE ABIGAIL M LEGROW

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
KARIEEM HOWELL
DOB: 11/21/1995
SBI: 00787244

CASE NUMBER:
1802010652

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	45.00
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	300.00
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	
PROSECUTION FEE ORDERED	100.00
VICTIM'S COM ORDERED	54.00
VIDEOPHONE FEE ORDERED	5.00
DELJIS FEE ORDERED	5.00
SECURITY FEE ORDERED	50.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	75.00
SENIOR TRUST FUND FEE	
AMBULANCE FUND FEE	
TOTAL	634.00

SURCHARGES

STATE OF DELAWARE
VS.
KARIEEM HOWELL
DOB: 11/21/1995
SBI: 00787244

CASE NUMBER:
1802010652

CRIM ACTION #	DESCRIPTION	AMOUNT
IN19-01-0397	DRTE	45.00
IN19-01-0397	VCF	54.00

COURTS REMOTENESS SUPPORT

CASE NAME	TIME DELAY
Andreavich v. State 2018 WL 3045599 (Del June 19, 2018	Sept 14, 2016 - Jan 5, 2017 113 Days
Torres v. State 979 A2d 1087 (Del 2009)	Oct 21, 2006- Oct 26, 27 2006. Nov 1, 2006. 4 Days
State V. Hynson 1992 WL 53419 (Del Feb 24, 1992)	Aug 8, 1989- Aug 10, 1989. Aug 14, 1989 4 Days
Karieem Howell	Nov 5, 2016- Feb 16, 2018 468 Days

EXHIBIT "A"

THUMBNAIL GETZ 404 ANALYSIS

A. Burden – State must justify Admissibility

B. Independent Logical Relevance - More Likely

C. Court's Analysis

   a. INTENT – Intent not an issue with denial of Marijuana and no physical findings.

   b. KNOWLEDGE – Knowledge that marijuana was in Defendant's residence and was intended to be sold by Malique.

   c. COMMON PLAN – Repetition does not a plan make – Court had no information of *Modus Operandus* in 2016.

D. Relevance – He did it before, he probably did it again = propensity.

E. Remoteness – Too Remote

   a. "Where there is no visible, plain or necessary connection between it and the proposition eventually to be proved" *Lloyd v. State* 1991 WL 247737 (Del. Nov 6, 1991); *Allen v. State* 644 A2d 982,988 (Del 1994). "A lengthy Time lapse can render the evidence legally irrelevant. Temporal remoteness depreciates or reduces the probative value of the evidence.

EXHIBIT "B"

DESHIELDS DRE 403 ANALYSIS

403 ANAYLSIS

1. Extent in Dispute	- Substantial
2. Adequacy of Proof of Prior Conduct	- High
3. Probative Force of Prior Conduct	- Very Low
4. Proponent's need for evidence	- nonexistent
5. Availability of less Prejudicial Proof	- Court could have placed limitations on number of texts
6. The Prejudicial effect of the evidence	- Extremely high
7. Similarity of Prior Wrong	- Virtually Identical
8. Effectiveness of Intruction	- Unknown
9. Prolonging Proceeding	- minimal

EXHIBIT "C"

Unfortunately, the lack of depth of the Courts Analysis beyond the parroting of 404's verbiage is shown by her conclusion of admissibility in deciding the verbal exchange between Defendant and Caldwell was material as to the weapon found in Malique's living space.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KARIEEM J. HOWELL Defendant -Below Appellant, v. STATE OF DELAWARE, Plaintiff-Below, Appellee.	))))))))))	No. 372,2020 COURT BELOW: In the Superior Court, In and For New Castle County, I.D. 1802010652

CERTIFICATE OF SERVICE

I, Joseph A. Hurley, hereby certify this 9th day of March that two (2) copies of the within Defendant's Amended Opening Brief was served upon the following:

Maria T. Knoll
Deputy Attorney General
Delaware Department of Justice
Carvel State Office Building, 7th FLoor
820 North French Street
Wilmington, Delaware 19801
Phone: 302-577-826

Joseph A. Hurley, Esquire
1215 King Street
Wilmington, Delaware 19801
(302) 658-8980
Bar I.D. No. 326

Dated: March 9, 2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KARIEEM J. HOWELL	)	
	)	
Defendant -Below	)	
Appellant,	)	
	)	
v.	)	No. 372,2020
	)	
STATE OF DELAWARE,	)	COURT BELOW: In the
	)	Superior Court, In and For
Plaintiff-Below,	)	New Castle County,
Appellee.	)	I.D. 1802010652

CERTIFICATION OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. The Defendant's Amended Opening Brief, Under Rule 26(c) 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, 2010. (Upon information and reasonable belief.)
2. This Defendant's Amended Opening Brief under Rule 26(c) contains 8,522 words which were counted by Microsoft Word using the Word Count Feature.

Joseph A. Hurley, Esquire
1215 King Street
Wilmington, Delaware 19801
(302) 658-8980
Bar I.D. No. 326

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