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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TERRELL S. MOBLEY, Defendant Below-Appellant, v. STATE OF DELAWARE, Plaintiff Below-Appellee.	))))))))))	No. 158, 2023 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE ID No. 1906003128A/B

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

OPENING BRIEF

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NATURE OF THE PROCEEDINGS

Arrest and indictment

Wilmington Police arrested Terrell Mobley on June 5, 2019 as he was walking down Coleman Street.[1] The police charged him with:

Possession of a Firearm by a Person Prohibited (PFBPP)
Possession of Ammunition by a Person Prohibited (PABPP)
Carrying a Concealed Deadly Weapon (CCDW)[2]

Five days later, on June 10, 2019, a grand jury returned an indictment separately charging Mr. Mobley with Murder First Degree and other serious offenses in Case ID No. 1906003201.[3] As to this firearm case on appeal, a grand jury returned an indictment on July 8, 2019, charging Mr. Mobley with PFPBB, PABPP, and CCDW.[4]

Pretrial matters and motions

The gun case and the 2019 murder case were assigned to the Honorable Andrea L. Rocanelli. The Court held an office conference on August 8, 2019, mainly pertaining to the murder case but peripherally discussing the gun case.[5] The State indicated its intent to proceed to trial on the gun case while the murder case was pending.

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[1] A29-33.
[2] A30.
[3] A1268; D.I. 1.
[4] A34-35.
[5] A36-52.

At Mr. Mobley's case review on September 12, 2019,[6] the State offered a plea to PFBPP and CCDW, recommending a 15-year sentence as an habitual offender.[7] After a colloquy, Mr. Mobley rejected the plea.[8]

On October 11, 2019, the defense filed a Motion to Suppress Evidence.[9] On that same date, the defense filed a Motion to Sever, seeking severance of the person prohibited charges and bifurcating the case.[10] The State filed its response to the suppression motion on October 28, 2019.[11]

The trial judge held a suppression hearing on November 12, 2019.[12] Two police officers and Mr. Mobley testified. The Court denied the motion to suppress.[13] The Court granted the unopposed motion to sever the person prohibited charges.[14]

At the final case review on January 23, 2020,[15] no plea was offered by the State.[16]

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[6] A53-69.
[7] A70.
[8] A60-62.
[9] A76-105.
[10] A106-113.
[11] A115-147.
[12] A148-351.
[13] A343-349.
[14] A352.
[15] A353-365.
[16] A357.

On February 7, 2020, the defense filed a motion to exclude certain of Mr. Mobley's prior convictions should he elect to testify at trial.[17] As to both the murder case and the drug case, the Court granted exclusion of Mr. Mobley's prior drug dealing convictions.[18] As discussed in the opinion, by this time both Mr. Mobley's cases had been continued due to the COVID-19 pandemic.[19]

Disposition of Mr. Mobley's two Murder First Degree cases

As noted, Mr. Mobley had a murder case pending at the same time as the gun case. On February 17, 2020, a grand jury approved a second murder indictment, charging Mr. Mobley with Murder First Degree and other serious charges in Case ID No. 2002007105. The 2020 murder case was assigned to the Honorable Ferris W. Wharton.[20] In fact, the 2019 murder case[21] and the gun case[22] were also reassigned to Judge Wharton due to the retirement of Judge Rocanelli.

The 2019 murder case went to trial on June 25, 2021. After a four-day trial, the jury could not come to a unanimous verdict; the Court declared a mistrial.[23]

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[17] A367-375.
[18] *State v. Mobley*, 2020 WL 2572738 (Del. Super. May 21, 2020).
[19] *Id.* at *1.
[20] A1262; D.I. 5.
[21] A1272; D.I. 31.
[22] A7; D.I. 38.
[23] A1276; D.I. 47.

Ultimately, the State entered *nolle prosequis* as to both the 2019[24] and 2020 murder cases.[25] This left only the instant firearm case to be prosecuted.

The first trial ends in a mistrial.

Just prior to the first trial, the prosecutor informed the defense by letter that two of the three officers involved in Mr. Mobley's arrest would not testify due to being the subjects of internal investigations.[26] That left only Corporal Moses as the remaining officer to testify.

At a teleconference on the eve of trial, the trial judge stated that he had been thinking about how trials are severed in person prohibited cases, and that sometimes jurors are displeased to learn they must stay for the B case.[27] The Court proposed telling the jurors in advance that the trial would be conducted in two parts.[28] The prosecutor responded that it was a good idea keep the jury "in the loop." However, the prosecutor noted there could be a big concern from the defense as to whether it would lead to prejudice.[29] The judge stated he would revisit the issue prior to jury selection.[30]

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[24] A1276 D.I. 54.
[25] A1267; D.I. 31.
[26] A482-483.
[27] A492-493.
[28] A493.
[29] *Id.*
[30] *Id.*

The next day, defense counsel argued against the idea, stating that it would raise the spectre of curiosity about the other part of the trial and could cause the jury to infer a general criminal disposition.[31] The State took no position.[32] The judge decided he would tell the jury that it was a two part-trial.[33]

After jury selection, during the judge's preliminary comments, the judge told the jury, "Some cases are tried in two parts. This is one of them. What that means is, after you return your verdict on the first part, we'll take a brief recess for a few minutes and then we'll try the second part of the case."[34]

The case was tried in one day on November 16, 2022. That afternoon, the jury sent out a note requesting further definition of the word "knowingly," and advising the Court that they were currently deadlocked.[35] The Court declined to give an Allen charge.[36]

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[31] A500.
[32] A505.
[33] A506.
[34] A619-620.
[35] A821.
[36] A831-833.

The next morning, the jury informed the judge they remained deadlocked.[37] The defense moved for a mistrial.[38] The State did not oppose.[39] The State also elected to not move forward on the B case.[40] The Court declared a mistrial.[41]

Motion to compel* Brady *material

On November 22, 2022, defense counsel moved to compel *Brady* material related to Corporal Moses.[42] Defense counsel had learned that in an earlier case, State v. Whittle,[43] Moses had sworn out an arrest warrant and testified at a preliminary hearing that he had seen a suspect with a gun and then arrested him.[44] At trial, it was revealed that Moses was acting on a tip from Downtown Visions, who saw the man on camera. Moses did not see the video at any time prior to arrest. He obtained the video later.[45]

In the Whittle case, the trial judge struck the officer's testimony and granted a motion for judgment of acquittal.[46] The judge admonished the prosecutor to bring

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[37] A871.
[38] A871-872.
[39] A872.
[40] A872-873.
[41] A873-874.
[42] A879-927.
[43] ID No. 1607000578.
[44] A881.
[45] A883-884.
[46] A884.

Moses's testimony to the attention of Moses's superiors.[47] The prosecutor agreed to do so.[48]

Defense counsel sought production of communications from that prosecutor to Moses's superiors, any information regarding actions taken by Wilmington Police Department, all communications within the Department of Justice regarding Moses's testimony in the Whittle case, and a disclosure of any other cases in which Moses had testified improperly.[49]

The State responded on December 14, 2022.[50] The State asserted that the *Brady* request was in fact a request for internal, privileged communication. The State claimed the defense motion was a "fishing expedition" prohibited by *Snowden v. State*.[51] The State went on to argue that Moses did not testify dishonestly, so *Brady* was not implicated.[52]

The Superior Court issued a letter decision on December 16, 2022.[53] The Court declined to decide whether a *Brady* violation had occurred.[54] Instead, the Court found that the defense "has made no effort" to justify the request to compel

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[47] A885.
[48] *Id.*
[49] A888.
[50] A928-936.
[51] 672 A.2d 1017, 1023-23 (Del. 1996).
[52] A930.
[53] A937-940.
[54] A938.

production.[55] The Court directed the State to make its own review of Cpl. Moses's personnel file and to turn over any *Brady* material.[56]

On December 20, 2022, the State wrote to the Court to say that after review, it found no *Brady* material in Moses's file.[57]

The defense moved for partial reargument of the Court's letter decision on December 20, 2022.[58] The gist of the motion is that only one category of the requested materials – Moses's personnel file at WPD – was subject to *Snowden*.[59] The motion goes on to argue that the remaining materials are not police personnel files and are simply impeachment material.[60]

On December 22, 2022, the Court issued another letter order,[61] noting that the prior order had not ruled on the original motion to compel. The Court again requested that the State review Moses's file for *Brady* material based on the defense interpretation of the facts.[62]

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[55] A939.
[56] A940.
[57] A941.
[58] A942-954.
[59] A947.
[60] A948.
[61] A955-956.
[62] A956.

The Court denied both motions on January 3, 2023.[63] The Court found that the defense had made no effort to justify the specific requests for production.[64] Nevertheless, the State wrote to the Court seeking to limit reference to the Whittle case in Mr. Mobley's second trial.[65] The defense responded by letter on January 26, 2023.[66]

The second trial

At an office conference prior to jury selection on January 31, 2023,[67] the State wanted clarification of how Moses would be cross-examined.[68] Defense counsel confirmed that he would be asking Moses about his various statements and testimony. But there was no way to introduce evidence of the Whittle' judge's ruling or the trial judge's recent rulings.[69]

The judge confirmed he would inform the jurors that it was to be a two-part trial. Defense counsel renewed the objection.[70] After the jury was sworn, the judge informed the jury that this was a criminal trial that would be tried in two parts.[71]

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[63] *State v. Mobley*, 2023 WL 107387 (Del. Super. Jan. 3, 2023).
[64] *Id.* at *2.
[65] A962-964.
[66] A965-969.
[67] A972-988.
[68] A976-977.
[69] A978-979.
[70] A986.
[71] A997.

The case proceeded to retrial on January 31, 2023. After less than one hour of deliberation, the jury reached a verdict, finding Mr. Mobley guilty of CCDW.[72] The next morning, after the brief B trial, the jury found Mr. Mobley guilty of PFBPP and PABPP.[73]

Sentencing

On April 4, 2023, the State filed a motion to declare Mr. Mobley an habitual offender.[74] The Court sentenced Mr. Mobley on April 14, 2023.[75] There being no basis to oppose the habitual motion, the Court granted it.[76] The Court sentenced Mr. Mobley to 31 years unsuspended prison time.[77]

Mr. Mobley, through counsel, filed a timely Notice of Appeal in this Court. This is his Opening Brief.

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[72] A1154-1155.
[73] A1198-1199.
[74] A1227-1235.
[75] A1236-1256.
[76] A1239-1240.
[77] A1257-1261; Exhibit A.

SUMMARY OF THE ARGUMENT

I. THE TRIAL JUDGE ERRED IN DENYING THE DEFENSE MOTION TO COMPEL *BRADY* MATERIAL, LEAVING THE DEFENSE UNABLE TO EFFECTIVELY IMPEACH THE CHIEF INVESTIGATING OFFICER ABOUT HIS FALSE AFFIDAVIT AND TESTIMONY IN A PRIOR CASE.

After the hung jury in the first trial, the defense came into possession about the arresting officer's false arrest warrant and testimony in a prior case. In that prior case, the officer's arrest warrant swore that he saw a suspect remove a gun from his waistband and put it in a stairwell. He testified similarly at the preliminary hearing. These averments were not true. Downtown Visions saw this suspect on video and called the officer, who went and made the arrest. The officer did not see this video until well after the arrest.

At trial, the officer testified finally to the accurate version of events. The trial judge in that case granted a motion for judgment of acquittal, noting that the officer had testified contrarily at the preliminary hearing. The trial judge told the prosecutor to report the officer to his superiors at the Wilmington Police Department; the prosecutor agreed to do so.

Defense counsel in Mr. Mobley's case filed a motion to compel *Brady* material, focused mainly on information in possession of the DOJ regarding what the prior prosecutor had reported to WPD. The State did not agree that any *Brady* violation had taken place, denying that the officer testified or swore falsely.

The trial court erred by applying the law of a case pertaining to *in camera* reviews of police personnel files. The defense did not want the officer's personnel file. The defense's reasonable request was for information in the DOJ's possession or WPD's possession pertaining to the officer's testimony in that prior case, as well as information in the DOJ's possession about other times the officer had testified falsely.

The trial judge's denial of the motion to compel prejudiced Mr. Mobley; without the material requested, the defense could not effectively impeach the officer's credibility. This became especially important because this officer was the only one left to testify about what happened on the day of Mr. Mobley's arrest. The other two officers were not called by the State due to their own legal and credibility issues.

II. THE TRIAL JUDGE'S *SUA SPONTE* DECISION TO TELL THE JURY THAT THE CASE WOULD BE TRIED IN TWO PARTS VIOLATED MR. MOBLEY'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

As is typical in Superior Court, Mr. Mobley's motion to sever the person prohibited charges to a B trial was granted without opposition. This was to avoid prejudice; the jury would not hear that Mr. Mobley was a person prohibited or why.

After the jury selection and over the objection of the defense, the trial judge told the jury that this criminal trial would be conducted in two parts. This,

according to the Court, was to avoid the jury's potential annoyance at being told there were additional charges to consider after the verdict in the A case. The judge rejected the defense argument that Mr. Mobley would be prejudiced by the announcement; the jury would speculate about the other charges and potentially infer a criminal disposition to Mr. Mobley. The trial judge ruled, erroneously, that Mr. Mobley would suffer no prejudice.

Embedded in the right to a jury trial is the fundamental right to an impartial jury whose verdict is rendered solely on the evidence. When the judge decided to tell the jurors there were more charges coming after the first part of the trial, Mr. Mobley's fundamental rights were violated.

STATEMENT OF FACTS

This case pertains to the June 5, 2019 arrest of Mr. Mobley. Three officers from the Street Crimes Unit saw from their police car an individual walking down Coleman Street carrying a purple bookbag. They were on a separate errand and were not looking for Mr. Mobley. When the officers u-turned in and returned up Coleman Street, the individual was no longer carrying the bag. This struck them as suspicious. They performed a pedestrian stop. The bag was on the street next to a car by this point. This all led to the search of the bag, which contained, among other things, a loaded firearm.[78]

Two of the officers could not testify due to their own legal and administrative problems. In a separate case, Corporal Jhalil Akil misrepresented facts in an arrest warrant and continued to do so at a preliminary hearing.[79] As such, the State elected not to call Corporal Akil in Mr. Mobley's trial.[80] Officer Kecia Rosado was charged with felony offenses, causing her termination from the Wilmington Police.[81] This left Corporal Moses as the only arresting officer available to testify.

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[78] A31.
[79] A482.
[80] *See*, *State v. Jackson*, 2022 WL 18401412, at *3-4 (Del. Super. Dec. 28, 2022) for a discussion of Corporal Akil's misrepresentations.
[81] A482-483.

The trial judge denies the defense's motion to compel the State to produce* Brady *material regarding Corporal Moses.

On November 22, 2022, the defense file a Motion to Compel Brady Material.[82] Two days after the first trial, an attorney from the Public Defenders Office provided defense counsel with information about Moses's testimony in State v. Daryus Whittle.[83]

In the Whittle case, Moses swore out an arrest warrant stating that he and another officer observed a male "from a disclosed [sic] location" remove a firearm from his waistband and hide it under the stairwell of a building.[84] The warrant further states that they then took the male into custody and recovered the firearm. This led to Whittle's firearm charges.[85] At the preliminary hearing, Moses testified that he and his partner observed Whittle from an undisclosed location, then went to that location and arrested Whittle.[86] The defense attorney asked how this occurred: was it a call? You just happened to be there?[87] But Moses remained vague, stating he and his partner were there observing the area. He then clarified that the view was "very close because we have video camera of it."[88] Still confused, the defense

[82] A879-927.
[83] ID No. 1607000578.
[84] A893.
[85] A892-893.
[86] A899-900.
[87] A901.
[88] A901-902.

lawyer asked if it was a body cam or an MVR (police car camera). Moses reiterated that "we have video footage of the situation."[89] But he continued to testify as to what *he* saw Whittle do.[90]

Whittle's trial began with the playing of the Downtown Visions footage with no witness on the stand.[91] Then, Moses's partner Officer Wiggins testified that it was a Downtown Visions agent who actually saw Whittle on camera and alerted the officers. Wiggins testified he never saw what happened.[92] In fact, he did not even see the video until after the arrest.[93]

Corporal Moses testified next. He testified that he went to Bennett Street because Downtown Visions called him and said there was a person with a gun in the 900 block.[94] The trial judge ordered the jury taken out. The judge told the prosecutor that he had heard hearsay evidence from two officers about the video. The prosecutor agreed and confirmed he would not be calling anyone from Downtown Visions.[95] The judge continued, "this officer swore under oath in the

[89] A902.
[90] A903.
[91] A916.
[92] *Id.*
[93] A917.
[94] A920.
[95] A920.

Court of Common Pleas that he actually saw this happen."[96] The prosecutor stated that he was unaware of what happened in the Court of Common Pleas.[97]

The judge told the prosecutor to read the transcript and to tell him whether he was comfortable as an officer of the court to rely on that testimony. The prosecutor, after reading the transcript, agreed that at several points in the preliminary hearing transcript, Moses had testified that he observed the incident before arresting Whittle.[98] Yet he still wanted to prosecute the case through the officers, although no one from Downtown Visions would be testifying.[99]

Moses, back on the stand for cross-examination, admitted that he did not actually see the incident happen.[100] He then attempted to clarify that he did not see the incident before or while it was happening, so that his prior testimony was "incorrect."[101] Moses admitted that his testimony that he was in the area and observed the defendant pull a firearm from his waist was also "incorrect."[102] When confronted with prior testimony that he observed the suspect prior to going to arrest him, Moses testified, "yes, I guess I did mess that up, in wording."[103]

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[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] A922.
[101] *Id.*
[102] *Id.*
[103] A923.

The judge then confirmed with Moses that he did not see the suspect prior to arresting him, and it was not until sometime after the arrest that he retrieved the footage from Downtown Visions.[104]

The judge then struck the officers' testimony and, over the prosecutor's objection, granted a motion for judgment of acquittal.[105] He then stated:

> Because of the rather odd circumstances of this, which began with the playing of just the tape with nobody describing what was occurring within that tape or who was involved, the court was unaware, and because of the circumstances of the Court of Common Pleas testimony, which, by the way, Mr. [Prosecutor], I hope as an officer of this Court you will bring to the attention of that officer's superiors.[106]

The prosecutor responded, "Yes, Your Honor."[107]

The Motion to Compel asserted that the fact of Moses's false affidavit and testimony was *Brady* impeachment material that should have been provided to the defense. The defense sought the communications between the prosecutor and Moses's superiors at WPD, any disciplinary action against Moses within the WPD, any communication within the DOJ about Moses and his credibility as a witness generally after the Whittle trial, and a disclosure of any other case in which Moses testified falsely or deceptively. [108]

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[104] A924.
[105] A925
[106] *Id.*
[107] *Id.*
[108] A888.

In its response, the State disagreed that Moses testified falsely.[109] The State attributed Moses's testimony to the cursory nature of preliminary hearings. Moreover, the State argued that when Moses attested in his warrant that he had observed Whittle, "it was not false at all."[110] The State attributed Moses's about face in his trial testimony to the testimony being more "fully developed."[111]

In its legal argument, the State cited to *Snowden v. State*,[112] and accused the defense of engaging in a "general fishing expedition."[113]

In a letter order,[114] the trial judge declined to decide whether a *Brady* violation had occurred. Moreover, the judge found that the defense had "made no effort" to establish the *Snowden* factual predicate for disclosure of internal communications "within the DOJ and the WPD."[115]

The defense filed a Motion for Partial Reargument,[116] pointing out that only one category of requested material implicated *Snowden*, and even that category did not request a review of Moses's personnel file.[117] The motion argued that the

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[109] A930.
[110] A930-931.
[111] A933.
[112] 672 A.2d 1017 (Del. 1996)(setting forth what threshold showing is required for a party to subpoena a police officer's personnel file).
[113] A929-930.
[114] A937-940.
[115] A938-939.
[116] A942-954.
[117] A947-948.

remaining categories had nothing to do with *Snowden* and were simply impeachment material.[118] The motion also argues that the Court should make a finding as to whether there was a *Brady* violation, because otherwise, using its own analysis, the State could decide it had no *Brady* obligations as to the Moses/Whittle issue.[119]

In its ruling on the motions, the Court found that the defense already possessed the "classic impeachment evidence" sought.[120] The Court was "not persuaded" that the defense had established a basis to compel the particular items it requested.[121] The Court denied both motions.

In Mr. Mobley's trial, Corporal Moses is ready with new answers about the Whittle case.

At trial, Moses testified he had never been misleading or untruthful in any of his prior affidavits or testimony on any occasion.[122] He then answered questions about the Whittle case. Moses agreed that he completed a contemporaneous police report setting forth the real facts: contacted by Downtown Visions, go arrest Whittle, obtain the video later.[123] When asked if he swore out an affidavit with a

[118] A948.
[119] A951.
[120] *State v. Mobley*, 2023 WL 107387, at *2 (Del. Super. Jan. 3, 2023).
[121] *Id.*
[122] A1060.
[123] A1063-1064.

different version of the facts, Moses replied, "it is confusing, yes."[124] Moses agreed that he changed up the order of events for his arrest affidavit, but then said "it wouldn't really be changed."[125] Moses then launched into an explanation of why he said undisclosed location instead of Downtown Visions: keeping things as generic as possible to preserve the safety of Downtown Visions employees.[126]

But when pressed about why he switched the order of events, Moses would not agree, although he conceded it was "confusing."[127] Moses then explained that in 2016 he was a new officer and that he wrote a confusing warrant.[128] He likened his warrant to building a house on bad bricks.[129] Moses claimed that his preliminary hearing testimony was not inaccurate about the order of events because he was never asked the question.[130] Moses pushed back on the characterization of his preliminary hearing testimony being accurate by using an analogy of baking a cake with the steps out of order.[131] He averred that he was young at the time and probably did not do the best job of testifying.[132]

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[124] A1064.
[125] A1065-1066.
[126] A1066-1067.
[127] A1067-1068.
[128] A1069-1070.
[129] A1070.
[130] A1071.
[131] A1072.
[132] A1073.

After some confusion, Moses finally conceded that he agreed at trial that his prior testimony was incorrect, particularly regarding the sequence of events.[133]

Cross-examination about the Whittle case ended there. Due to the Court's denial of the motion to compel, the communique between the Whittle prosecutor and WPD was not in the possession of the defense.

The trial judge informs the jury that the trial will be conducted in two parts.

At an office conference before the first trial, the judge floated the idea of informing the jury that the trial would be conducted in two parts.[134] The judge's concern was that juries are frustrated when they think they are done but then told they have to consider other charges.[135]

The next morning, the Court asked if the parties had considered the suggestion. Defense counsel argued that it would lead to curiosity about the other charges and could lead to inference of a general criminal disposition. Counsel asserted that the Court's suggestion would be unfair to Mr. Mobley.[136]

The judge reiterated that the reason for the suggestion was that it is "awkward" to tell the jury that they must come back, especially when the verdict in the A trial is toward the end of the day.[137]

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[133] A1078.
[134] A492-493.
[135] A493-494.
[136] A500.
[137] A501-502.

Defense counsel argued that if the jury, through *voir dire*, were told a particular number of days, there should not be surprise if they have to consider additional charges.[138] Counsel reiterated that the whole point of severance is to avoid prejudice, and to tell the jury there would be more charges to come would be prejudicial.[139] The Court interrupted to say that the Court never said the jury would be told there were more charges: "it could be a forfeiture hearing."[140]

The State took no position on the Court's suggestion.[141]

The Court elected to tell the jury that the case would be tried in two parts. The judge found it was "a bit of a stretch" from informing the jury to having them conclude that the defendant has a general criminal disposition.[142]

At an office conference of the morning of the second trial, the Court confirmed it would again inform the jury that the trial will be conducted in two parts. Defense counsel noted his continuing objection.[143]

Beginning *voir dire*, the judge informed the jury that "this is a criminal case," thereby eliminating any chance that the second part of the trial would be an asset forfeiture matter or any other civil matter.[144] After the jury was selected and

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[138] A504.
[139] *Id.*
[140] A505.
[141] A505-506.
[142] A506.
[143] A986.
[144] A991.

sworn, the judge told them, "this is a criminal case, as distinguished from a civil case. And in the case of some criminal cases and civil cases, this case will be tried in two parts. I will address that at a more appropriate time."[145]

Trial testimony

The three trial witnesses testified as follows:

Corporal Leonard Moses

On June 5, 2019, Moses was partnered with Corporal Akil and Corporal Rosado.[146] Coincidentally, the team was sent to the Browntown area to seek out a person who was reported to have a firearm in a book bag.[147] That person was not Mr. Mobley.[148] The car the officers were in was unmarked but was commonly known in the city as a police car.[149] Akil was driving; Rosado was in the front passenger seat.[150]

Traveling south on Coleman Street, the officers saw a male on the east side of the street. They saw that it was not the person they were seeking.[151] The officers kept traveling. They performed a U-turn to head back towards the city.[152] Doing so,

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[145] A997.
[146] A1024-1025.
[147] A1025.
[148] A1025-1026.
[149] A1028-1029.
[150] A1029.
[151] A1032.
[152] A1033.

the officers saw that the male, who previously had a satchel, was no longer carrying it. They decided to investigate.[153]

Officers saw the satchel not far away on the ground. Moses attempted a consensual encounter with Mr. Mobley. Mr. Mobley kept walking but did not run. Moses began to pull out his Taser.[154] But Mr. Mobley stopped and turned around.[155] Moses was given a "notification" to detain Mr. Mobley.[156] Moses did so. While walking Mr. Mobley to the police car, Moses asked him what was going on with the bag, to which Mr. Mobley replied, "what bag?"[157]

Moses never actually saw the bookbag. It was Rosado who went to it.[158] Once Moses looked in to the bag, he started investigating whether Mr. Mobley had a carry permit.[159] But Mr. Mobley would not provide his name. As such, the officers transported him to WPD.[160]

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[153] *Id.*
[154] A1034.
[155] A1042.
[156] A1035.
[157] *Id.*
[158] A1040.
[159] A1044.
[160] A1045.

Detective Hugh Stephey

Detective Stephey, a forensic services officer, conducted testing on the firearm.[161] He swabbed the firearm for DNA.[162] Stephey also tested for fingerprints but found no useable fingerprints for analysis.[163]

Bethany Netta

Ms. Netta is employed as a DNA analyst at the Division of Forensic Science in Wilmington.[164] She testified that the Canada Dry bottle produced a DNA profile that matched Mr. Mobley.[165] The straps of the bookbag produced a mixed profile from which no conclusions could be drawn.[166] Same with the swabs from the t-shirt and jacket found in the bag.[167] No conclusions could be made about the firearm swabs or the swabs from the coffee container that was in the bookbag.[168]

The State then rested.[169] After a colloquy,[170] Mr. Mobley elected not to testify.[171] The defense rested.[172] The jury found Mr. Mobley guilty of CCDW.[173]

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[161] A1094.
[162] A1095.
[163] A1096.
[164] A1100-1101.
[165] A1114.
[166] A1115-1116.
[167] A1116-1117.
[168] A1117.
[169] A1120.
[170] A1121-1124.
[171] A1124.
[172] *Id.*
[173] A1156.

The B case

After the guilty verdict in the A case, the jury reassembled the next day for the B trial on the charges of PFBPP and PABPP. After another colloquy,[174] Mr. Mobley elected not to testify.[175] Mr. Mobley stipulated that he was a person prohibited from owning or possessing a firearm or ammunition.[176] The jury found Mr. Mobley guilty of the two charges.[177]

[174] A1172-1173.
[175] A1173.
[176] A1179-1180.
[177] A1199.

ARGUMENT

I. THE TRIAL JUDGE ERRED IN DENYING THE DEFENSE MOTION TO COMPEL *BRADY* MATERIAL, LEAVING THE DEFENSE UNABLE TO EFFECTIVELY IMPEACH THE CHIEF INVESTIGATING OFFICER ABOUT HIS FALSE AFFIDAVIT AND TESTIMONY IN A PRIOR CASE.

A. Question Presented

Whether the trial judge erred in denying the defense motion to compel *Brady* material: impeachment evidence related to Corporal Moses's false statements in an arrest warrant and in preliminary hearing testimony in a prior case. The defense preserved this issue by filing a Motion to Compel Brady Material[178] and a Motion for Partial Reargument.[179]

B. Scope of Review

This Court reviews questions of law and constitutional claims, "such as claims based on the State's failure to disclose exculpatory or impeaching evidence, *de novo*."[180]

C. Merits of Argument

Applicable legal precepts

Due process requires the prosecution to disclose exculpatory and impeachment evidence within its possession to the defense. First recognized by the

[178] A879-927.
[179] A942-954.
[180] *Risper v. State*, 250 A.3d 76 (Del. 2021).

United States Supreme Court, the *Brady*[181] rule is based on principles of due process and fairness in trials.[182] As *Brady* instructs, "society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[183]

A *Brady* violation occurs when:

> (1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching;
>
> (2) that evidence is suppressed by the state; and
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> (3) its suppression prejudices the defendant.[184]

The right to cross-examination is a primary interest secured by the Confrontation Clause of the Sixth Amendment.[185] It is the "principal means by which the believability of a witness and the truth of his testimony are tested."[186] This Court has likewise held that "effective cross-examination is essential to a defendant's right to a fair trial."[187]

The suppression of material impeachment evidence by the prosecution justifies a new trial irrespective of the good faith or bad faith of the prosecution.[188]

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[181] *Brady v. Maryland*, 373 U.S. 83 (1963).
[182] *Risper*, 250 A.3d at 90.
[183] *Brady*, 373 U.S. at 87.
[184] *Starling v. State*, 882 A.2d 747, 756 (Del. 2003).
[185] *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).
[186] *Davis v. Alaska*, 415 U.S. 308, 316 (1974).
[187] *Jackson v. State*, 770 A.2d 506, 515 (Del. 2001).
[188] *Brady*, 373 U.S. at 87.

Impeachment evidence is material if in any reasonable likelihood it could have affected the judgment of the jury.[189]

In *Giglio v. United States*, the key government witness and conspirator testified that he had not been promised that he would not be prosecuted. The prosecutor affirmed this to the court. But a prior prosecutor in the case had informed the witness that he would certainly be prosecuted if he refused to testify, but if he did testify, he could rely on the judgment and conscience of the government.[190] The United States Supreme Court held that the former prosecutor's promise must be attributed to the government, and its nondisclosure was a *Brady* violation. Acknowledging that such imputations could place a burden on large prosecution offices, the Court held that the prosecutor's office is an entity and speaks for the government.[191]

This Court confronted a similar issue in *Starling v. State*.[192] One prosecutor authorized the withdrawal of the capias and VOP of the State's key witness prior to trial. Prosecutor One did not divulge this information to defense counsel. Prosecutor One apparently failed to inform Prosecutor Two, who told defense

[189] *Napue v. People of State of Ill.*, 360 U.S. 264, 271 (1959).
[190] *Giglio*, 405 U.S. 150, 153 (1972).
[191] *Id.*
[192] 130 A.3d 316 (Del. 2015).

counsel that the VOP and capias were still pending.[193] This Court found a *Brady* violation, holding:

> In order for the State to discharge its responsibility under *Brady*, the prosecutor must disclose all relevant information obtained by the police or others in the Attorney General's Office to the defense. That entails a duty on the part of the individual prosecutor to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.[194]

This Court found that the *Brady* violation was material, in that the suppressed evidence "create[ed] a *reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[195]

In accordance with these precepts, the State does disclose impeachment material to the defense and has developed a "Brady list." The case of Corporal Akil, one of the arresting officers in Mr. Mobley's case, is instructive.

The State placed Akil on its Brady list due to his conduct in a 2020 case. As the State disclosed, Akil swore out an arrest warrant based on information he received from a covert police Instagram account. But he averred that he had received the information from a "confidential informant."[196] At the preliminary

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[193] *Id.* at 331-332.
[194] *Id.* at 333.
[195] *Id.* (emphasis in original).
[196] *State v. Jackson*, 2022 WL 18401412, at *3 (Del. Super. Dec. 28, 2022).

hearing, his testimony maintained the confidential informant ruse.[197] The State further disclosed to the defense that Akil had been referred to WPD authorities, who did not find actionable misconduct against Akil.[198]

The WPD finding resulting in no discipline was fair to Akil. He was only acting on orders from the DOJ. WPD sought the DOJ's advice about what to do when they arrested suspects based on finding their posts using the WPD's fake Instagram accounts. A prosecutor from the DOJ instructed the WPD to state that the information came from a confidential informant.[199]

The trial judge, relying on inapplicable legal precepts, erred in denying the motion to compel* Brady *information.

The Court, in its initial letter about the motion, declined to resolve the dispute as to whether a *Brady* violation had occurred.[200] Instead, the Court held that the defense had made "no effort" to justify the requests for DOJ-WPD internal communications, any report made by the Whittle prosecutor to the WPD, or any communications within the DOJ.[201] The Court based its findings on *Snowden v. State*, a case related to a subpoena for a police officer's personnel file.[202]

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[197] *Id.* at *4.
[198] *Id.* at *3.
[199] *Id.* at *4.
[200] A938.
[201] A939.
[202] *Id.*

This Court in *Snowden* held that when a defendant seeks an *in camera* review of a police officer's personnel file, he or she must establish a factual basis for the review and that the request is not "merely a desperate grasping at a straw."[203] Relatedly, when the defense serves a subpoena for an officer's file, the prosecutor is required to review that file for *Brady* material.[204]

But the motion was not a *Snowden* request. No subpoena was filed. The defense did not request a review of Moses's file; it just requested any document relevant to the Whittle case. Communications between the DOJ and WPD are not even contemplated by *Snowden*; the Court holding otherwise was error.

The State responded to the Court's letter by notifying the Court that Moses's file contained no *Brady* material[205] – a meaningless representation since the State took the position that no *Brady* violation occurred in the first place.

To address these issues, the defense filed a Motion for Partial Reargument.[206] The motion urged the Court to reconsider its holding that all the items requested were subject to the *Snowden* rubric.[207] The motion also asked the Court again to make a finding that a *Brady* violation occurred, given the State's

[203] *Id.* at 1023-1024 (internal citations omitted).
[204] *Id.* at 1023.
[205] A941.
[206] A942-954.
[207] A947-950.

position that one had not occurred.[208] Then the Court directed the State to provide any *Brady* material based on the defense's interpretation.[209] The State did not respond to that directive prior to the Court issuing its decision on the motions.

In denying the motions, the Court stated that the defense "made no effort to *justify* his *specific* requests and cited to no authority for productions of the items sought *in particular*."[210] Not so. The authority is *Brady* and its progeny, as argued in the motions. As to the justification, the Court found the obvious justifications of impeachment such as refreshing of recollection and confrontation with a prior inconsistent statement unpersuasive.[211]

With this ruling, the Court turned *Brady* on its head by requiring the defendant to prove justification for *Brady* material – material that was the State's obligation to provide in the first place. Apparently still relying on *Snowden's* holding about police personnel files, the Court erred by imposing a justification requirement that the defense had neither the means nor the obligation to justify.

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[208] A950.
[209] A956.
[210] *State v. Mobley*, 2023 WL 107387, at *2 (Del. Super. Jan. 3, 2023)(italics in original).
[211] *Id.*

The State's* Brady *violation was material in that it is reasonably probable that the violation affected the outcome of the trial.

The trial judge noted that the Whittle prosecutor was not specifically ordered to report Whittle to his WPD superiors.[212] That is a far-fetched interpretation. Any Delaware prosecutor told by a judge that the judge "hoped as an officer of the court you are going to bring [Moses's affidavit and testimony in the Court of Common Pleas] to the attention of that officer's superiors" will interpret that as a directive of the Court. Moreover, the prosecutor responded, "Yes, Your Honor."[213]

That agreement by the Whittle prosecutor obligated the Mobley prosecutor to search within DOJ for the communication provided to WPD about Moses. The Mobley prosecutor did not do so. Even after the Court's ruling, the prosecutor was still trying to limit the use of the Whittle case in the cross-examination of Moses. The prosecutor wrote to the Court that "Corporal Moses was not disciplined by the Wilmington Police for testifying falsely, nor was he placed on the Department of Justice's *Brady* List."[214] Tellingly, the prosecutor did not reveal the nature of any communications between the Whittle prosecutor and the WPD. And the prosecutor never disclosed such communications; its sole focus was Moses's personnel file,

[212] A938, n.2.
[213] A925.
[214] A962.

not DOJ records. At no point in this litigation did the prosecutor inform the Court that the Whittle prosecutor did not report Moses to his superiors.

The fact that Moses was not disciplined is of no moment. Akil was not disciplined either, but he was referred for discipline. And Akil ended up on the State's Brady list. The fact that the State did not put Moses on its Brady list proves nothing, as the State unilaterally composes that list.

With the defense having no means of impeaching Moses with any consequences of his falsely sworn affidavit and testimony in the Whittle case, Moses was ready with new and well-prepared answers for his conduct. Having never mentioned it in the Whittle case, Moses testified that he purposely omitted mention of Downtown Visions because he was concerned for the safety of that equipment and personnel. So, that was a purposeful misstatement according to Moses's new testimony – the same sort of purposeful misstatement that got Akil referred for discipline.

As in Mr. Mobley's case, the sequence of events was crucial. In Whittle, Moses's affidavit clearly states that he observed Whittle with a firearm then went to arrest him – which was not true. Moses arrested Whittle first and only sometime prior to trial did he make the "observation" by watching Downtown Visions' footage. At Mr. Mobley's trial, unlike in the Whittle trial, Moses attributed his "mistakes" in Whittle to being a rookie officer who got confused. Moses's

testimony about building a house with bad bricks and baking a cake notwithstanding, that is not true. Moses was not confused when on the same day he wrote a police report which had the sequence of events in the correct order. He was not so inexperienced that he could not get that right. But Moses, by now on notice of the Whittle issue, had ready answers for all questions. Without the communication from DOJ to WPD and any communication within the DOJ about Moses, the defense had no means to impeach Moses on his answers.

Moses was of course the crucial witness because he was the only officer left who could testify. Rosado and Akil were disqualified by the State due to their own problems. Moses did not see the bookbag or the gun until after it was at the police car. The account of Moses's interaction with Mr. Mobley came only from Moses. The statements attributed to Mr. Mobley came only from Moses. The fact that there was a gun in the bookbag likewise came only from Moses.

Because of Moses's centrality to the question of guilt or innocence, the State's *Brady* violation was material. Because there is a reasonable probability of a different result had the State met its *Brady* obligations, Mr. Mobley's convictions should be reversed.

II. THE TRIAL JUDGE'S *SUA SPONTE* DECISION TO TELL THE JURY THAT THE CASE WOULD BE TRIED IN TWO PARTS VIOLATED MR. MOBLEY'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

A. Question Presented

Whether the trial judge's *sua sponte* decision to tell the jury that the trial would be conducted in two parts violated Mr. Mobley's right to a fair trial by an impartial jury. This issue was preserved when defense counsel objected to the judge's suggestion before the first trial,[215] and when defense counsel renewed the objection on the morning of the second trial.[216]

B. Scope of Review

When a claim involves the infringement of a constitutionally protected right such as the right to an impartial jury, this Court reviews *de novo*.[217]

C. Merits of Argument

Applicable legal precepts

An "essential ingredient" of the accused's right to a trial by jury is that the jury consist solely of impartial jurors.[218] The jury's verdict must be based only on the evidence developed at trial; this goes to "the fundamental integrity of all that is

[215] A493-506.
[216] A986.
[217] *Copper v. State*, 85 A.3d 689, 692 (Del. 2014).
[218] *Turner v. Louisiana*, 379 U.S. 466, 471-472 (1965).

embraced in the constitutional concept of trial by jury.[219] Only by ensuring that the verdict is based only on a fair assessment of the evidence is the jury right preserved. As this Court has held, "indeed, if only one juror is improperly influenced, a defendant in a criminal case is denied his Sixth Amendment right to an impartial jury."[220]

When jury members come into extra-evidentiary knowledge of facts about the case, the defendant's right to an impartial jury is violated. In *Hughes v. State*, a post-trial inquiry found that several jurors knew about the defendant's prior homicide conviction and the fact that he had taken a polygraph and likely failed it.[221] This Court reversed, particularly criticizing the inadequacy of *voir dire* in securing an impartial jury.[222]

When an indictment includes a PFBPP and/or PABPP charge, it is the longstanding practice of the Superior Court, upon motion, to permit severance of that charge. Proof of person prohibited charges often requires proof of prior convictions. The obvious reasoning for severance of PFBPP/PABPP is that the jury "may be unable to compartmentalize their judgment of guilt or innocence with

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[219] *Id.* at 472.
[220] *Hughes v. State*, 490 A.2d 1034, 1043 (Del. 1985), *citing*, *Styler v. State*, 417 A.2d 948, 951-952 (Del. 1980).
[221] *Hughes*, 490 A.2d at 1039.
[222] *Id.* at 1041.

regard to each of the separate counts of the indictment and may infer a general criminal disposition."[223]

Mr. Mobley's right to an impartial jury was violated when the trial judge told the jurors that the case was a criminal case that would be tried in two parts.

Once the jury was selected, and before it heard any evidence, the judge told the jury that the case was a criminal case that would be tried in two parts. This established as a fact that a separate trial on at least one additional criminal charge was in the offing. The jury was not told anything else about the second part of the trial and was not instructed to not speculate about the second part of the trial.

Defense counsel argued against the Court's suggestion of informing the jury about the two-part trial, arguing that it would lead to speculation about the other charges and inference of a general criminal disposition. The Court disagreed, finding it would be "a bit of a stretch" to think the jury would infer a general criminal disposition based on being told there would be a second part of the trial.[224]

But it was not a stretch. The judge's comments confirmed to the jury that Mr. Mobley faced additional criminal charges. This information was provided

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[223] *State v. Williams*, 2007 WL 2473428, at *1 (Del. Super. Aug. 9, 2007), (citing *State v. Loper*, 1990 WL 91087, at *1 (Del. Super. June 19, 1990)); *See also, State v. Morrow*, 1994 WL 636994, at *1 (Del. Super. Jan. 7, 1994)("it is necessary for this court on the motion to sever to consider the likelihood of the admissibility of [the defendant's] conviction as it impacts on the prejudice the defendant will suffer at trial if that conviction is presented to the jury.").

[224] A506.

solely by the judge and not the evidence at trial. In fact, the entire reason the trial was bifurcated was so that the jurors would *not* know about the additional charges until the appropriate time.

The judge's rationale is that jurors can be annoyed when told there are additional charges to consider after reaching a verdict. That concern is easily allayed, as it was in this case by informing jurors of the length of their service in the *voir dire* process. As in this case, the B trial is never onerous. B trials take about 30 minutes typically. More to the point, any concern about the jury's reaction to having consider more charges is far outweighed by the constitutional requirement that the jury be impartial and consider only the evidence presented at trial.

In Mr. Mobley's case, the judge's announcement violated his right to an impartial jury. It led to speculation about the additional charges and likely led to one or more jurors inferring a criminal disposition to Mr. Mobley. After all, if even one juror was influenced, then Mr. Mobley's due process rights were not protected.

This Court should reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, Appellant Terrell Mobley respectfully requests that this Court reverse the judgments of the Superior Court. This case was plagued by errors of constitutional dimension; a remand for a new trial is the appropriate remedy.

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