DELAWARE STATE BAR ASSOCIATION

PRESENTS

FUNDAMENTALS OF CRIMINAL LAW AND PROCEDURE 2021

LIVE SEMINAR AT DSBA WITH ZOOM OPTION

SPONSORED BY THE CRIMINAL LAW SECTION
OF THE DELAWARE STATE BAR ASSOCIATION

WEDNESDAY, NOVEMBER 10, 2021 | 9:00 A.M. TO 4:15 P.M.

6.0 Hours CLE credit including 1.0 credit in Enhanced Ethics
for Delaware and Pennsylvania Attorneys

CLE

Please note that the attached materials are supplied by the speakers and presenters and are current as of the date of this posting.

FUNDAMENTALS OF CRIMINAL LAW AND PROCEDURE 2021

ABOUT THE PROGRAM

This course, which is one of the seven Fundamentals courses offered by DSBA, focuses on the anatomy of the criminal trial from the initial arrest through plea negotiations and trial and to post-trial procedure. Speakers and panelists will focus on each stage in the criminal process and provide insight from experienced practitioners.

MODERATOR

Eugene J. Maurer, Jr., Esquire
Eugene J. Maurer, Jr., P.A.

PROGRAM

8:30 a.m. – 9:00 a.m.
Registration and Check-in

9:00 a.m. – 10:00 a.m.
Pre-trial Practice
William H. Leonard, Jr., Esquire
Delaware Department of Justice
Kevin J. O'Connell, Esquire
Office of Defense Services

10:00 a.m. – 11:00 a.m.
Trial Practice
Tasha M. Stevens, Esquire
Fuqua, Willard, Stevens & Schab P.A.
Erika R. Flaschner, Esquire
Delaware Department of Justice
Thomas A. Foley, Esquire
Thomas A. Foley, Attorney at Law

11:00 a.m. – 11:15 a.m.
Break

11:15 a.m. – 12:15 p.m.
Opening and Closing Arguments
Ross A. Flockerzie, Esquire
Office of Defense Services
Steven P. Wood, Esquire
McCarter & English, LLP

12:15 p.m.– 1:00 p.m.
Lunch

1:00 p.m. – 1:45 p.m.
Sentencing, PSI, Mitigation
John P. Deckers, Esquire
John P. Deckers, P.A.

1:45 p.m.- 2:15 p.m.
Appeals and Postconviction Relief
The Honorable Andrea Maybee Freud
Superior Court of the State of Delaware
Nicole Marie Walker, Esquire
Office of Defense Services
Maria T. Knoll, Esquire
Department of Justice

2:30 p.m. – 3:15 p.m.
Perspectives from Young Practitioners
Meghan E. Crist, Esquire
Office of Defense Services
Kimberly A. Price, Esquire
Collins & Associates
Alexander W. Funk, Esquire
Curley, Dogde, Fizgerald & Funk, LLC

3:15 p.m. – 4:15 p.m.
Ethical Considerations and Candor to the Court
(Brady/Experts/Candor to Opposing Counsel)
Robert M. Goff, Jr., Esquire
City of Wilmington Law Department
The Honorable Mary M. Johnston
Superior Court of the State of Delaware

COVID-19 POLICY: The DSBA requires that everyone, including speakers and attendees, must be fully vaccinated against COVID-19 to attend live CLE events. In addition, all participants and attendees, regardless of COVID-19 vaccination status, must wear masks except when presenting, eating, or drinking.

CLE is a HYBRID CLE. You may register for this event as a live participant or by Zoom. Even if you register as a live participant, you will receive a Zoom link by email immediately which you may disregard if not attending by Zoom. (Check spam folders if you do not.) If you are going to attend the live session, you will report to the venue and check in. Only live attendees will receive live CLE credits after 12/31/2022.

REGISTRATION INFORMATION AND RATES

This CLE will be conducted live and via Zoom. To register, visit www.dsba.org/cle and select this seminar, choosing whether you wish to attend live or by Zoom. If registering for EITHER method, you will receive an email back from Zoom immediately providing you with the correct login information. If attending by zoom and you do not receive this email, contact DSBA via email: reception@dsba.org. The Supreme Court of the State of Delaware Commission on Continuing Legal Education cannot accept phone conferencing only. You must attend through a device that allows DSBA to obtain your Bar ID in order to receive CLE Credit. Your attendance will be automatically monitored beginning at the scheduled start time and will be completed when the CLE has ended. If you enter or leave the seminar after or before the scheduled start /end time, you will receive credit only for the time you attended. Your

CLE credits will be submitted to the Delaware and Pennsylvania Commissions on CLE, as usual. Naturally, if you attend the seminar live, you must sign in and we will use your attendance as the means for reporting the live credit.

Moderator

Eugene J. Maurer, Jr., Esquire
Eugene J. Maurer, Jr., P.A.

Pre-trial Practice

William H. Leonard, Jr., Esquire
Delaware Department of Justice

Kevin J. O'Connell, Esquire
Office of Defense Services

William Leonard has been a Deputy Attorney General with the Delaware Department of Justice for 6 years. He is currently an Assistant Unit Head in the New Castle County Felony Trial Unit.

Kevin J. O'Connell
Curriculum Vitae

Education

Vanderbilt University:	1981 Bachelor of Arts
Delaware Law School of Widener University:	1984 Juris Doctor

Professional

1984-2005:	Private practice of law with concentration on defending people accused of crime
2005-present:	State of Delaware, Office of Defense Services, Chief Defender; previously New Castle County Division Head, Supervising Attorney, Superior Court Trial Unit

Fellow, American College of Trial Lawyers

Other Experience

Adjunct Professor,
University of Delaware
Capital Punishment and the Law, 2015 - present

Personal

Married (Marilyn), 2 daughters (Lauren and Kathleen)

Pretrial Practice

William Leonard, DAG & Kevin O'Connell, APD

Materials:

1. Arrest Warrant & Affidavit of Probable Cause
2. Delaware Pretrial Assessment Tool
3. Intake forms, Office of Defense Services
4. Motion for Reduction of Bail
5. Indictment
6. Defense Discovery Request and Certificate of Service
7. State's Discovery Response
8. State's Discovery Request
9. Motion to Disclose Witness Information/Protective Order
10. Defendant's Motion to Suppress
11. State's Response to Defendant's Motion to Suppress
12. Motion *in Limine*
13. Plea Offer & Immediate Sentencing Form
14. Select Delaware Rules of Criminal Procedure

Adult Complaint and Warrant

In the Justice of the Peace Court

In and for the

State of Delaware

State of Delaware vs. [redacted]

I, [redacted] of NEW CASTLE COUNTY PD, do hereby state under oath or affirmation, to the best of my knowledge, information and belief that the above-named accused violated the laws of the State of Delaware by committing criminal acts in New Castle county on or about the date, or dates, and at or about the location, or locations, as indicated in Exhibit A hereto attached and made a part hereof.

Wherefore, your affiant prays that the above-named accused may be forthwith approached and held to answer this complaint consisting of **6** charges, and to be further dealt with as the law directs.

X _____

Affiant

Sworn to and subscribed to before me this 16th day of November AD, 2016.

_____

Judge/Commissioner/Court Official

(To be completed by the Judge/Commissioner/Court Official)

A. _____ The crime was committed by a child.
B. _____ A misdemeanor was committed against a child.
C. _____ A misdemeanor was committed by one family member against another family member.
D. _____ Other: Explain _____

Warrant

To any constable or other authorized person:

Whereas, the foregoing complaint consisting of **6** charges, having been made, as listed in Exhibit A which is attached hereto and incorporated herein, and having determined that said complaint has been properly sworn to and having found that there exists probable cause for the issuance of process, based upon the affidavit of probable cause which is attached hereto and incorporated herein as Exhibit B, you are hereby commanded in the name of the State of Delaware, to take [redacted] accused, and bring same before

JUSTICE OF THE PEACE COURT 20, FORTHWITH, to answer said charges

GIVEN UNDER MY HAND, this 16th day of November AD, 2016.

_____

Judge/Commissioner/Court Official

Executed on _____ by _____

Case Number: **16 11 010428** Warrant Number: **32 16 022612** Arrest Number:

State of Delaware vs. [redacted] Case Number: [redacted]

Exhibit A

Charge Sequence: 001 Police Complaint Number: [redacted] Arrest Number: [redacted]
Charge: **Manufactures, delivers, or PWID a controlled substance in a Tier 2 quantity**
In Violation of 16 Del.C. § 4753 0001 F C
Location: [redacted]
TO WIT: [redacted] on or about the 16th day of OCTOBER, 2016, in the County of NEW CASTLE, State of Delaware, did unlawfully manufactures, delivers, or possesses w/i to manufacture/deliver a controlled substance, 15 grams white powdery substance, several off white rocks, several baggies of heroin, green leafy substance, baggies containing an off white substance AND several white rocks and powder which is a controlled substance listed as a Tier 2.
To Wit: [redacted] was in possession with the intent to deliver one baggie containing several off white rocks and powder, consistent with crack cocaine. The rocks were field tested positive for crack cocaine, utilizing field test kit #13 and had a total weight of 15 grams.

Charge Sequence: 002 Police Complaint Number: [redacted] Arrest Number [redacted]
Charge: **Manufactures, delivers, or possesses w/i to manufacture, deliver a controlled substance**
In Violation of 16 Del.C. § 4754 0001 F D
Location: [redacted]
TO WIT: [redacted] on or about the 16th day of OCTOBER, 2016, in the County of NEW CASTLE, State of Delaware, did unlawfully manufactures, delivers, or possesses w/i to manufacture/deliver a controlled substance, 1.185 grams white powdery substance, several off white rocks, several baggies of heroin, green leafy substance, baggies containing an off white substance AND several white rocks and powder which is a controlled substance.
To Wit: [redacted] was in possession with the intent to deliver several small baggies, containing a blue wax paper, with a white powdery substance within consistent with heroin. The white powdery substance was field tested positive, utilizing field test kit #3, and had a total weight of 1.185 grams.

Charge Sequence: 003 Police Complaint Number: [redacted] Arrest Number: [redacted]
Charge: **Possesses a controlled substance in a Tier 3 quantity**
In Violation of 16 Del.C. § 4754 0002 F D
Location: [redacted]
TO WIT: [redacted] on or about the 16th day of OCTOBER, 2016, in the County of NEW CASTLE, State of Delaware, did unlawfully possess a controlled substance, 15 grams white powdery substance, several off white rocks, several baggies of heroin, green leafy substance, baggies containing an off white substance AND several white rocks and powder which is listed as a Tier 3 quantity.
To Wit: [redacted] was in possession of one baggie containing several off white rocks and powder, consistent with crack cocaine. The rocks were field tested positive for crack cocaine, utilizing field test kit #13 and had a total weight of 15 grams.

State of Delaware vs. [redacted] Case Number: [redacted]

Charge Sequence: 004 Police Complaint Number: [redacted] Arrest Numbe[redacted]
Charge: **Possesses a controlled substance in a Tier 1 quantity**
In Violation of 16 Del.C. § 4756 0000 F F
Location: [redacted]
TO WIT: [redacted] on or about the 16th day of OCTOBER, 2016, in the County of NEW CASTLE, State of Delaware, did unlawfully possess a controlled substance, 1.185 grams white powdery substance, several off white rocks, several baggies of heroin, green leafy substance, baggies containing an off white substance AND several white rocks and powder which is listed as a Tier 1.
To Wit: [redacted] was in possession of several small baggies, containing a blue wax paper, with a white powdery substance within consistent with heroin. The white powdery substance was field tested positive, utilizing field test kit #3, and had a total weight of 1.185 grams.

Charge Sequence: 005 Police Complaint Number: [redacted] Arrest Numbe[redacted]
Charge: **Conspiracy Second Degree-Agreement to Engage in Felony Criminal Conduct**
In Violation of 11 Del.C. § 0512 0001 F G
Location: [redacted]
TO WIT: [redacted], on or about the 16th day of OCTOBER, 2016, in the County of NEW CASTLE, State of Delaware, did when intending to promote the commission of a felony. did agree with [redacted] to engage in conduct constituting the felony of POSSESSION WITH THE INTENT TO DELIVER and did commit an overt act in the furtherance of said conspiracy by committing POSSESSION WITH THE INTENT TO DELIVER.
To Wit: [redacted]) did conspire with Ronnie Alburg (b/m/n 09.07.1994) to sell both crack cocaine and heroin to various drug users within New Castle County. Both subjects were in possession of large amounts of crack cocaine, as well as heroin.

Charge Sequence: 006 Police Complaint Number: [redacted] Arrest Numbe[redacted]
Charge: **Possess/Consume Marijuana Personal Use Quantity 21 or Older - Civil Violation**
In Violation of 16 Del.C. § 4764 000c C
Location: [redacted]
TO WIT: [redacted] on or about the 16th day of OCTOBER, 2016, in the County of NEW CASTLE, State of Delaware, did knowingly or intentionally possess a personal use quantity of a controlled substance or a counterfeit controlled substance classified in Title 16, Section 4714(d)(19), in a quantity of 3 gram.
To Wit: [redacted] was in possession of 2 separate baggies containing a green leafy substance within, consistent with marijuana. The green leafy substance was field tested positive for marijuana, utilizing field test kit #8 and had a total weight of 3 grams.

State of Delaware vs. [redacted] Case Number: [redacted]

Exhibit B

Also Known As:
Date of Birth/Age: [redacted] Sex: [redacted] Race: [redacted]
Eye Color: [redacted] Hair Color: [redacted] Height: [redacted] Weight: [redacted]
Driver's License: [redacted] Social Security Number:

Address: [redacted] Next of Kin, Address, Employer
[redacted]
Phone:

Employer: [redacted] Phone: [redacted]

Date and Times of Offense: **Between 10/16/2016 at 0800 and 10/16/2016 0800**
Location of Offense: [redacted]

Alias Names:
[redacted]

Your affiant [redacted] can truly state that:

1. Your affiant, [redacted] is a sworn police officer employed by the New Castle County Police Department. Your affiant has been employed by this Department since November 2011, and is currently assigned to the Mobile Enforcement Team. Your affiant has had training in identification of illegal drugs and dangerous substances. Your affiant has also made numerous drug arrests and investigations.

2. During the past few months, your affiant has been conducting a drug investigation involving the sales of Heroin and Crack Cocaine specifically along Route 13 and Route 40, within New Castle County, Delaware. Your affiant identified the main source of distribution along this area as a subject identified as [redacted] whom also goes by a street name of "Cobra".

3. Your affiant conducted a CJIS inquiry of the subject [redacted] and identified a [redacted] Your affiant identified that [redacted] currently has an active capias for Violation of Probation from New Castle County Superior Court, issued on October 25, 2016. [redacted]

4. Your affiant learned that [redacted] is currently staying at [redacted] On Wednesday, November 16, 2016, your affiant and assisting Officers responded to [redacted] and conducted surveillance on [redacted]

5. During surveillance, undercover officers observed a tan four door vehicle respond to [redacted] and a female enter the room and quickly exit same, which your affiant is aware is indicative of drug activity. Undercover officers were able to follow the vehicle and observed the vehicle fail to utilize its turn signal when turning right onto [redacted] The vehicle was identified as [redacted]

_____
Affiant

Sworn to and subscribed to before me this 16th day of November AD, 2016.

_____
Judge/Commissioner/Court Official

State of Delaware vs. [redacted] Case Number: [redacted]

[redacted].

6. [redacted] and Detective [redacted] conducted a traffic stop on the vehicle and quickly made contact with the female within the vehicle who was identified as [redacted]. The female was questioned in reference to her recent whereabouts and whom she visited. The female advised that she responded to [redacted], and made contact with a black male, who she referred to as [redacted] Det. [redacted] showed the female a picture of the subject your affiant knows as [redacted], which is [redacted], which she positively identified as [redacted].

7. Your affiant advises that undercover officers maintained surveillance on [redacted], while your affiant responded to JP Court 11 and had a body of search warrant signed by Judge [redacted] on today's date, November 16, 2016, fo[redacted].

8. Your affiant again made contact with undercover officers, who were maintaining constant surveillance on [redacted] whom advised your affiant that no individuals have left or responded to the room.

9. Your affiant then responded back to [redacted], with the signed body of search warrant, and executed the search warrant. Once inside the room, your affiant made contact with two subjects who were sleeping in two separate beds. The first occupant of the room was identified as [redacted] and the second subject as [redacted].

10. Your affiant and assisting units took both subjects into custody without incident. While your affiant and assisting Officers were clearing the rest of the room, your affiant observed in plain view, a clear plastic baggie containing a green leafy substance, consistent with marijuana within, resting on the nightstand between both beds.

11. Also, your affiant obtained a pair of brown Timberland boots to place on one of the subject's bare feet, so they could be transported back to NCCPD Headquarters. As assisting units obtained the Timberland boots and moved the boot around, they could observe several small baggies, containing an off white powdery substance consistent with heroin within.

12. Both subjects were transported back to NCCPD HQ and assisting Officers on scene stayed with the room,

_____
Affiant

Sworn to and subscribed to before me this 16th day of November AD, 2016.

_____
Judge/Commissioner/Court Official

State of Delaware vs. [redacted] Case Number: [redacted]

ensuring no subjects entered or exited. Your affiant then responded back to JP Court and had a search warrant for [redacted] signed by Judge [redacted] due to observed drugs in plain view.

13. Your affiant then responded back to [redacted], and executed the search warrant. During the search of [redacted], assisting Officers located under a pillow, where [redacted] was sleeping, a black baggie containing a single bag with several pieces of off white rocks consistent with crack cocaine. The white rocks were field tested positive for crack cocaine, utilizing field test kit #13 and had a total weight of 15 grams.

14. Also within the same black bag, assisting Officers located several small baggies, containing a blue wax paper with a white powdery within, consistent with heroin. The white powdery substance was field tested positive for heroin, utilizing field test kit #3, and had a total weight of 1.185 grams. There were a total of 79 baggies of heroin, stamped [redacted].

15. Assisting Officers also located within the same black bag, one baggie containing a green leafy substance consistent with marijuana. The green leafy substance was field tested positive for marijuana, utilizing field test kit #8 and had a weight of 1 gram.

16. Your affiant located on top of the nightstand, next to [redacted] bed, one baggie containing a green leafy substance also consistent with marijuana. The green leafy substance was field tested positive for marijuana, utilizing field test kit #8 and had a weight of 2 grams. The total weight of all marijuana was 3 grams.

17. Your affiant also located several bundles of USC, within mixed denominations, all throughout the room, specifically within [redacted] pant pocket and along the nightstand. In total, your affiant seized $3,387 USC in suspected drug proceeds, after K9 Ofc. [redacted] and his partner [redacted] gave a positive indication of a controlled dangerous substance on the USC. The USC had various mixed denominations and was bundled in several different bundles.

18. [redacted] was also found to be in possession of 3 different cell phones, which all seemed to be operable. Your affiant is aware through training and experience that subjects will carry several phones to conduct drug transactions and avoid giving their personal phone numbers to drug users.

_____
Affiant

Sworn to and subscribed to before me this 16th day of November AD, 2016.

_____
Judge/Commissioner/Court Official

State of Delaware vs. [redacted] Case Number: [redacted]

19. During a search of the second subject sleeping in the bed, [redacted] your affiant located within [redacted] brown Timberland boot, one single plastic baggie containing several smaller baggies with a blue wax paper with a white powdery substance within, consistent with heroin. The white powdery substance was field tested positive for heroin, utilizing field test kit #3 and had a total weight of 1.44 grams. There were a total of 96 baggies, which was also stamped [redacted].

20. Within the same clear baggie, inside of [redacted] boot, your affiant located another clear baggie containing several small rocks and an off white powdery substance, consistent with crack cocaine. The white rocks were field tested positive for crack cocaine, utilizing field test kit #13 and had a total weight of 5 grams.

21. Your affiant advises that [redacted] was also in possession of two cell phones during the investigation.

22. Your affiant conducted a post Miranda interview with [redacted], which he advised that he understood his rights and agreed to speak with me in reference to this investigation. [redacted] advised that he currently sells both crack cocaine and heroin daily. [redacted] stated that he has been selling quite some time and frequently sells to drug users he knows. [redacted] stated that he currently knew he was wanted for his Violation of Probation and was selling drugs tomake money. [redacted] stated that both he and [redacted] purchase crack cocaine and heroin together and will sometimes share clients when selling same.

23. Your affiant conducted a post Miranda interview with [redacted] which he advised that he understood his rights and agreed to speak with me in reference to this investigation. [redacted] stated that he just recently started selling both crack cocaine and heroin due to financial issues. [redacted] advises that he sells both crack cocaine and heroin to drug users he knows or that [redacted] knows. [redacted] stated that he currently has no job and needed money to provide for himself; therefore he decided to sell both crack cocaine and heroin for money. [redacted] advised that he primarily gets his crack cocaine and heroin from [redacted] and they will often share drug users to sell and distribute drugs.

24. Your affiant prays a warrant be granted so that both [redacted] and [redacted] may answer to the above listed charges.

Affiant: OFC [redacted] of NEW CASTLE COUNTY PD

Victims:	Date of Birth	Relationship Victim to Defendant
SOCIETY/PUBLIC		Victimless Crime

Affiant

Sworn to and subscribed to before me this 16th day of November AD, 2016.

Judge/Commissioner/Court Official

JUSTICE OF THE PEACE OF THE STATE OF DELAWARE
IN AND FOR New Castle COUNTY, COURT NO. 11

DELAWARE PRETRIAL ASSESSMENT TOOL

Defendant: [redacted] Uniform Case No.:
Alias....:
SBI No...: [redacted] Date of Birth...:

1. The Failure to Appear Scale scores range from 0 to 6. The Risk Factors and Weights are as follows:

Weights		Risk Factors
a. 0	N	Any prior probation supervision in the past 10 years: (0=no; 1=yes)
b. 0	0	Total number of prior FTAs in the past year: (0=none; 1=1; 2=2 or more)
c. 0	00	Total number of prior FTAs in the past 10 years: (0=none; 1=1; 2=2 or more)
d. 0	N	Current arrest include at least 1 charge of larceny/stolen vehicle: (0=no; 1=yes)
00	SUB TOTAL	

2. The New Criminal Activity Scale scores range from 0 to 9. The Risk Factors and Weights are as follows:

Weights		Risk Factors
a. 0	N	Any pending case: (0=no; 1=yes)
b. 0	0	Any prior convictions: (0=none; 1=1; 2=2 or more)
c. 0	00	Any prior misdemeanor arrests in the past 2 years: (0=none; 2=1 or more)
d. 0	0	Any prior probation supervisions: (0=none; 1=1 or more)
e. 1	19	Age at first arrest: (0=20 or older; 1=19 or younger)
f. 0	0	Any prior failures to appear: (0=none; 1=1 or more)
g. 0	00	Any prior violent* conviction w/in past 5 years: (0=0 prior violent convictions, 1=1+ prior violent convictions)
01	SUB TOTAL	

3. Lethality Assessment Indicates:
- Victim Screened In - Victim Not Screened In X Not Available

DEL PAT	NCA 0	NCA 1	NCA 2	NCA 3	NCA 4	NCA 5	NCA 6	NCA 7	NCA 8	NCA 9
FTA ---0---		X								
FTA ---1---										
FTA ---2---										
FTA ---3---										
FTA ---4---										
FTA ---5---										
FTA ---6---										

Score: X Conditions Assigned by DELPAT - Less Intensive Conditions - More Intensive Conditions

Date: 01/27/2020 Judge: HOOF, BOBBY

QUALIFICATION FOR OFFICE OF DEFENSE SERVICES REPRESENTATION

FIRST NAME: *MIDDLE NAME:* *LAST NAME:* *SUFFIX:* *DUC #:*

TRUE NAME (IF DIFFERENT):

SBI NUMBER: *DATE OF BIRTH:* *PD CASE #:*

IF DEFENDANT IS A MINOR, GIVE THE NAME OF PARENT OR GUARDIAN AND INCLUDE THEIR ADDRESS IF DIFFERENT THAN THE MINOR:

○

SECTION 1 - AUTOMATIC DETERMINATION OF INDIGENCY

Public Assistance ○ *Bankruptcy (within the last 3 yrs)* ○ *Social Security/Disability* ○ *Juvenile Defendant*

○ *Unemployed* ○ *Workers Compensation* ○ *Court Ordered* ○ *Incarceration* ○ *None of the Above*

SECTION 2 - FINANCIAL DETERMINATION OF INDIGENCY

IF ADJUSTED NET INCOME TOTALS $500.00 PER WEEK OR LESS, DEFENDANT IS ELIGIBLE. REDUCE NET INCOME BY $80.00 PER DEPENDENT PER WEEK. ADD $80.00 PER WEEK, PER PERSON SHARING HOUSEHOLD EXPENSES.

EMPLOYER: *EMPLOYER ADDRESS:*

SUPERVISOR: *EMPLOYER PHONE:* *FOR HOW LONG?* *SECOND JOB?* **NO**

ADJUSTED NET WEEKLY INCOME:	*# OF RESIDENT CHILDREN UNDER 18*	*# OF PEOPLE SHARING HOUSEHOLD EXPENSES*	*OTHER HOUSEHOLD INCOME:*

NOTES:

*** I HAVE BEEN ADVISED OF THE $100.00 ADMINISTRATIVE ASSESSMENT FEE FOR SERVICES BY THE OFFICE OF DEFENSE SERVICES IMPOSED BY THE COURT WHICH WILL BE INCLUDED IN THE COURT COSTS.***

*** I CERTIFY THAT I HAVE LESS THAN ADEQUATE LIQUID ASSETS INCLUDING CASH, STOCKS, BONDS, BANK ACCOUNTS, AND OTHER PROPERTY TO COVER THE ANTICIPATED COST OF LEGAL REPRESENTATION. ***

DEFENDANT OR PARENT/GUARDIAN (IF MINOR) SIGNATURE:

ELIGIBILITY STATUS:

◉ **ELIGIBLE** ○ **NOT ELIGIBLE (APPEAL FORM GIVEN TO CLIENT)** ○ **REFUSED REPRESENTATION**

MELISSA.SAGE	**3/3/2020** **10:34 AM**	**PD Courthouse**
INTERVIEWER	***DATE/TIME***	***LOCATION***

OFFICE OF DEFENSE SERVICES CONFIDENTIALITY AGREEMENT

All lawyers and legal staff of the Office of Defense Services owe our clients a duty of confidentiality. *Delaware Lawyers Rules of Professional Conduct 1.6.* The Office of Defense Services recognizes that confidentiality is not only required by the Delaware Rules of Professional Conduct but it is critical to both the attorney-client relationship and effective legal representation. The duty applies to both current and former clients and it continues even after a client's legal case is closed.

Confidential information includes any information relating to the representation of a client. This includes information: (i) obtained from a client and/or any other party during the intake interview or thereafter, (ii) obtained from documents related to client's current or prior case or case file (s), and (iii) included in any Office of Defense Services databases or servers related to the client and his or her current or prior cases. Confidential information also includes "work product" which is any material produced by an attorney or any member of the legal team in the course of representation of a client. "Work product" includes legal research, records, correspondence, reports or memoranda which contain the opinions, theories or conclusions of the attorney, or any employee of the office. Confidential information also includes information related to a case that is learned from casual conversation either inside or outside of the office. **Office of Defense Services employees cannot disclose confidential information except in a few very limited circumstances.**

As a general rule, confidential information shall not be disclosed to any other person inside or outside of the office. This includes other clients of the Office of Defense Services as well as any employee of the office not associated with the defense team.

The Office of Defense Services requires each and every member of its office to maintain client confidentiality. As an employee of the Office of Defense Services, I understand my duty of confidentiality and that it is my responsibility to maintain the confidentiality of information I may learn through my work. I further understand that I am prohibited from disclosing any confidential information to any other client or any employee not associated with the defense team. Any questions about this policy should be directed to Central Administration.

I hereby certify that I have read and fully understand the policy regarding the duty of confidentiality.

I shall maintain client confidentiality at all times.

MELISSA.SAGE
INTERVIEWER

3/3/2020 10:34 AM
DATE/TIME

_____

Signature

Conflicts Form

A: IDENTIFYING POTENTIAL CONFLICTS

First Name: **Middle Name:** **Last Name:** **Suffix:** **DUC #:**

Has the investigator reviewed and attached a copy of the Affidavit of Probable Cause, eTicket or summons? Yes ○ No ○

If no, why not?

Question A1. Are there any co-defendants in this case? Yes ○ No ○

Question A2. Does the prospective client (the person the intake investigator is interviewing) have any other open cases? Yes ○ No ○

Question A3. Have any alleged victims or potential State witnesses in this case been identified? Yes ○ No ○

Question A4. Is the prospective client (the person the intake investigator is interviewing) a victim or a State witness in a different case? Yes ○ No ○

Question A5. Has the Public Defender's Office represented any alleged victims or potential State witnesses in any past cases? Yes ○ No ○

Question A6. Is there something about this case that makes the Intake Investigator unsure about whether he/she should declare a conflict? Yes ○ No ○

B. COMMUNICATING THE CONFLICT FINDING

Check the box that applies to your findings in Section A. Also, make the appropriate entry on the Intake Worksheet.

- ○ The Intake Investigator has asked all the above questions and determined there is no conflict.
- ○ The Intake Investigator has identified a conflict as checked above in Section A.
- ○ The Intake Investigator refers this case to the supervising attorney for further conflict evaluation.

MELISSA.SAGE	**3/3/2020**	**PD Courthouse**
INTERVIEWER	**DATE**	***LOCATION***

Client Information

Interview ID:			*DUC Number:*	
First Name:	*Middle Name:*		*Last Name:*	*Suffix:*
Address:				
City:	*State:*	*Zip:*	*Phone:*	*Cell:*
Education: Select...	*Email Address:*		*Alternate Email Address*	
Lives With:				
Were you born in the U.S.?				
If No, Where were you born?				
Interpreter Needed for Client?	**No**			
Military:	*Veteran?* **No**			
Client's account of events including identity of supporting witnesses:				
Swabbed for DNA? **No**				
Witnesses? **No**	*List Attached or Will Follow:* **No**			

Do you belong to any social networking sites? If Yes, Which ones? **NO**	
Have you posted information online about this case? **NO**	
Are you aware of anyone else, such as a victim or a witness, posting information online about this case? **NO**	
Investigator: **MELISSA.SAGE**	***Date Interviewed:*** **3/3/2020**

ADULT MEDICAL/PSYCHOLOGICAL HISTORY

First Name: *Middle Name:* *Last Name:* *SUFFIX:* *DUC #:*

- Do you have any Drugs or Alcohol problems? **No**
  Please list what substances (i.e. drugs or alcohol) you are now using.

  Have you ever been in any treatment for any drug or alcohol abuse? **No**
- Have you ever been diagnosed or treated for Mental Health problems? **No** If Yes, Where?
- Are you now under treatment for any medical or mental health problems? **No**
- Are you prescribed any medications? **No**
  If Yes, Explain:

  Are you taking the medications as prescribed? **No**
- Have you ever hit your head hard enough that you sought medical attention, or thought you should have sought medical attention? **No**
  If Yes, Explain:

Please have the defendant sign release forms for any specific treatment programs that they have mentioned.

Psycho-Forensic Evaluation Recommended? **No**
If Yes, Explain:

Notes:

JUVENILE MEDICAL/PSYCHOLOGICAL HISTORY

FIRST NAME: *MIDDLE NAME:* *LAST NAME:* *SUFFIX:* *DUC #:*

- Do you presently use or have you ever used drugs or alcohol? **No**

  List Substances:

  If yes, when is the last time you used and what did you use?

- Have you ever been in a treatment program for drugs or alcohol? **No**

  ☐ Aquilla ☐ Brandywine Counseling ☐ Crossroads
  ☐ Open Door ☐ Others:

- Have you ever been in a treatment program for mental health? **No**

  ☐ Terry Center ☐ Mid-Atlantic ☐ Any RTC ☐ Rockford ☐ Harmonious Minds
  ☐ Meadow Wood ☐ Delaware Guidance ☐ Brandywine Counseling ☐ Broudy & Assoc.
  ☐ Dover Behavioral ☐ Vision Quest ☐ Center for Child Development
  ☐ Other:

- Have you ever been treated by a doctor for any physical or mental health illnesses? **No**

  PCP / Counselor Name:
  If yes, for what? Check all below that apply.
  ☐ ADHD ☐ DEPRESSION ☐ BI-POLAR ☐ PTSD ☐ SCHIZOPHRENIA
  ☐ ODD ☐ ANXIETY ☐ SUICIDAL MOOD ☐ DISORDER
  OTHER:

- Are you prescribed any medications? **No**

  List Medications:

  Are you taking the medications as prescribed ? **No**

- Are you presently employed?

  If Yes, Where?

- Are you presently attending school?

  Last School Attended

- Are you currently passing your classes in school?

- During the last school year have you been: Expelled? Suspended?

  Reason:

- Do you have an IEP? ILC? 504?

Do you recommend a Psycho-Forensic Evaluation? **No**
If Yes, Explain:

Notes:

Office of Defense Services, State of Delaware
AUTHORIZATION FOR DISCLOSURE OF PROTECTED HEALTH INFORMATION
&
OTHER PERSONAL/PRIVATE RECORDED INFORMATION

I understand that my records are currently protected under the Federal privacy regulations within the Health Insurance Portability and Accountability Act (HIPAA),45 C.F.R.Parts 160 and 164. I understand that my personal health or other private information specified below will be disclosed pursuant to this authorization. The Federal regulations governing Confidentiality of Alcohol and Drug Abuse Patient Records, 42 C.F.R. Part 2; however, will continue to protect the confidentiality of information that identifies me as a patient in an alcohol or other drug program from redisclosure. If treatment is for substance abuse, I understand that my records are protected under the federal regulations governing confidentiality of Alcohol and Drug Abuse Patient Records, 42 C.F.R. Part 2, and cannot be disclosed without my written consent, unless otherwise provided for in the regulations. The federal regulations require covered entities to obtain your authorization for disclosure and use of your health or other private information . So that we may obtain your health or other private information from your providers, you will need to complete and sign this authorization form.

Client Information (Incl Maiden and Aliases):

Name: DOB: SS #: _____

Street Address:

City: State: Zip:

I Hereby Authorize:

Provider:

Address:

City, State, Zip:

Its directors or designees, or Medical Information Services Department to release complete copies of all information, records, and reports, including summaries, digests and notes (whether handwritten, typed, or dictated), in your possession, custody, or control relating to my examination, consultation, confinement or treatment (including outpatient treatment) for any physical, emotional, or mental conditions or related physical illnesses, including:

- ☐ Medical and Health records _____ Requires separate signature
- ☐ Alcohol and Substance Abuse records _____ Requires separate signature
- ☐ Mental Health and Illness records _____ Requires separate signature
- ☐ HIV / Genetic Testing results _____ Requires separate signature
- ☐ All Educational Records _____ Requires separate signature
- ☐ DSCYF Department Records _____ Requires separate signature

to the following organization:

Attorney/Office: Office of the Defense Services, State of Delaware

Purpose or Need of Disclosure: For Preparation of Legal Defense

Attention: _____

This authorization is subject to written revocation at any time except to the extent that the provider has already taken such action in reliance on the authorization. I understand the information disclosed is subject to re-disclosure and will no longer be protected by the Federal Privacy Rules, 45C.F.R Parts 160 and 164. This authorization will also enable the dissemination of information to any attorney or agent of the Office of Defense Services in either the Office of the Public Defender or the Office of Conflicts Counsel division.

A photocopy of this authorization shall have the same force and effect as an original authorization.

Signature:_____ Date:_____

Legal Guardian (if applicable): _____Relationship: _____

This Authorization Expires: Upon completion of the litigation entitled: State v.

OFFICE OF DEFENSE SERVICES OF THE STATE OF DELAWARE

Refusal to Authorize Disclosure of HIPAA Protected Information

I, , hereby acknowledge that I refuse to sign the discussed Authorization for Disclosure of Protected Health Information & Other Personal/Private Recorded Information, which will enable my defense team to communicate with providers, gather records and mitigation, and advocate for my defense.

_____

Client Signature and Date

INTAKE CHECKLIST

FIRST NAME: *MIDDLE NAME:* *LAST NAME:* *SUFFIX:* *DUC #:*

Client Interview Worksheet

☑ *Personal information has been verified.* *In Which County are the Client's Charges?*

Qualification Form - *Determined Eligible?* **Yes**

Conflicts? - **No**

The Intake Investigator refers this case to the supervising attorney for further conflict evaluation.

Co-defendant, Names-Current Case:

Co-defendant, Names-Other Cases:

Victim, Names:

Other, give the reason:

Client Information

☑ Client Information Form attached

☑ Juvenile or Adult Medical/Psychological Form attached

☐ HIPAA Form attached (check one)

○ Signed ○ Refused to Sign ○ Blank (interview done by videophone)

☐ DUI Case in JP 11

Referrals - check any that apply

☐ FSS Referral - In NCC the interview worksheet has been sent to the Chief of Support. In Kent and Sussex the FSS Unit has been provided a copy of the interview worksheet. County:

☐ Forensic Unit Referral - The interview worksheet and affidavit of probable cause have been sent to Lisa Schwind for cases involving:

- ○ Rape I, II, or III charges
- ○ Cases resulting in death
- ○ Case where blood was drawn from the defendant
- ○ Defendant claims self defense
- ○ Defendant suffers from a serious chronic condition, such as Multiple Sclerosis, AIDS, or terminal cancer.
- ○ Arson I, Assault I, Robbery I or Abuse of a patient
- ○ Other type of case requiring the Forensics Unit's services

☐ Investigative Referrals - The interview worksheet has been sent to the Investigative Unit for all Class A felonies.

☐ Homicide Referral - The interview worksheet has been sent to the Homicide Unit for all Homicides.

MELISSA.SAGE
INTERVIEWER

3/3/2020
DATE

OFFICE OF DEFENSE SERVICES OF THE STATE OF DELAWARE

NEW CASTLE COUNTY
COURTHOUSE
500 N. KING STREET
SUITE 2400
WILMINGTON DE 19801

BRENDAN O'NEILL
CHIEF DEFENDER

TODD E. CONNER
(302)255-0130

TO WHOM IT MAY CONCERN:

Please be advised that

has/had an appointment in our office on 3/3/2020

If you have any questions concerning this matter, please contact our office.

Brendan O'Neill

DUI CLIENT INTERVIEW FORM

FIRST NAME: *MIDDLE NAME:* *LAST NAME:* *SUFFIX:* *DUC #:*

1) *Where were you coming from?*

2) *Where were you going?*

3) *How much did you have to drink?*

And in what time period?

4) *Are you taking any prescription medicine?* ○ *Yes* ○ *No*

What kind and how much?

When was the last time you took the medicine?

5) *Were you using any illegal drugs prior to being stopped?* ○ *Yes* ○ *No*

What kind and how much?

When was the last time you used the illegal drugs?

6) *Why were you stopped?*

What time were you stopped?

7) *Describe weather and lighting conditions at the time of the stop:*

8) *Were you given any "field tests" at the scene?* ○ *Yes* ○ *No*

- ☐ *DUI Finger to Nose*
- ☐ *Heel to Toe*
- ☐ *One Leg Stand*
- ☐ *Alphabet*
- ☐ *Count Fingers*
- ☐ *Follow Pencil*
- ☐ *Other "Field Test"* *Describe the Other Test:*

9) *Did the police search your vehicle before arresting you?* ○ *Yes* ○ *No*

10) *Were you given a breathalyzer?* ○ *Yes* ○ *No* *Where:*

Were you told the results? ○ *Yes* ○ *No* *BAC:*

11) *Was blood taken?* ○ *Yes* ○ *No*

12) *Do you have any prior DUI convictions?* ○ *Yes* ○ *No*

When/Where:

ANY ADDITIONAL INFORMATION:

Partners for Justice Questionnaire

Interview ID:	**Juvenile:**	**DUC Number:**	
First Name:	**Middle Name:**	**Last Name:**	**Suffix:**
Address:			
City:	State:	Zip:	Phone:	Cell:
Date of Birth	Veteran? No	Immigration status?	

Status: Select...

Ethnicity

Are you of Hispanic or Latino origin or descent?	○ Yes	○ No

Employment

Are you currently employed?	○ Yes	○ No

Have you ever been denied a job because of your criminal record?

	○ Yes	○ No

Are you currently or do you plan on seeking an occupational license in the future?

	○ Yes: *[what license?*	
	○ No	

Benefits/Aid

Which benefits do you currently receive from the government? *(Check if you receive the benefits):*

Type of Benefit	**Do you currently receive this benefit?**
Medicare	○ Yes ○ No
Medicaid	○ Yes ○ No
Supplemental Security Income (SSI)	○ Yes ○ No
Disability	○ Yes ○ No
Unemployment	○ Yes ○ No
Food Stamps (SNAP)	○ Yes ○ No
Temporary Assistance for Needy Families (TANF)	○ Yes ○ No
Other? (please specify):	○ Yes ○ No

Within the last 6 months, have you lost benefits or have any of your benefits been reduced?

	○ Yes	○ No	○ Don't Know

Have you recently received any mail from the Department of Social Services or the Social Security Administration about your benefits that worried you?

	○ Yes	○ No

Do you have any debts or bills that you are worried you will not be able to pay?

	○ Yes	○ No

Do you currently have any other form of private health insurance (not Medicare or Medicaid)?

	○ Yes	○ No

In the past six months, have you been worried your food would run out before you got money to buy more?

	○ Yes	○ No

Housing

What type of housing do you live in?

○ Owned home	○ Public Housing
○ Rented home, apartment, or room	○ Single Room Occupancy (SRO)
○ Motel/Hotel	○ Group Home
○ Staying with family temporarily	○ Transitional Housing
○ Staying with family permanently	○ Car
○ Shelter	○ No current housing
○ Staying with friends temporarily	○ Other

Do you live in subsidized housing or do you receive any kind of voucher to help with your housing?

	○ Yes	○ No	○ Don't Know

Do you have a PFA or No Contact Order that will prevent you from going back to where you lived before this case?

	○ Yes	○ No	○ Don't Know

Have you recently been threatened with eviction?

	○ Yes	○ No	○ Not Applicable

In the past 12 months has there been a time when you have been homeless?

	○ Yes	○ No

Family

If client has children: **Have you had to deal with Family Court or Child Services recently?**

	○ Yes	○ No

Law Enforcement

Did the police hurt you during your arrest?

	○ Yes	○ No

If Yes, how did the police hurt you?

Did the police take anything from you during your arrest?	○ Yes	○ No

If so, what did they take?

Military

Are you trying to join the military?

	○ Yes	○ No

Have you ever tried joining the military in the past, but been denied because of your criminal record?

	○ Yes	○ No

Education

Are you currently enrolled in school?		
	○ Yes	○ No
Do you plan on attending school in the future?		
	○ Yes	○ No

Our office has Client Advocates who may be able to assist you with challenges like the ones we've just discussed, whether it's related to your criminal case or not. Would you like an Advocate to contact you about these kind of issues?		
	○ Yes	○ No

Comments:

Check Box to Refer Case to an Advocate? ☐

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, Plaintiff, v. Defendant.	No.

NOTICE OF MOTION

TO: , Esquire
Deputy Attorney General
Department of Justice
State Office Building
820 North French Street
Wilmington, DE 19801

PLEASE TAKE NOTICE that the within Motion for Reduction of Bail will be presented to this Honorable Court as soon as counsel may be heard.

Dated:

_____

Assistant Public Defender
State Office Building
820 North French Street
Wilmington, DE 19801

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, Plaintiff, v. Defendant.	No.

MOTION FOR REDUCTION OF BAIL

COMES NOW, Defendant, , by and through his attorney, , Esquire, and respectfully requests that this Honorable Court reduce the amount of bail imposed upon him. In support of this Motion, defendant offers the following:

1. Defendant was arrested on or about , on the charge(s) of . ***ATTORNEY NOTE: if any of the charges are 5.2B "signal offences," (listed after Rule 5.2, pp. 29-34), then "the court need not give presumptive weight to the result of the risk assessment, but is given discretion to impose conditions of release it deems reasonably necessary to assure public safety." Additionally, 5.2(h)(2)(A) and (C) provide separate presumptions for crimes of Domestic Violence, and DUIs.***

2. Defendant's pretrial assessment score is , which places him/her in the color group in the pretrial assessment matrix. (*See* 5.2 (b) (1) (A)-(C)) Thus, presumptively . Bail

was set in the amount of and defendant was incarcerated in default of bail.

3. The Eighth Amendment to the United States Constitution and Article 1, Section 11 of the Delaware Constitution provide that excessive bail shall not be required. U.S. Const., Amend. VIII; Del. Const., Art. 1, §11. The Eighth Amendment's prohibition against excessive bail is applicable to the states through the due process clause of the Fourteenth Amendment. *Sistrunk v. Lyons*, 646 F.2d 64, 70 (3d Cir. 1981).

4. The right to reasonable bail before conviction permits the unhampered preparation of a defense and prevents infliction of punishment before conviction. *Stack v. Boyle*, 342 U.S. 1, 4 (1951). Bail should be set utilizing a totality of the circumstances analysis that provides a "balanced assessment of the relative weights" of all the relevant factors in the individual case. *Illinois v. Gates*, 462 U.S. 213, 214 (1983). A totality of the circumstances approach requires a focus on all legally relevant factors and not just a single factor, such as the nature of the charged offense. *SENTAC, Delaware Sentencing Accountability Commission Benchbook 2018*, pg. 168.

5. One factor which must be considered is "defendant's financial circumstances, including the defendant's ability to furnish the security or money necessary to guarantee the bond by a surety or pledge of property, cash or its

equivalent, or other assets." Rule 5.2(l). Delaware Courts have been "encouraged" by our legislature "to make individualized decisions about terms and conditions of pretrial release," and to "utilize . . . reasonable non-monetary conditions of release" unless there is a showing that such conditions cannot "adequately provide a reasonable assurance of" statutorily recognized concerns. 11 *Del. C.* § 2101.

6. Defendant requests that the Court consider the following additional factors to determine the appropriate bail amount in his case:1

a. Defendant is years of age.

b. The defendant was born in the State of . Prior to his incarceration, he resided at with . He has lived in Delaware for years.

c. Defendant has significant ties to the community as his family including his (describe family) live in Delaware.

d. If released, defendant states that he would reside at with , while pending the disposition of his case.

e. Defendant has a grade education and attends . (If defendant is currently in high school, trade

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[1] Employment, custody Status at the time of the offence, and length of residence in the community are all identified by 5.2 (a) (5) as having been "excluded from the pretrial assessment

school, vo-tech, college, GED course, etc., list here or list schools where he has successfully attended especially if in DE.)

f. Defendant states that prior to his incarceration, he was employed by . Upon his release he plans to return to this employment. (or Defendant states that prior to his incarceration, he was unemployed but intends to seek gainful employment upon his release.)

g. Defendant has ***a minimal*** prior criminal (or felony) record.

h. Defendant has no other charges pending against him.

i. Defendant has a limited FTA history.

j. Defendant is currently engaged in treatment at for . (***Describe treatment.***)

k. Defendant suffers from a physical (or mental) impairment that would be better managed by community based services. (Describe impairment and treatment.)

l. Any concerns regarding community safety, Defendant's appearance at future court events, or obstruction of justice, can be sufficiently addressed through less restrictive means by imposing any or all of the following statutorily authorized (11 Del. C. § 2108)

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because they were found to lack a sufficiently strong correlation with the defendant's risk of pretrial failure."

conditions of release:

i.

ii.

iii.

This Court is prohibited, by both the United States' and Delaware's Constitutions, from considering community safety in calculating bail

Federal Constitution: The Eight Amendment does not guarantee bail in all cases. *United States v. Salerno*, 481 U.S. 739, 752, 107 S. Ct. 2095, 2104, 95 L. Ed. 2d 697, 712, (U.S. 1987) ("[the Eight Amendment] says nothing about whether bail shall be available at all."). The Supreme Court of the United States has determined that public safety is one legitimate concern for which a defendant can be denied bail all together. *Id.* However, when a defendant is deemed fit for bail, the singular criterion recognized by the Supreme Court and enshrined in the Eighth Amendment is that it must not exceed an amount calculated to give "adequate assurance that the accused will stand trial and submit to sentencing." *Id.* at 5. Therefore, while a court or legislature may in some instances deny bail based on community safety, when bail is granted, determining the amount of said bail based on community safety concerns is constitutionally prohibited. Thus, Defendant argues that 11 Del. C. §§ 2105(b) and 2107(a), which together require this Court to consider

community safety in setting an amount of bail, comprise a legislative scheme that is unconstitutional on its face, and unconstitutional as applied to Defendant.

State Constitution: Considering community safety in calculating bail is prohibited by Article I, Section § 12 of the Delaware Constitution, which generally requires that "[a]ll prisoners shall be bailable by sufficient sureties." The *Sufficient Sureties Clause* of the Delaware Constitution has been interpreted by the District of Delaware as being focused on "the accused's providing adequate and reasonable assurance that he will stand trial when summoned by the Court and submit to sentence if convicted." *United States ex rel. Priest v. Department of Corrections*, 268 F. Supp. 242, 243 (D. Del. 1967). Likewise, other jurisdictions have found their own, similar, sufficient sureties clauses to be exclusively focused on securing the appearance of the defendant at subsequent court dates. *State v. Steele*, 430 N.J. Super. 24, 35, 61 A.3d 174, 181 (App.Div. 2013) ("The Constitution's reference to 'sufficient sureties' is designed to assure a defendant's appearance. The amount of the bond must be set at such amount as in the judgment of the trial court under the circumstances of the case will insure his appearance at the trial.");[2] *People ex rel. Gendron v. Ingram*, 34 Ill. 2d 623, 217 N.E.2d 803, 806 (1966) ("Sufficient . . . means

[2] New Jersey has since amended its constitution to specifically allow for preventative detention.

sufficient to accomplish the purpose of bail, not just the ability to pay in the event of a 'skip.'"); *Iowa v. Briggs*, 666 N.W.2d 573, 5882 (Iowa 2003) ("The defendant was given a right to be bailed, subject to the state's analysis of a surety's sufficiency to provide adequate recompense if the prisoner did not show for his judicial proceedings.").[3]

The bail imposed in this case violates the Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court has expressed significant concern regarding the disproportionate impact of bail on indigent defendants:

> The fundamental tradition in this country is that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt . . .
>
> This traditional right to freedom during trial and pending judicial review has to be squared with the possibility that the defendant may flee or hide himself. Bail is the device which we have borrowed to reconcile these conflicting interests. The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court. It is assumed that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to break the conditions of one's' release.

---

[3] Defendant also notes that any interpretation of the Delaware Constitution's *Sufficient Sureties* Clause that allows for bail to be determined by needs other than assuring a defendant's appearance would directly conflict with Standard Rule 2.5(c) of the National Association of Pretrial Services Agencies ("Financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person.), and Model ABA Standard 10-1.4(d) ("Financial conditions should not be employed to respond to concerns for public safety.").

> But this theory is based on the assumption that a defendant has property. To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. We have held that an indigent defendant is denied equal protection of the law if he is denied an appeal on equal terms with other defendants, solely because of his indigence. Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?

Bandy v. United States, 81 S. Ct. 197, 197-98 (1960) (internal citations omitted). At least one federal court has clearly, and recently answered this question:

> No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution be held in custody after an arrest because the person is too poor to post a monetary bond.

Pierce v. The City of Velda City, Case No. 4:15-cv-570, Declaratory Judgment (E.D. Mo., E. Div., June 3, 2015).[4]

A traditional equal protection analysis grants great deference to legislative classifications. If "the distinctions drawn have some basis in practical experience" (*South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966)), or if "any state of facts reasonably may be conceived to justify" them, (*McGowan v. Maryland*, 366 U.S. 420, 426 (1961)), and they are not drawn "on the basis of criteria wholly unrelated to the objective of [the]

---

[4] *Available at* http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/04/Velda-City-Final-Judgment-and-Injunction.pdf.

statute," (*Reed v. Reed*, 404 U.S. 71, 76 (1971)), then the statute will withstand an equal protection challenge. But the Supreme Court also has refined this traditional test and has said that a statutory classification based upon suspect criteria or affecting "fundamental rights" will encounter equal protection difficulties unless justified by a "compelling governmental interest." *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971). The Court has stressed that in such cases the State must demonstrate that the classification is "necessary to promote a compelling governmental interest". *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972). Thus, under the strict scrutiny test, "if there are other, reasonable ways to achieve [the State's goals] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Id.*

This Court's analysis must focus on four questions: (1) Does Delaware's bail system create a classification? (2) If so, is that classification "suspect" or does it affect "fundamental rights"? (3) Is the State of Delaware attempting to promote a compelling governmental interest by making the classification? and (4) Are less restrictive means available to effectuate the desired end? *See Pugh v. Rainwater*, 557 F.2d 1189, 1195 (5th Cir. Fla. 1977).

(1) *Delaware's Bail System Creates a Classification*

Defendant does not allege that their bail was set solely on the basis of their lack of wealth. However, at issue is not whether factors other than wealth were considered, rather, the concern is with the effect of the bail. In this case, Defendant is incarcerated as a result of the Bail set, where as a non-indigent defendant would have been able to post bail, and be released.

A basic principle of equal protection is that "a law nondiscriminatory on its face may be grossly discriminatory in its operation". *Williams v. Illinois*, 399 U.S. 235, 242 (1970). Thus, the lack of deliberate discrimination on the basis of poverty is not dispositive of Defendant's claim.

Under 11 *Del.C.* §§ 2104, 2105 and 2107, a judge has broad discretion in deciding whether a bail is necessary, and if so how much. When a judge does set a monetary bail she creates a *de facto* classification based on the defendant's ability to pay. *Pugh*, at 1196.

(2) *The Classification Involve "Suspect Criteria" or "Fundamental Rights" warranting "strict scrutiny"*

Although the Supreme Court has cautioned that "lines drawn on the basis of property like those of race are traditionally disfavored," (*Harper v. Virginia Board of Electors*, 383 U.S. 663, 668 (1966)), it has never held that wealth *per se* is a suspect

criterion. Nevertheless, the Court has been extremely sensitive to classifications based on wealth in the context of criminal prosecutions. "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin v. Illinois*, 351 U.S. 12, 17 (1956). *Griffin* opened the door to equal protection attacks on procedures which, although nondiscriminatory on their face, in effect confront the indigent defendant with the "illusory choice" of paying a fee he cannot afford or forfeiting an opportunity available to those who can pay. *Pugh*, at 1196-97. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* at 19. The Court has extended this principle to prohibit a State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full. *Tate v. Short*, 401 U.S. 395, 398 (1971).

The factors of a wealth-based classification in the context of a criminal prosecution, combined with its effect on the fundamental right to be presumed innocent and to prepare an adequate defense, require this Court to assess the challenged bail practices with strict judicial scrutiny.

(3) *The Classification Serves a Compelling Governmental Interest*

Defendant concedes that (1) assuring the presence of the accused at trial, and (2) community safety, are both compelling governmental interests. However, as argued above the State is entirely prohibited from using bail to for the purpose of the second interest. *See supra* pars. 1 and 2. Additionally, given that this analysis is conducted with strict scrutiny, it is the State's burden to show that these interests are in fact furthered by the imposition of money bail. This latter point is not conceded.

(4) *Money Bail is Not Necessary to Promote the State's Interest in Assuring Appearance*

The theory behind money bail is simple: "[i]t is assumed that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to break the conditions of one's release". *Bandy*, at 197. However, "under the professional bondsman system the only one who loses money for non-appearance is the professional bondsman, the money paid to obtain the bond being lost to the defendant in any event". *Pannell v. United States*, 115 U.S.App.D.C. 379, 320 F.2d 698, 699 (1963) (Wright, J., *concurring*).

> Because the bondsman does not want to lose money, he has a powerful incentive to make sure that the defendant for whom he is surety appears at trial. Thus, the bondsman has long enjoyed legal protection as a modern day bounty hunter, entitled to arrest his principal "even under extreme circumstances". In this sense, the accused pays the bondsman to perform a police function - apprehension

of a person who has jumped bail.

Pugh v. Rainwater, 557 F.2d 1189, 1200 (5th Cir. Fla. 1977). An indigent defendant released on his own recognizance would face similar consequences. 11 *Del.C.* § 2113(a) (requiring the Court to "issue a warrant and cause the arrest" of an "accused [who] fail[s] to appear as required by the recognizance or bond"). Presumably, then, the deterrence factor is comparable regardless of whether money bail has been posted.

Delaware law contains various non-financial means by which the court can secure the appearance of Defendant. 11 *Del. C.* § 2108 creates eight specific conditions for pretrial, as well as a ninth, catch all provision, allowing a judge to impose "any other condition deemed reasonably necessary." 11 *Del. C.* § 2108. When a judge decides to set money bail, the indigent will be forced to remain in jail, whereas the non-indigent has the option of release. Equal protection standards are not satisfied unless the judge is required to consider less financially onerous forms of release before she imposes money bail. Equal Protection is violated because Delaware law does not provide that indigent defendants will be required to pay money bail only in the event that no combination of the 11 *Del. C.* § 2108 release conditions will reasonably assure their appearance at trial. *See Pugh*, at 1201 ("Requiring a presumption in favor of non-money bail accommodates the State's interest in assuring the defendant's

appearance at trial as well as the defendant's right to be free pending trial, regardless of his financial status.").

To the degree that this Court finds that imposing bail to uphold community safety is valid purpose, it does not pass the equal protection analysis for the same reasons applied to the purpose of securing a defendant's appearance.

WHEREFORE, the defendant respectfully requests that this Honorable Court reduce the bail to a lesser secured amount, or an unsecured amount.

_____

Assistant Public Defender

RULE 9 WARRANT

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE)
)
V.) INDICTMENT BY THE GRAND JURY
) I.D. #[redacted]
[redacted])
)

The Grand Jury of New Castle County charges [redacted] with the following offense(s);

COUNT I. A FELONY

#N_____

MURDER FIRST DEGREE, in violation of Title 11, Section 636(a)(1) of the Delaware Code.

[redacted] on or about the [redacted] day of [redacted], 20[redacted], in the County of New Castle, State of Delaware, did intentionally cause the death of [redacted] by shooting him.

COUNT II. A FELONY

#N_____

POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY, in violation of Title 11, Section 1447A of the Delaware Code.

[redacted], on or about the [redacted] day of [redacted], 20[redacted], in the County of New Castle, State of Delaware, did knowingly and unlawfully possess a firearm as defined by Title 11, Section 222 of the Delaware Code, during the commission of Murder First Degree, a felony, as set forth in Count I of this indictment, which is incorporated herein by reference.

COUNT III. A FELONY

#N_____

RECKLESS ENDANGERING FIRST DEGREE, in violation of Title 11, Section 604 of the Delaware Code.

[redacted] on or about the [redacted] day of [redacted], 20[redacted], in the County of New Castle, State of Delaware, did recklessly engage in conduct which created a substantial risk of death to [redacted], by firing a gun in [redacted] direction.

COUNT IV. A FELONY

#N_____

POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY, in violation of Title 11, Section 1447A of the Delaware Code.

[redacted] on or about the [redacted] day of [redacted], 20[redacted], in the County of New Castle, State of Delaware, did knowingly and unlawfully possess a firearm as defined by Title 11, Section 222 of the Delaware Code, during the commission of Reckless Endangering First Degree, a felony, as set forth in Count III of this indictment, which is incorporated herein by reference.

COUNT V. A FELONY

#N[redacted]

POSSESSION OF A FIREARM BY A PERSON PROHIBITED, in violation of Title 11, Section 1448 of the Delaware Code.

[redacted] on or about the [redacted] day of [redacted] 20[redacted], in the County of New Castle, State of Delaware, did knowingly and unlawfully possess or control a handgun, a firearm as defined by Title 11, Section 222 of the Delaware Code, after having been [redacted] in Case Number [redacted] in the [redacted] Court of the State of Delaware, in and for New Castle County on or about [redacted] to the charge of [redacted]

A TRUE BILL

_____
(FOREPERSON)

MATTHEW P. DENN
ATTORNEY GENERAL

_____
DEPUTY ATTORNEY GENERAL

OFFICE OF DEFENSE SERVICES
PUBLIC DEFENDER'S OFFICE
ELBERT N. CARVEL STATE OFFICE BUILDING
820 NORTH FRENCH STREET, THIRD FLOOR
WILMINGTON, DELAWARE 19801

BRENDAN O'NEILL
CHIEF DEFENDER

CATHY A. JOHNSON
ASSISTANT PUBLIC DEFENDER

TODD E. CONNER
CHIEF DEPUTY

TELEPHONE
(302) 577-5131

Deputy Attorney General
Department of Justice
820 N. French Street
Wilmington, DE 19801

Re: *STATE OF DELAWARE V.*
I.D.#

Dear Counsel:

I. Pursuant to Rule 16 of the Superior Court Criminal Rules, I request the materials listed below. To the extent any of the Rule 16 items have already been provided through automatic discovery, you need not reply. If you have already provided Rule 16 materials in automatic discovery but they have not yet reached my file, I will again check the prothonotary's office and the Public Defender's Office. If I still cannot locate them, I will make an informal request that you again provide the Rule 16 materials via automatic discovery.

A. Any written or recorded statements made by the defendant or a codefendant (whether or not charged as a principal, accomplice or accessory in the same or in a separate proceeding); any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a state agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged; the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a state agent if the state intends to use that statement at trial.

B. Defendant's prior criminal record.

C. Any books, papers, documents, photographs, tangible objects, buildings or places, which are material to the preparation of the defendant's defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.

D. Any results or reports of physical or mental examinations, and of scientific tests or experiments which are material to the preparation of the defense or are intended for use by the state as evidence in chief at the trial. This request includes any notes prepared by any law enforcement officer relating to sobriety field tests conducted in this case.

E. Expert witnesses. Any evidence which the state may present at trial under Rules 702, 703, or 705 of the Delaware Uniform Rules of Evidence, including the identity of the expert witness, his/her business address and phone number and the substance of the opinions to be expressed. This request includes any notes prepared by any expert made while conducting any test, examination or experiment and/ or notes used by any expert in the preparation of any report about any test, examination or experiment.

II. In addition, to the above, I would appreciate it if you would provide the following. If the police reports contain the items listed below, and the police reports have already been provided, this is not a request that you provide the same information twice.

A. A statement as to the approximate time and location of the alleged offense(s) in the above case(s).

B. In addition, a statement as to the date, the approximate time and location of the defendant(s) arrest, the name(s) of the arresting officer(s) or other State agent(s), and the name of the agency with which he (they) are associated.

C. Copies of all executed warrants of arrest and all executed search warrants relating to the above-captioned case(s), including all affidavits and warrant returns.

D. A statement as to the involvement of any confidential informant(s), if applicable.

E. The names of the police officers or other State agents involved in the investigation of the above case(s), and the agencies with which they are associated. If the officers in this case were required to use any degree of force in subduing the defendant, please forward copies of all reports concerning the degree of force exercised by the officers that their police agency requires.

F. A statement as to the date, time and location of any and all line-ups, photographic or show-up identifications (or attempted identifications) of the defendant(s) in connection with the above case(s).

G. An opportunity pursuant to *Jencks v. United States*, 353 U.S. 657 (1957), to review witness reports and statements, whether oral or written.

H. A disclosure as to the utilization of any electronic or other mechanical surveillance device, if applicable, including but not limited to, cell phone tracker technology such as Stingray devices.

I. Copies of all audio or videotapes, which may relate to the alleged incident in this case,

including but not limited to, any law enforcement body camera footage or in-car camera footage.

J. Copies of any and all medical records pertaining to the victim that may relate to this case to include all follow-up medical visits. Please also include a list of any and all medical facilities from which the alleged victim sought medical treatment or advice.

K. Notice of and an opportunity to view any and all displays the State intends to present to the finder of fact during opening statements, a witness's testimony and/or closing summations, including but not limited to, drawings, diagrams, graphs, slide presentations, videotapes, films, single- or multi-media presentations, and PowerPoint (or PowerPoint like) presentations.

III. All information and materials in the possession of the State which fall within the ambit of *Brady v. Maryland*, 373 U.S. 83, (1963) and its progeny.

IV. Please consider this letter defendant's demand for all persons involved in the chain of custody of any evidence to be presented in court and Medical Examiner's personnel who prepared the Medical Examiner's report be subpoenaed for trial. This request is pursuant to 10 Del. C. Sections 4330-4332.

V. Please consider this letter defendant's demand for the presence of the Forensic Toxicologist, Forensic Chemist, State Police Forensic Analytical Chemist or any person necessary to establish the chain of custody pursuant to 21 Del. C. Section 4177 (h)(4).

VI. In any case in which the State will be using the Delaware Division of Forensic Science, there will be no stipulations or agreements with regard to any trial issue, including but not limited to testing and chain of custody, unless expressly agreed to in writing by counsel for Defendant.

VII. Please identify the State's witnesses so I can check for possible conflicts of interest.

VIII. Any and all records prepared and/or maintained by the Delaware Department of Correction (DOC) re the DOC's supervision of the defendant. These records are sometimes referred to as DOC's supervision history records.

Thank you for your cooperation and assistance in complying with this request.

Very truly yours,

Assistant Public Defender

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
	)	I.D. NO.
vs.	)	
	)	
	)	
	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I, , Esquire, hereby certifies that on

two copies of the attached Request for Discovery, were hand delivered to:

Deputy Attorney General
Department of Justice
820 N. French Street
Wilmington, Delaware 19801

_____

ASSISTANT PUBLIC DEFENDER

MATTHEW P. DENN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX (302) 577-6499

[redacted]

New Castle County - Criminal Division

[redacted]

Re: ***State of Delaware v.*** [redacted]
I.D. No. [redacted]

Dear Counsel:

Pursuant to Superior Court Criminal Rule 16, the following information concerning the above-captioned case is being supplied. Any supplements required by Rule 16 will be provided as stated below.

As you are aware, police reports are not generally subject to discovery and are provided in this matter as a convenience to you in assessing this case. You may find certain redactions in the reports relating to names, addresses or other identifying information of victims and/or witnesses. These steps are taken to ensure the safety and confidentiality of the State's witnesses.

The following redacted reports are included herewith:

- Initial Crime Report of Det. [redacted] - 3 pages.
- Supplemental Report of Cpl. [redacted] - 1 page.
- Supplemental Report of Det. [redacted] - 3 pages.
- Supplemental Report of Det. [redacted] - 4 pages.

I would request that you not forward copies of these reports to your client or his friends or relatives unless you first discuss the matter with me.

Beyond that information already found in any enclosed police reports the State responds, pursuant to Rule 16 of the Superior Court Rules of Criminal Procedure, as follows:

Rule 16(a)(1)(A): Relevant written, recorded or oral statements made by defendant or any juvenile or adult co-defendant in response to interrogation by a person then known to the defendant to be a state agent:

See enclosed police report(s) that reflect oral statements made by the defendant that the State intends to use at trial.

Rule 16(a)(1)(B): Defendant's Prior Record.

Enclosed is a copy of the defendant's known criminal and motor vehicle violation history as same is maintained in DELJIS. Although this is a very reliable source of such data available within the state, I caution you that such information is occasionally incomplete or inaccurate. I therefore suggest that you discuss this matter with your client who should be able to correct any erroneous data and complete the record as needed. Further, you may make application to the State Bureau of Identification pursuant to 11 *Del. C.* §8513(a) and/or the Department of Motor Vehicles for your client's records.

The State also gives advance notice pursuant to D.R.E. 609(b) that it intends to use evidence of the defendant's past convictions more than 10 years old.

Rule 16(a)(1)(C): Documents and Tangible Objects.

You should assume that any physical evidence noted in the police reports may be used by the State at trial. There is no other separate listing of documents or other physical evidence in the possession of the State. Inspection of any documents and tangible objects that the State may intend to enter as evidence at trial will be permitted upon reasonable notice and during normal business hours. Please contact my office to discuss any such evidence and to arrange for a mutually convenient time for inspection. If other evidence falling under Rule 16(a)(1)(c) comes to the State's attention you will be notified as soon as is practicable.

However, I have enclosed copies of the following for your review:

Rule 16(a)(1)(D): Reports of Examinations and Tests.

Results or reports of mental or physical examinations and scientific tests or experiments that the State intends to use during its case-in-chief, or that the State believes may be material to the defense are:

Enclosed, as the SANE Christiana Care documents.

Have been requested. Discovery to extent permitted or required under Rule 16 will be made upon request.

Rule 16(a)(1)(E): Identity of Expert Witnesses.

In accordance with the above Rule and D.R.E. 702, 703, or 705, the identity and substance of the opinion of potential expert witnesses are:

Evidence that may be the subject of expert testimony is currently undergoing analysis. Reports of such analysis will be made available to you consistent with this Rule.

If for any reason these materials are insufficient to provide you an understanding of the evidence and opinions to be offered by the State under Rule 16 (a)(1)(D)or(E), please feel free to contact me so that appropriate clarification can be made.

Rule 16(a)(3): Recorded testimony of the defendant before a Grand Jury:

None.

At this time the State is unaware of any information that must be disclosed pursuant to *Brady v. Maryland* beyond that which may be contained in the enclosed materials. If you believe such evidence exists, please advise me of the specific nature of your belief and I will respond.

Please be advised that this response, together with any acknowledgments of information to be supplied when received, constitutes the State's entire response to its discovery obligations under Rule 16 or any written request filed by this defendant. If, prior to or during trial, additional material or evidence that is subject to disclosure under Rule 16 is discovered, it will be disclosed

in a timely fashion. Further discovery - except to the extent referred herein - is objected to as being outside the scope of the State's obligation under Criminal Rule 16. Should you wish to pursue further discovery, please file the appropriate requests or applications under Superior Court Criminal Rule 16.

This letter also comprises the State's request for reciprocal discovery. Pursuant to Superior Court Criminal Rule 16(b), the State requests the following:

1. An opportunity to inspect and copy or photograph any books, papers, documents, photographs, tangible objects, or copies of portions thereof, that are within the possession, custody or control of the defendant that the defendant intends to introduce as evidence in chief at trial. Please contact me if you are aware of any such materials or become aware of any such materials during the pendency of this matter (in accord with Rule 16(d)) so that we may make mutually convenient arrangements for my examination of these materials.

2. An opportunity to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this matter, or copies thereof, that are within the possession, custody or control of the defendant and that the defendant intends to introduce as evidence in chief at trial or that were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to that witness' testimony. Please contact me if you are aware of any such materials or become aware of any such materials during the pendency of this matter (in accord with Rule 16(d)) so that we may make mutually convenient arrangements for my examination of these materials.

3. Disclosure of any evidence the defendant may present at trial under Rules 702, 703 or 705 of the Delaware Rules of Evidence. Pursuant to this request, please provide a written response that includes the identity of the witness or witnesses and the substance of the opinions to be expressed.

Please be advised that failure to respond to this reciprocal discovery request will be taken as a representation that the defendant has no materials discoverable under Rule 16(b) and the State will rely upon such representation in future proceedings in this matter including any proceedings under Rule 16(d).

Plea Offer:

The State makes the following plea offer:

None at this time.

If your client is inclined to accept any plea offer in this matter, please advise me at your earliest convenience and the State will discuss the matter with the necessary parties so as to make a firm offer.

If the defendant has other pending charges not specifically referred to herein, they should not be considered part of this plea offer. In addition, if the defendant should be arrested for additional charges prior to entry of a plea in this matter, any offer herein should be considered withdrawn.

Very truly yours,

Joseph S. Grubb
Deputy Attorney General

JSG/med
cc: Criminal Prothonotary
[redacted]

MATTHEW P. DENN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
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CRIMINAL DIVISION (302) 577-8500
FAX (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX (302) 577-6499

New Castle County-Criminal Division (302) 577-8500

[redacted]

[redacted]

State v. [redacted]
Case # [redacted]

Dear [redacted]

This letter reiterates the State's previous request on August 16, 2016 for reciprocal discovery. Pursuant to Superior Court Criminal Rule 16(b), the State requests the following:

1. An opportunity to inspect and copy or photograph any books, papers, documents, photographs, tangible objects, or copies of portions thereof, that are within the possession, custody or control of the defendant or that the defendant intends to introduce as evidence in chief at trial. Please contact me if you are aware of any such materials or become aware of any such materials during the pendency of this matter (in accord with Rule 16(d)) so that we may make mutually convenient arrangements for my examination of these materials.

2. An opportunity to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this matter, or copies thereof, that are within the possession, custody or control of the defendant and that the defendant intends to introduce as evidence in chief at trial or that were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to that witness' testimony. Please contact me if you are aware of any such materials or become aware of any such materials during the pendency of this matter (in accord with Rule 16(d)) so that we may make mutually convenient arrangements for my examination of these materials.

3. Disclosure of any evidence the defendant may present at trial under Rules 702, 703 or 705 of the Delaware Rules of Evidence. Pursuant to this request,

please provide a written response that includes the identity of the witness and the substance of the opinions to be expressed.

Please be advised that failure to respond to this reciprocal discovery request will be taken as a representation that the defendant has no materials discoverable under Rule 16(b) and the State will rely upon such representation in future proceedings in this matter including any proceedings under Rule 16(d).

Very Truly Yours,

Joseph S. Grubb
Deputy Attorney General
820 N. French Street, 7th Floor
Wilmington, DE 19801

Cc: [redacted]
Criminal Prothonotary
File

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	
	)	
v.	)	I.D. No. [redacted]
[redacted]	)	
	)	
Defendant.	)	

MOTION TO DISCLOSE NON-DISCOVERABLE INFORMATION INCLUDING POLICE REPORTS AND WITNESS IDENTIFYING INFORMATION

COMES NOW, the State of Delaware, by and through Deputy Attorneys General Joseph S. Grubb and [redacted] and hereby moves this Honorable Court to permit the State to disclose police reports and witness identifying information, subject to a protective order. The State avers the following:

1. On [redacted] was shot and killed [redacted]

2. On [redacted] Defendant [redacted] was indicted on charges of Murder First Degree, Possession of a Firearm During the Commission of a Felony and Possession of a Firearm by a Person Prohibited.

3. Trial is scheduled to commence on [redacted]

4. The State is not required to provide witness statements or police reports in discovery. *See* Super. Ct. Crim. R. 16 (a)(2). However, the State is willing to provide such material in advance of trial in order to facilitate the efficient exchange of information and permit defense counsel to better prepare for trial. Additionally, the provision of the information will allow State to comply with its obligation under Superior Court Criminal Rule 26.2 in advance of trial; thus,

permitting the parties to agree upon necessary redactions which will eliminate unnecessary delays during trial.

5. The State is precluded from disclosing witness identifying information unless good cause is shown. 11 *Del. C.* Section 9403.

6. Upon information and belief, witnesses may be subject to harassment, threats, and/or physical harm if the identifying information is disclosed to the defendant, his family or associates. Moreover, disclosure may preclude other witnesses from coming forward for fear that their names would be disclosed. Therefore, the information will only be provided with a suitable protective order.

7. The Court has the inherent authority to issue protective orders in criminal cases. *See State v. Siple*, 1995 W.L. 264669, *1-2 (Del. Super. April 25, 1995)(issuing protective order precluding public disclosure of information); *c.f.* Super. Ct. Civ. R. 26(c) (providing Court broad authority to issue protective orders in civil cases).[1] Superior Court Criminal Rule 16(d)(1) specifically authorizes the Court to, *inter alia*, issue protective orders restricting *discovery* in appropriate cases. (emphasis added). Federal Criminal Rule 16(d)(1), which is the source of Delaware's corresponding rule, has been understood to be applicable in cases involving witness security. *See U.S. v. Roberts*, 793 F.2d 580, 587 (4th Cir. 1986), *vacated on other grounds*, 811 F.2d 257 (4th Cir. 1987); *See also U.S. v. Lee*, 374 F.3d 637, 652 (8th Cir. 2004)(holding that protective order was appropriate and provision prohibiting counsel from disclosing identifying information to client was appropriate to protect the safety of witnesses). The information the State seeks to disclose and protect is not discoverable under Superior Court Criminal Rule 16; however,

[1] **"In all cases not provided for by rule... the Court shall regulate its practice in accordance with applicable Superior Court civil rule or in any lawful manner not inconsistent with these rules or the rules of the Supreme Court." Super. Ct. Crim. R. 57(d).**

the Court has the inherent authority to issue a suitable protective order to restrict disclosure of non-discoverable information, such as witness identifying information.

8. Defense counsel does not oppose this motion.

WHEREFORE, the State hereby moves this Court to permit the State to disclose police reports and witness identifying information to the defense attorney; and order the defense attorney not to disclose or reproduce police reports or the witness identifying information to any other person, except his employees and agents, without leave of the Court, and order the defense attorney not contact the witnesses, directly or indirectly, without leave of the Court.

Joseph S. Grubb
[redacted]
Deputy Attorneys General
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

Date: [redacted]

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE)
)
)
)
v.)
)
[redacted]) I.D. [redacted]
)
)
)
Defendant.)

NOTICE OF MOTION

TO: WILLIAM H. LEONARD, JR., ESQUIRE
Deputy Attorney General
Department of Justice
State Office Building
820 North French Street
Wilmington, DE 19801

PLEASE TAKE NOTICE that the within Motion to Suppress will be presented to this Honorable Court as soon as counsel may be heard. First case review was on August 20, 2018; final case review is scheduled for November 26, 2018; Trial is scheduled for December 11, 2018.

Dated: September 10, 2018

KEVIN J. O'CONNELL (2326)
Assistant Public Defender
Carvel State Office Building
820 North French Street,
Wilmington, Delaware 19801
(302) 577-5144

Service of a copy of the within is hereby acknowledged this 10th day of Sept AD 2018
W. Leonard
Attorney

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	
	)	
	)	
	)	
v.	)	
[redacted]	)	I.D. [redacted]
	)	
	)	
	)	
Defendant.	)	

MOTION TO SUPPRESS

COMES NOW, the Defendant, [redacted] ("Defendant"), by and through his attorney, Kevin J. O'Connell, who moves this Court pursuant to Superior Court Criminal Rule 41, to suppress:

a) The search of his person when he was arrested by Wilmington Police on [redacted]; and

b) The search of the residence located at [redacted] on April 25, 2018.

These searches violated the defendant's rights under the 4th Amendment to the United States Constitution, Article 1, Section 6 of the Delaware Constitution and the provisions of 11 *Del.C.* Chapters 19 and 23. In support of this motion, the Defendant states the following:

Factual Background

1. During the last half of March of 2018, Wilmington Police received information from a past proven reliable confidential informant in regards to a [redacted]

[redacted]. The informant advised that [redacted] was a dark-skinned black male subject estimated to be in his forties that frequented the West Center City area of Wilmington where he distributed heroin and cocaine from his vehicle. The informant further advised police that [redacted] was known to keep firearms on his person and/or in his vehicle. During the first half of [redacted] a second past proven reliable confidential informant corroborated the information received from the first informant concerning Dew. The second informant stated that [redacted] was known to distribute heroin and cocaine from his vehicle throughout the city of Wilmington and advised that Dew would often change vehicles, but that he typically kept a firearm on his person. During the [redacted]8, Wilmington Police met with a cooperating defendant concerning information he/she knew about Dew. The cooperating defendant was able to corroborate the information obtained from both of the other informants. The cooperating defendant stated that [redacted] often frequented the West Center City area of Wilmington and was known to distribute heroin and cocaine from a [redacted] baring an [redacted] registration. The cooperating defendant also confirmed that [redacted] was known to keep firearms on his person. During the [redacted]8, Wilmington Police made arrangements to have the cooperating defendant conduct a controlled purchase of narcotics from [redacted] The cooperating

defendant was checked for contraband and currency, and supplied with a sum of departmentally issued buy money, and was instructed to contact [redacted] for the purpose of purchasing cocaine. Wilmington Police maintained constant visual contact with cooperating defendant as he/she responded to a location within the city of Wilmington. Police observed a [redacted] in color [redacted] bearing Delaware [redacted] registration number [redacted] operated by a black male subject enter the area. The cooperating defendant then contacted the operator of that vehicle and an exchange was made. Upon leaving the area, visual contact was maintained with the cooperating defendant until he/she arrived at the predetermined meet location. The cooperating defendant was again searched for contraband and currency where upon the police discovered a white rocky substance that field tested positive for cocaine. The cooperating defendant was able to positively identify [redacted] as the individual who provided him/her with the cocaine. On April 20, 2018, Wilmington Police obtained a warrant to search the [redacted] bearing Delaware [redacted] registration number [redacted] for the purpose of recovering evidence related to the crimes described above. *See attached "A", Affidavit in Support of Search Warrant for* [redacted]

2. On April 25, 2018, Wilmington Police located the [redacted] operating in Hilltop area of the city of

Wilmington. Surveillance was maintained as the [redacted] responded to the 1500 block of West 7th Street, where it pulled into a parking lot situated behind homes on the northern side of the block. A black male subject matching the provided description of Dew parked and exited the vehicle. The subject then went west on 7th Street and into a residence located at the western end of the block. The police maintained surveillance until the subject exited a residence at the western end of the block and headed back to the parked [redacted]. As that subject leaned into and began to enter the [redacted], the police approached the vehicle in an effort to take the subject into custody for the purpose of executing the search warrant they had obtained for the [redacted] The affidavit of probable cause in support of the search warrant for [redacted] alleges that the defendant actively resisted police efforts to take him into custody, ran through the parking lot and threw a black in color semi-automatic handgun to the ground. The affidavit of probable cause in support of the arrest warrant alleges that Det. [redacted] of the Wilmington Police deployed his taser on the defendant causing him to fall to the ground, whereupon Det. [redacted] removed the handgun from the defendant's waistband. Both affidavits were prepared and sworn to by Det. [redacted] of the Wilmington Police. The defendant was found to be in possession of a large sum of United States currency and one plastic bag containing a

green substance consistent with marijuana. In addition the subject was in possession of a set of house keys. A search of the [redacted] produced a quantity of a white rocky substance consistent with crack cocaine. The subject taken into custody was identified as [redacted]s with a date of birth of [redacted]. A DELJIS inquiry revealed an address of [redacted] *See attached "B", Affidavit of Probable Cause in Support of Arrest Warrant.*

3. The Wilmington Police took the house keys that they had seized from the defendant and went to the building known as [redacted] That building is a multiunit dwelling with three apartments. The keys were then checked on each of these apartments, receiving a positive result on the second floor western most apartment. The police went into the apartment and cleared it for "officer safety" and security. A search warrant for that apartment was then obtained. *See attached "C" Affidavit in Support of Search Warrant for* [redacted]

Legal Argument

a. The Stop and Search of Alanderer Willis

4. Under *Terry v. Ohio*, 392 U.S. 1 (1968), a peace officer must have reasonable, articulable suspicion of criminal activity in order to stop and detain an individual. The holding in *Terry* is codified in Delaware law under 11 *Del. C.* §1902(a). Pursuant to Section 1902(a), "[a] peace officer may

stop any person abroad, or in a public place, who the officer has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand the person's name, address, business abroad and destination." The Delaware Supreme Court has held that "reasonable grounds" as used in Section 1902(a) has the same meaning as reasonable and articulable suspicion. *Jones v. State*, 745 A.2d 856, 861 (Del. Supr. 1999). A determination as to reasonable, articulable suspicion must be evaluated in the context of the totality of the circumstances tests. *See United States v Cortez*, 449 U.S. 411, 417-418 (1981). Under this test, an officer must "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Coleman v. State*, 562 A.2d 1171, 1174 (Del. Supr. 1989) (quoting *Terry*, 392 U.S. at 21).

5. In this case, Wilmington Police had been told by confidential informants that a dark-skinned black make subject estimated to be in his forties who went by the name [redacted] was distributing heroin and cocaine from his vehicle. They set up a controlled buy between a cooperating defendant and [redacted]. Officers observed a black male operating a g[redacted] bearing [redacted] registration [redacted] No further description of [redacted] is given. Ultimately Wilmington Police obtain a warrant to search the [redacted] bearing

[redacted] registration [redacted] Five days after obtaining this search warrant Wilmington Police officers observed the [redacted] operating in the Hilltop area of Wilmington. They observe an African-American male "matching the provided the description of [redacted] operating the vehicle. Nevertheless, the description given by the confidential sources and the cooperating defendant is nothing more than a dark-skinned black make estimated to be in his forties.

6. "When an officer detains an individual based on a third party's description of the suspect, courts must evaluate several factors to determine whether the officer had reasonable suspicion to stop the particular individual." *Commonwealth v. McClure*, 2002 WL 34351935, at p.3 (Pa.Com.Pl. 2002), *citing Commonwealth v. Jackson*, 519 A.2d 427, 430 (Pa.Super. 1986). "Of these factors, specificity of the description is most important." *Id.* In this case, police officers had a rather vague description (dark-skinned black male subject estimated to be in his forties) of the person that their confidential sources referred to as [redacted] If the description relied upon by the detaining officer is overly general, meaning it could apply to a relatively large group, similarities between the description and the individual detained are insufficient to establish reasonable suspicion. *McClure, Id.* Furthermore, the fact that the individual who loosely matched the description given by the

confidential sources, was taken into custody as he attempted to enter a vehicle for which the police *may* have probable cause to search does not *ipso facto* create reasonable suspicion that this person is involved in criminal activity. Probable cause to search a place and probable cause to arrest are not fungible legal concepts and each involves a distinctly separate inquiry. *Dorsey v. State*, 761 A.2d at 812. "The focus of probable cause to search is upon a place, *i.e.*, whether contraband or evidence will be found in a particular location. The focus of probable cause to arrest is upon a person, *i.e.*, whether a criminal offense has been or is being committed by the person being arrested." *Id.* The fact that [redacted] shares some of the physical characteristics of the person described by the confidential sources as [redacted] and is attempting to enter a vehicle which police believe was involved in the distribution of narcotics, is insufficient evidence to support a finding of reasonable articulable suspicion sufficient to take [redacted] into custody as he attempted to enter the [redacted] on April 25, 2018. *See, e.g. Jones v. State*, 745 A.2d 856 (Del. 1999) (where "911 call reports a suspicious black male wearing a blue coat standing in front of 98 Karlyn Drive, police observation of the defendant, a black male wearing a blue coat standing in front of 85 Karlyn Drive, was insufficient evidence to establish probable cause to arrest").

b. The Search of the Residence at [redacted]

7. Delaware follows a "four corners "test for probable cause in review search warrant applications. Accordingly, sufficient facts must appear on the face of the affidavit so that an appellate court can verify the factual basis for the judicial officer's determination regarding the existence of probably cause. *Pierson v. State*, 338 A.2d 571, 573 (Del. 1975). The affidavit in support of the search warrants must set forth facts adequate for a neutral judicial officer to form a reasonable belief that an offense has been committed and that seizeable property will be found in a particular place or on a particular person. See 11 *Del.C.* Section 2306; *Edwards v. State*, 320 A.2d, 701, 703 (1974); *Wilson v. State*, 314 A.2d 905,906-07 (Del. 1973). Probable cause to search the residence at [redacted] exists if the affidavit sets forth facts that would permit an impartial judicial officer to reasonably conclude that the items sought would be found in that location. In determining whether probable cause has been demonstrated, there must be a logical nexus between the items sought and the place to be searched. *Dorsey v. State*, 761 A.2d 807, 811 (Del. 2000) citing *Hooks v. State*, 416 A.2d 189, 203 (Del. 1980). The information set forth within the affidavit's four corners, and any logical inferences from the specific facts alleged, must demonstrate why it was objectively reasonable for the police to

expect to find the items sought in those locations. *Dorsey*, 761 A.2d at 811-12.

8. In this case neither the confidential informants nor the cooperating defendant alleged that Dew ever sold controlled substances or possessed firearms anywhere other than Dew's motor vehicle. This intelligence was confirmed when the cooperating defendant arranged a controlled buy with [redacted] which was consummated in a motor vehicle operated by [redacted] When the Wilmington Police located the [redacted] in the [redacted] five days later, they were unable to observe the residence where its operator went to and came from. Only when the defendant was arrested and a DELJIS inquiry was conducted did the police learn that the defendant resided at [redacted]; nevertheless the police did not know which of the apartments located at [redacted] was the defendant's. That knowledge was acquired only when the Wilmington Police took the keys seized from the defendant and tested them in the door locks on the doors to the residences located in that building.

9. It is noteworthy that the door lock to the defendant's residence is protected by the Fourth Amendment to the United States Constitution and the act of testing a key in that lock constitutes a search. *See, United States v. Bain*, 874 F.3d 1 (C.A. 1 2017). Accordingly, the warrantless search of that door lock is unreasonable under the Fourth Amendment and any

subsequent search of the defendant's residence is fruit of that unlawful search which should be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963).

10. Additionally, in this case the warrant affidavit for the residence at [redacted] did not present the issuing magistrate with a substantial basis for finding probable cause to search the defendant's residence. The factual information and police expert statements in the affidavit were inadequate to establish an evidentiary nexus between the evidence of drug sales that Wilmington Police hoped to find and the defendant's residence. *State v. Cannon*, 2007 WL 1849022, *5, Ableman, J. (Del.Super. June 27, 2007). Police did not conduct a controlled buy from [redacted] The defendant was never observed leaving or entering his residence, let alone with a bag or anything else that would suggest he was bringing evidence or contraband to or from his home. To the extent he interacted with either of the confidential informants or the cooperating defendant, it never occurred at [redacted] Absent this nexus between the criminal activity and the residence to be searched, no warrant should have been issued. The fruits of the search of the residence should be suppressed.

WHEREFORE, the Defendant, [redacted], respectfully requests that this Court enter an Order suppressing from evidence, all items seized, and all statements made, as a result

of the illegal searches and seizure on April 25, 2018, and such other relief that the Court deems appropriate.

KEVIN J. O'CONNELL (2326)
Assistant Public Defender
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801
(302) 577-5144

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE)
)
)
)
)
v.)
) I.D. [redacted]
[redacted])
)
)
)
Defendant.)

O R D E R

AND NOW, TO WIT, this _____day of _____, 2018, the foregoing Motion having been heard and considered, it is hereby;

ORDERED_____

_____

_____

_____

_____

_____
JUDGE

IN THE SUPERIOR COURT OF THE STATE DELAWARE

STATE OF DELAWARE,	)	
	)	
	)	
V.	)	I.D. NO. [redacted]
	)	
[redacted]	)	
Defendant.	)	

NOTICE OF STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS

TO: Kevin J. O'Connell, Esquire
820 North French Street, Third Floor
Wilmington, DE 19801

PLEASE TAKE NOTICE that the within Response to Defendant's Motion to Suppress will be presented to the Court prior to trial.

William H. Leonard (Bar I.D. 6175)
Deputy Attorney General
Department of Justice
820 North French Street
Wilmington, DE 19801
(302)577-8500

Date: [redacted]

IN THE SUPERIOR COURT OF STATE OF DELAWARE

STATE OF DELAWARE	)	
	)	
v.	)	
	)	
[redacted]	)	I.D. No [redacted]
	)	
Defendant.	)	

STATE'S ANSWER TO DEFENDANT'S MOTION TO SUPPRESS

COMES NOW, the State of Delaware, by and through its Deputy Attorney General William H. Leonard, and moves this Honorable Court, to deny Defendant's Motion to Suppress. In support thereof, the State presents the following:

NATURE AND STAGE OF PROCEEDINGS

On [redacted], a grand jury returned a re-indictment against Defendant, charging him with three counts of Possession of a Firearm by a Person Prohibited, Possession of Ammunition by a Person Prohibited, Drug Dealing, Aggravated Possession, Resisting Arrest with Force or Violence, two counts of Possession of a Firearm During the Commission of a Felony, and two counts of Possession of Drug Paraphernalia. On [redacted], Defendant filed a Motion to Suppress ("the Motion"), seeking to suppress evidence seized from his

person and evidence seized from an apartment at [redacted] in Wilmington, Delaware.[1]

FACTS

Beginning in [redacted] officers of the Wilmington Police Department (WPD) received information regarding [redacted] During the [redacted], a past proven reliable confidential informant told police that [redacted] istributed heroin and cocaine from his vehicle. The confidential informant also told police that [redacted] typically carries firearms on his person and in his vehicle. During [redacted], a second past proven confidential informant provided similar information to police. The second confidential informant told police that [redacted] distributed heroin and cocaine from his vehicle in Wilmington. The second confidential informant also told police that [redacted] often changed vehicles and kept a firearm on his person. During [redacted], a third confidential informant corroborated information provided the other two informants. The third confidential informant told police that [redacted] distributed heroin and cocaine from a [redacted] bearing an unknown Delaware temporary registration. The third confidential informant told police that [redacted] carried a firearm on his person.

[1] Defendant makes no argument that evidence seized from Defendant's [redacted] should be suppressed.

Based on information provided by the informants, police utilized the third confidential informant, who is also a cooperating defendant, to conduct a controlled buy [redacted]. Prior to the controlled buy, police checked the cooperating defendant for contraband and currency, and police provided the cooperating defendant with departmentally issued buy money. Police instructed the cooperating defendant to contact [redacted] for the purpose of purchasing [redacted]. Police maintained constant visual surveillance on the cooperating defendant as he met with the driver of a [redacted] bearing a [redacted] to complete the buy. As the exchange took place, Detective [redacted] observed Defendant to be the only person seated in the [redacted] approached by the cooperating defendant. Following the exchange between Defendant and the cooperating defendant, police maintained visual surveillance on the cooperating defendant until he met with police at a predetermined location. At that point, the cooperating defendant provided police with a white rocky substance that field tested positive for cocaine. The cooperating defendant told police that [redacted] sold the cocaine to him.

Based on the information provided by the informants and the controlled buy, on April 20, 2018, [redacted] drafted a search warrant to search the [redacted] bearing registration number [redacted]. Detective

[redacted] swore to the warrant before a magistrate of Justice of the Peace Court 20, and the magistrate signed off on the warrant.

On [redacted], police prepared to execute the search warrant on the Camry. Police observed the [redacted] travel in Wilmington and maintained surveillance. Police observed the [redacted] park in a parking lot near the [redacted]. Police observed Defendant exit the [redacted] and enter a residence at [redacted] Police observed Defendant exit the residence and walk back to the [redacted]. Officer [redacted] identified Defendant as the person he observed conduct the controlled buy with the cooperating defendant. As Defendant attempted to enter the [redacted], police approached him in an effort to detain Defendant while they searched the [redacted] Defendant actively resisted, struck [redacted] Cannon deployed a taser, causing Defendant to fall to the ground. While taking Defendant into custody, Detective [redacted] observed a black handgun in Defendant's waistband. Detective [redacted] removed the firearm and tossed it on the ground as Defendant continued to resist.[2] Police later determined that the firearm was loaded with 16 rounds, including one in the chamber.

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[2] In the Motion, Defendant suggests that Detective [redacted] provided two different accounts as to the firearm on Defendant's person. This is explainable. When Detective Wilkers first arrived, he observed the firearm on the ground. At that point, without further information, Detective [redacted] believed Defendant tossed

A search of Defendant's person yielded $1,400 in various denominations, five grams of a green plant like substance that field tested positive for marijuana, a set of house keys, and two black cell phones.

A search of the [redacted] yielded a large quantity of a white rocky substance consistent with cocaine.

Police utilized the keys recovered from Defendant's person to check the locks of various apartments contained in [redacted] The key unlocked one of the apartments. Police conducted a protective sweep and subsequently secured a search warrant to search the apartment. Prior to obtaining the warrant, the leaseholder of the apartment appeared. The leaseholder consented to police searching the apartment (Exhibit A). The leaseholder told police [redacted] Further, the leaseholder said that Defendant has a key to the apartment, is frequently there, and keeps belongings there. Inside the apartment, police recovered two additional firearms, additional ammunition, additional cocaine, pink food coloring, baking soda, and documents belonging to Defendant.

During a *Mirandized* interview, Defendant told police that all of the drug evidence belonged to him. Defendant confirmed that he used items found in the

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the gun as he resisted. Detective [redacted] later learned that [redacted] Cannon removed the firearm from Defendant's waistband and tossed it away from Defendant during the struggle.

kitchen to manufacture cocaine. Defendant told police that he purchased the firearm found on his person several years ago, and that he knows he is prohibited from possessing a firearm.

ARGUMENT

I. POLICE LAWFULLY SEIZED DEFENDANT.

Defendant argues that police lacked authority to seize him. Police derived authority to seize Defendant from two sources. First, police had authority to detain Defendant while police executed the search warrant on the [redacted] Second, and in the alternative, police had authority to arrest Defendant based on probable cause that Defendant previously committed drug dealing.

A. Police had authority to detain Defendant while searching the [redacted]

Detentions incident to the execution of a search warrant are reasonable under the Fourth Amendment because the limited intrusion on personal liberty is outweighed by the special law enforcement interests at stake.[3] In *Michigan v. Summers*, the United States Supreme Court held that a warrant to search for contraband founded on probable cause implicitly carries with it the limited

[3] *Bailey v. United States*, 568 U.S. 186, 202 (2013).

authority to detain the occupants of the premises while a proper search is conducted.[4] The Court reasoned:

> In assessing the justification for detention of an occupant of premises being searched for contraband pursuant to a valid warrant, both the law enforcement interest and the nature of the "articulable facts" supporting detention are relevant. Most obvious is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found. Less obvious, but sometimes of greater importance, is the interest in minimizing the risk of harm to the officers.... [T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.[5]

The *Summers* holding permits detention of individuals during the execution of a search warrant within a home. In *Hovington*, the Delaware Supreme Court extended the *Summers* holding to the execution of a warrant to arrest someone for a narcotics violation outside of a home.[6] In *Downs*, the Delaware Supreme Court held that police have authority to forcibly stop and detain a person if they have a reasonable suspicion that a vehicle or its occupants are subject to seizure for violation of the law.[7]

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[4] 452 U.S. 692, 705 (1981). *See Bailey*, 568 U.S. 186 (officer's detention of occupants of premises during a search warrant of premises limited to individuals in immediate vicinity of premises being searched).
[5] *Id.* at 702.
[6] 616 A.2d 829, 832 (Del. 1992).
[7] 570 A.2d 1142, 1145 (Del. 1990) (citing *Delaware v. Prouse*, 440 U.S. 648, 663 (1979)). *See Howard v. State*, 2007 WL 231001, at *2 (Del. Aug. 14, 2017) (police justified in making stop, detaining Defendant and searching Defendant's

Here, police possessed a signed search warrant to search Defendant's [redacted] for narcotics. In preparing to execute the warrant, police observed Defendant exit the [redacted] and later attempt to reenter the [redacted] At the point of Defendant's attempted reentry, police attempted to detain Defendant prior to executing the search warrant. Defendant's detention here served the interests set forth in *Summers*. At the point police attempted to detain Defendant, Defendant was in the immediate vicinity of the vehicle subject to the search warrant. Defendant's detention prevented him from fleeing in the event that police found incriminating evidence in his vehicle, and minimized the risk of harm to police officers. Police had a reason to be concerned about safety given the information provided by multiple sources that Defendant kept a firearm on his person and in his vehicle. Moreover, under *Downs*, because Defendant attempted to enter the vehicle subject to the search warrant, police had authority to forcibly stop and detain Defendant.

B. Police possessed probable cause to arrest Defendant in connection with the controlled buy that occurred [redacted]

Defendant argues that police lacked reasonable articulable suspicion to detain Defendant given the vague description of Defendant provided to police by the confidential informants. Nonetheless, Officer [redacted] observed Defendant engage in a controlled buy with the cooperating defendant two weeks prior to

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car where police had probable cause to believe the vehicle contained evidence of criminal activity).

police executing the search warrant on the [redacted] Accordingly, police not only had reasonable articulable suspicion to stop Defendant, but also had probable cause to arrest Defendant for drug dealing.

Under 11 *Del. C.* § 1904(b)(1), police may make an arrest without a warrant where "the officer has reasonable ground to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed."[8] The Court has interpreted "reasonable ground to believe" as the legal equivalent of probable cause.[9] Probable cause is a "practical, nontechnical concept" that must be measured by the totality of the circumstances.[10] Generally, it lies "somewhere between suspicion and sufficient evidence to convict."[11] *United States v. Kellam* is instructive here. In *Kellam*, the court found probable cause to arrest Kellam where the arresting officer previously observed Defendant sell drugs to a confidential informant.[12] Further, the court held that the probable cause did not dissipate because several weeks passed between the last controlled buy and the arrest.[13] Here, like in *Kellam*, police utilized a cooperating defendant to conduct a controlled buy of cocaine from Defendant. On the day of the controlled buy,

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[8] *Ortiz v. State*, 2004 WL 2741185, at *2 (Del. Nov. 16, 2004).
[9] *Id.* (citations omitted).
[10] *Id.*
[11] *Id.*
[12] *United States v. Kellam*, 2015 WL 6560637, at *5 (M.D. Pa. Oct. 29, 2015)
[13] *Id.*

Officer [redacted] observed the cooperating defendant enter Defendant's [redacted] for the purpose of purchasing cocaine. At that time, Officer [redacted] observed Defendant to be the only person in the [redacted] and seated in the driver's seat. After the controlled buy occurred, the cooperating defendant met with members of WPD and provided the cocaine he purchased from Defendant. As a result of Officer Schupp's observation, police possessed probable cause to arrest Defendant for drug dealing pursuant to 11 *Del. C.* 1904(b)(2).

II. POLICE SEARCHED [redacted] PURSUANT TO VALID CONSENT.

Defendant argues that evidence recovered from [redacted] (the apartment) is inadmissible for two reasons. First, Defendant argues that evidence seized from the house is fruit of an unlawful search that occurred when police checked the locks of apartments within [redacted] Second, Defendant argues that police failed to provide the magistrate with a substantial basis to find probable cause to search the apartment. The Court need not reach these issues, because police recovered evidence from the apartment pursuant to valid consent.

Generally, the police must have a warrant to conduct a search unless it falls within one of the exceptions to the warrant requirement.[14] A recognized exception to the warrant requirement is for searches conducted pursuant to valid consent.[15] To be valid, a consent to search must be voluntary and the person giving such consent must have the authority to do so.[16] Third party authority to consent to a search must include both possession and equal or greater control, *vis-à-vis* the owner, over the area to be searched.[17] The consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom the authority is shared.[18]

Here, prior to police obtaining the search warrant, [redacted] the leaseholder of the searched apartment, provided voluntary consent to search the apartment by signing a WPD Authorization to Search and Seize Property Form (Exhibit A). As the leaseholder, [redacted] had authority to provide such consent. Further, assuming Defendant had common authority over the apartment with the leaseholder, the leaseholder's consent is still valid. Accordingly, evidence seized from the apartment is admissible.

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[14] *State v. Hunter*, 2000 WL 710103, at *2 (Del. 2000) (citing *Katz v. United States,* 389 U.S. 347, 357 (1967)).
[15] *Scott v. State*, 672 A.2d 550, 552 (Del. 1996).
[16] *Id.* (citations omitted).
[17] *Id.* (citing *Ledda v. State*, 564 A.2d, 1125, 1128 (1989).
[18] *United States v. Matlock*, 415 U.S. 165, 169 (1974).

CONCLUSION

Based on the foregoing, evidence seized from Defendant's person and from [redacted] is admissible, and the Court should **DENY** Defendant's Motion to Suppress.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

William H. Leonard (Bar I.D. 6175)
Deputy Attorney General
820 N. French Street
Carvel State Building, 7th Floor
Wilmington, DE 19801

DATE:

Cc: Criminal Prothonotary
File

IN THE SUPERIOR COURT OF STATE OF DELAWARE

STATE OF DELAWARE	)	
	)	
v.	)	
	)	
[redacted]	)	I.D. No. [redacted]
	)	
Defendant.	)	

ORDER

SO ORDERED this____day of_____, [redacted] the Defendant's Motion to Suppress is hereby **DENIED.**

_____

_____

_____

_____

_____

[redacted]

Judge, Delaware Superior Court

IN THE SUPERIOR COURT OF STATE OF DELAWARE

STATE OF DELAWARE	)
	)
v.	)
	)
[redacted]	) [redacted]
Defendant.	)

CERTIFICATE OF SERVICE

The undersigned Deputy Attorney General of the State of Delaware hereby certifies that two (2) copies of the attached Answer to Defendant's Motion to Suppress were served by mail and electronic mail on:

Kevin J. O'Connell, Esquire
820 North French Street, Third Floor
Wilmington, DE 19801
kevin.oconnell@state.de.us

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

WHL

William H. Leonard (Bar I.D. 6175)
Deputy Attorney General
Carvel State Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

DATE: [redacted]

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	
	)	
v.	)	
	)	I.D. # 1701011552
	)	
JAMES SCHNADER,	)	
	)	
Defendant.	)	

Motion *in limine* for sanctions pursuant to *Deberry v. State* and *Lolly v. State*

Comes now the defendant, James Schnader, by and through his undersigned counsel, who moves this Court for an Order *in limine*, imposing sanctions under *Deberry v. State*, and *Lolly v. State*, for the failure of the Wilmington Police to preserve potentially exculpatory evidence for the defense pursuant to *Brady v. Maryland*. In support of this motion, defendant states the following:

Factual Background

1. The defendant has been charged by the grand jury with Burglary, Second Degree, Theft and Criminal Mischief which is alleged to have taken place sometime between 8:30 a.m. and 8:00 p.m. on January 5, 2017, in the City of Wilmington. According to reports from the Wilmington Police, officers responded to 711 S. Broom Street at approximately 8:20 p.m. Upon arrival the police made contact with the victim, Martin Lenhardt, a

Wilmington Police Officer, who advised that he discovered that property was missing from his residence when he returned from work at 8:00 p.m. Upon a canvas of the residence he discovered that the point of entry for the perpetrator(s)was a second floor rear balcony door that had been forced open. Upon further examination of the scene police discovered "a substance that appeared to be blood" located on the interior side of the point of entry, as well as on some gift wrapping paper located in the living room. An evidence detection officer of the Wilmington Police swabbed the apparent blood and the wrapping paper was secured as well. There is no indication that the police did anything else with this apparent blood evidence.

Legal Argument

1. The State is required to preserve evidence that may be material to a defendants' guilt or innocence. *Lolly v. State*, 611 A.2d 956, 959 (Del.1992). "A *Lolly* missing evidence instruction, advising the jury that it must infer that the missing evidence would have been exculpatory to the defense, is required as a matter of due process under the Delaware Constitution when the Court determines from the totality of the circumstances that the State must bear responsibility for the loss of evidence." *Lunnon v. State*, 710 A.2d 197, 199 n. 1 (Del. 1998) *citing Lolly v. State*, 611 A.2d at 960-61.

The Delaware Supreme Court has held that such claims must be analyzed with the following questions: 1) Would the requested material, if extant in the possession of the State at the time of the defense request, have been subject to disclosure under Criminal Rule 16 or *Brady*?; 2) If so, did the government have a duty to preserve the material?; and 3) If there was a duty to preserve, was the duty breached, and what consequences should flow from a breach? The third question is determined in accordance with a separate three-part analysis which considers: 1) the degree of negligence or bad faith involved; 2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and 3) the sufficiency of the other evidence produced at the trial to sustain the conviction. *State v. Adgate*, 2014 Del.Super.LEXIS 335, *9, 2014 WL 3317968 (Del. Super. Ct. July 7, 2014).

2. The Wilmington Police had no witnesses to the alleged burglary of 711 S. Broom Street. The blood evidence found at the point of entry and on the gift wrap could have been used to ascertain the identity of the perpetrator of this offense, or, importantly, exculpate James Schnader from his current charges. Nevertheless, no testing was ever performed on the evidence seized. Accordingly, the jury in this case should be instructed as follows:

In this case the Court has determined that the State failed to test certain evidence which is material to the defense. The failure of the State to test such evidence entitles the defendant to an inference that if such evidence were available at trial it would be exculpatory. This means that, for purposes of deciding this case, you are to assume that the missing evidence, had it been collected, would not have incriminated the defendant and would have tended to prove the defendant not guilty. The inference does not necessarily establish the defendant's innocence, however. If there is other evidence presented which establishes the fact or resolves the issue to which the missing evidence was material, you must weigh that evidence along with the inference. Nevertheless, despite the inference concerning missing evidence, if you conclude after examining all the evidence that the State has proven beyond a reasonable doubt all elements of the offenses(s) charged, you would be justified in returning a verdict of guilty.
Lolly v. State, 611 A.2d at 962, n.6 (1992).

Kevin O'Connell
Assistant Public Defender

SUPERIOR COURT PLEA AGREEMENT

State of Delaware v.

Case No(s):

C.A. No(s):

HABITUAL OFFENDER ELIGIBLE, Title 11 ☐ §4214(a) ☐ §4214(b) BOOT CAMP DIVERSION ELIGIBLE:

☐ Title 16, §4751B – Prior qualifying Title 16 convictions

☐ Title 21:

☐ School Teacher or Administrator convicted of a crime as described in Title 11, §4101(e)

☐ Title 11, §4120, §4121 – Sex offender registration required ☐ DUI ☐ BAC: ☐ No BAC

☐ Title 11, §4336 –Sex offender notification required

DEFENDANT WILL PLEAD:

Count	C.A. No.	Charge (if LIO, indicate and include applicable citation)

Upon the sentencing of the defendant, a *nolle prosequi* is entered on:

☐ all remaining charges on ☐ the following charges:

SENTENCE: State and Defendant request ☐ PSI ☐ Immediate Sentencing

Recommendation/Agreement:

State and Defendant agree to the following:

☐ Restitution:

☐ No contact with

☐ Other Conditions:

Is this one page the complete Plea Agreement?

☐ I accept this Plea Agreement.

DAG _____ print name

_____ signature

Date _____

DEF. COUNSEL _____ print name

_____ signature date

DEFENDANT _____ signature date

☐ I have reviewed this offer with counsel, have chosen not to accept this offer and understand that this offer will remain open until and may not be extended again.

DEFENDANT _____ signature date

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IMMEDIATE SENTENCING FORM

State of Delaware v. **Case No(s):**

DEPARTMENT OF JUSTICE RECORDS INDICATE THE FOLLOWING CONVICTIONS SINCE 1988:

Prior violent (Title 11, §4201(c)) felonies (Specify crime and year of conviction):

Prior non-violent (Title 11, §4201(c)) felonies (Specify crime and year of conviction):

Prior misdemeanors (Specify crime and year of conviction):

Relevant Juvenile Adjudications (specify adjudication and year of adjudication):

Was the Defendant on Superior Court probation at the time of the crime?	☐ Yes ☐ No
Was the crime committed while the Defendant was pending trial/sentencing in Delaware?	☐ Yes ☐ No ☐ Unknown
Will this plea result in an enhanced penalty and/or a minimum mandatory penalty?	☐ Yes ☐ No

Deputy Attorney General *Print name* *Date*

TO BE COMPLETED BY DEFENDANT:

Have you previously been declared a §4214 habitual offender?	☐ Yes ☐ No
Do you agree that the State's description of your criminal record is correct?	☐ Yes ☐ No
If no, explain your disagreement.	
Do you have any felony convictions, since 1988, in addition to those listed above?	☐ Yes ☐ No
Was the crime in this case committed while you were released on bail?	☐ Yes ☐ No
Was the crime in this case committed while you were on probation?	☐ Yes ☐ No
If yes, what court and probation level?	
Are you a school teacher or administrator?	☐ Yes ☐ No
Have you been sentenced to, or participated in, a substance abuse program before?	☐ Yes ☐ No
Describe program(s).	

Any false statements made on this paper are punishable under 11 Del. C. §1233.

Defendant *Print name* *Date*

Selection of Delaware Rules of Criminal Procedure

Court of Common Pleas Cr. R. 5.1. Preliminary hearing

(a) Probable cause finding. -- If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the defendant shall be bound over for the grand jury. The finding of probable cause may be based in whole or in part upon credible hearsay evidence. The defendant may cross-examine witnesses and may, subject to reasonable limitations imposed by the Court, introduce evidence in defendant's behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary hearing, but evidence thereof may, subject to the discretion of the Court, be heard for the purpose of determining the weight to be afforded such evidence. Motions to suppress must be made to the trial court as provided in Superior Court Criminal Rule 12.

(b) Discharge of defendant. -- If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the complaint shall be dismissed and the defendant discharged. The discharge of the defendant shall not preclude the State from instituting a subsequent prosecution for the same offense.

(c) Transmittal of documents. -- After the proceeding is concluded, all papers in the proceeding and any bail taken shall be transmitted forthwith to the prothonotary of the proper county.

(d) Production of statements.

> (1) In general. -- Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case.
>
> (2) Sanctions for failure to produce statement. -- If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to a moving party, the court may not consider the testimony of a witness whose statement is withheld.

Court of Common Pleas Cr. R. 26.2. Production of statements of witnesses

(a) Motion for production. -- After a witness other than the defendant has testified on direct examination, the Court, on motion of a party who did not call the witness, shall order the Attorney General or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified. For purposes of the application of this subdivision at a hearing on a motion to suppress evidence under Rule 12 (b)(3), a law enforcement officer shall be deemed a witness called by the State.

(b) Production of entire statement. -- If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the Court shall order that the statement be delivered to the moving party.

(c) Production of excised statement. -- If the other party claims that the statement contains privileged information or matter that does not relate to the subject matter concerning which the witness has testified, the Court shall order that it be delivered to the Court in camera. Upon inspection, the Court shall excise the portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection shall be preserved by the Attorney General, and, in the event of a conviction and an appeal by the defendant, shall be made available to the Superior Court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) Recess for examination of statement. -- Upon delivery of the statement to the moving party, the Court, upon application of that party, may recess the proceedings for the examination of such statement and for preparation for its use in the proceedings.

(e) Sanction for failure to produce statement. -- If the other party elects not to comply with an order to deliver a statement to the moving party at a trial, the Court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the Attorney General who elects not to comply, shall declare a mistrial if required by the interest of justice. If the other party elects not to comply at an evidentiary hearing, the Court shall not consider the affidavit or testimony of the witness.

(f) Definition. -- As used in this rule, a "statement" of a witness means:

(1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness;

(2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) A statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

(g) Scope of rule. -- This rule shall apply at trials and evidentiary hearings in criminal proceedings.

Super. C. Crim. R. 7. The indictment and the information

(a) Use of indictment or information.

(1) In general. -- An offense which may be punished by death shall be prosecuted by indictment. An offense within the exclusive jurisdiction of Superior Court other than a capital crime shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(2) Transfer cases. -- The prosecution shall proceed on the information filed in the Court of Common Pleas.

(3) Appeals de novo. -- The prosecution shall proceed on a new information filed in Superior Court charging substantially the same offense as charged by the complaint or information in the court below.

(b) Waiver of indictment. -- An offense within the exclusive jurisdiction of Superior Court other than a capital crime may be prosecuted by information if the defendant, after having been advised of the nature of the charge and of the rights of the defendant, waives in writing or in open court prosecution by indictment.

(c) Nature and contents.

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

(2) Harmless error. -- Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

(d) Surplusage. -- The court on motion of the defendant may strike surplusage from the indictment or information.

(e) Amendment. -- The court may permit an indictment or an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) Bill of particulars. -- The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or

at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Super. C. Crim. R. 11. Pleas

(a) Alternatives.

(1) In general. -- A defendant may plead not guilty, guilty, nolo contendere, or guilty but mentally ill. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) Conditional pleas. -- [Omitted].

(b) Nolo contendere; guilty without admission. -- A defendant may plead nolo contendere or guilty without admitting the essential facts constituting the offense charged only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to defendant. -- No plea of guilty or nolo contendere shall be accepted to a class B misdemeanor, an unclassified misdemeanor or a violation for which no sentence of imprisonment will be imposed unless the court is satisfied that the defendant understands the nature of the charge and the maximum possible penalty provided by law. Before accepting a plea of guilty or nolo contendere to a felony or a class A misdemeanor, or to any other offense for which a sentence of imprisonment will be imposed, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) If the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) That the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury, when applicable, and at trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) That if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) If the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring that the plea is voluntary. -- The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney general and the defendant or the defendant's attorney.

(e) Plea agreement procedure.

(1) In general. -- The attorney general and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney general will do any of the following:

(A) File a dismissal of other charges; or

(B) Make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court.

The prosecuting attorney shall comply with 11 Del. C. § 5106.

(2) Notice of such agreement. -- If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Time of plea agreement procedure. -- Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(4) Inadmissibility of pleas, plea discussions, and related statements. -- Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or

criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) A plea of guilty which was later withdrawn;

(B) A plea of nolo contendere;

(C) Any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) Any statement made in the course of plea discussions with the attorney general which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, a judgment of conviction upon a plea of guilty or nolo contendere may be admissible in any proceeding, and a statement under (C) or (D) of this paragraph is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining accuracy of plea. -- Notwithstanding the acceptance of a plea of guilty or nolo contendere, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the judgment.

(g) Record of proceedings. -- A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea. The record shall also include a completed and executed plea agreement and a completed and executed waiver of rights on forms approved by the court.

(h) Harmless error. -- Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

(i) Guilty but mentally ill. -- A plea of guilty but mentally ill shall be accepted when the requirements of this rule applicable to a plea of guilty are met and the court finds that the defendant was mentally ill at the time of the offense, in accordance with 11 Del. C. § 408.

Super. C. Crim. R. 12. Pleadings and motions before trial; defenses and objections

(a) Pleadings and motions. -- Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty, nolo contendere, and guilty but mentally ill. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) Pretrial motions. -- Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Motions to compel discovery under Rule 16; or

(5) Motions for severance of charges or defendants under Rule 14.

(c) Motion date. -- The court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.

(d) Notice by the state of the intention to use evidence. -- [Omitted].

(e) Ruling on motion; certification for appeal. -- A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record. Within 30 days of the entry of an order suppressing evidence before trial, the attorney general may present to the judge who entered the order a certification for appeal and a proposed order, in accordance with 10 Del. C. § 9902(b).

(f) Effect of failure to raise defenses or objections. -- Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

(g) Records. -- A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.

(h) Effect of determination. -- If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information.

Nothing in this rule shall be deemed to affect the provisions of any statute relating to periods of limitations.

Super. C. Crim. R. 12.2. Notice of insanity defense or expert testimony of defendant's mental condition

(a) Defense of insanity. -- If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney general in writing of such intention and file a copy of such notice with the prothonotary. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) Expert testimony of defendant's mental condition. -- If a defendant intends to introduce expert testimony relating to a mental illness, defect, psychiatric disorder or any other mental or emotional condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney general in writing of such intention and file a copy of such notice with the prothonotary. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Mental examination of defendant. -- In an appropriate case the court may, upon motion of the attorney general, order the defendant to submit to an examination. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental or emotional condition on which the defendant has introduced testimony.

(d) Failure to comply. -- If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.

(e) Inadmissibility of withdrawn intention. -- Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Super. C. Crim. R. 16. Discovery and inspection

(a) Disclosure of evidence by the state.

(1) Information subject to disclosure.

(A) Statement of defendant. -- Upon request of a defendant the state shall disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant or a codefendant (whether or not charged as a principal, accomplice or accessory in the same or in a separate proceeding), or copies thereof, within the possession, custody, or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the attorney general; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a state agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The state shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a state agent if the state intends to use that statement at trial. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of that testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved.

(B) Defendant's prior record. -- Upon request of the defendant, the state shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the attorney general.

(C) Documents and tangible objects. -- Upon request of the defendant the state shall permit the defendant to inspect and copy or photograph books,

papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defendant's defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of examinations and tests. -- Upon request of a defendant the state shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the state, and which are material to the preparation of the defense or are intended for use by the state as evidence in chief at the trial.

(E) Expert witnesses. -- Upon request of a defendant, the state shall disclose to the defendant any evidence which the state may present at trial under Rules 702, 703, or 705 of the Delaware Uniform Rules of Evidence. This disclosure shall be in the form of a written response that includes the identity of the witness and the substance of the opinions to be expressed.

(2) Information not subject to disclosure. -- Except as provided in paragraphs (A), (B), (D) and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the attorney general or other state agents in connection with the investigation or prosecution of the case, or of statements by state witnesses or prospective state witnesses.

(3) Grand jury transcripts. -- Except as provided in Rules 6 and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

(b) Disclosure of evidence by the defendant.

(1) Information subject to disclosure.

(A) Documents and tangible objects. -- If the defendant requests disclosure under subdivision (a)(1)(C), (D) or (E) of this rule, upon compliance with such request by the state, the defendant, on request of the state, shall permit the state to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of examination and tests. -- If the defendant requests disclosure under subdivision (a)(1)(C), (D) or (E) of this rule, upon compliance with

such request by the state, the defendant, on request of the state, shall permit the state to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(C) Expert witnesses. -- If the defendant requests disclosure under subdivision (a)(1)(E) of this rule, upon compliance with the request by the state, the defendant, on request of the state, shall disclose to the state any evidence the defendant may present at trial under Rules 702, 703, or 705 of the Delaware Uniform Rules of Evidence. This disclosure shall be in the form of a written response that includes the identity of the witness and the substance of the opinions to be expressed.

(2) Information not subject to disclosure. -- Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by state or defense witnesses, or by prospective state or defense witnesses, to the defendant, the defendant's agents or attorneys.

(c) Continuing duty to disclose. -- If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.

(d) Regulation of discovery.

(1) Protective and modifying orders. -- Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the Supreme Court in the event of an appeal.

(2) Failure to comply with a request. -- If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. However,

failure of the state to comply with paragraph (B) of subdivision (a)(1) of this rule shall not prohibit the introduction or consideration of a defendant's prior conviction in a sentencing proceeding. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(3) Procedure.

(A) Request. -- The defendant may serve a request under subdivision (a) after the filing of an indictment or information but not later than ten days after arraignment or such other time as ordered by the court. The state may serve a request under subdivision (b) not later than ten days after service on the attorney general of a request by the defendant or such other time as ordered by the court. The request shall set forth the items sought with reasonable particularity and shall specify a reasonable time, place and manner of compliance with the request.

(B) Response. -- The party upon whom the request is served shall serve a response within 20 days after service of the request or at such other time as ordered by the court. The response shall comply with the request or specify any objection to it. The response may specify a reasonable alternative time, place and manner of compliance not later than ten days before trial.

(C) Motion to compel. -- If a party fails to comply with a request the opposing party may move for an order compelling compliance with the request. A motion to compel shall be filed within ten days after the time for response or at such other time as ordered by the court.

(4) Service and filing. -- All requests for discovery under this rule and responses thereto shall be served on other counsel or parties but shall not be filed with the court. In lieu thereof, the party requesting discovery and the party responding shall file with the court a "Notice of Service" certifying that a request or response was served and the date and manner of service. The party responsible for service shall retain custody of the original. In cases involving out-of-state counsel, local counsel shall be the custodian. When a party uses any part of a request or response at trial or in proceedings on a motion, that party shall file it with the court. When a discovery request or anything produced in response to such a request is needed for any reason, the court, on its own motion, on motion by any party, or by stipulation of counsel, shall order the custodian to deliver it to the court. When a party files discovery material with the court other than during trial, the party shall file a notice stating, in no more than one page, the reason for filing the material and setting forth an itemized list thereof.

Super. C. Crim. R. 19. Reverse amenability proceedings

(a) Record. -- When a case is transferred pursuant to 10 Del. C. § 1010, the clerk of the Family Court shall transmit to the prothonotary all papers in the proceeding and any bail taken, and the prosecution shall continue in accordance with these rules.

(b) Reverse amenability. -- Within 30 days of arraignment, a juvenile defendant may petition the Court for a transfer of the case to the Family Court pursuant to 10 Del. C. § 1011(b). An evidentiary hearing shall be held as soon as practicable after the filing of the petition.

(c) Decision on reverse amenability. -- The Court shall render its decision on the petition within 90 days of arraignment consistent with 10 Del. C. § 1011(c)(2).

(d) Extensions. -- The schedule for a decision to be rendered shall not be extended unless the assigned Judge determines that justice or the complexity of the case requires an extension.

(e) Referral to Commissioner. -- In the event of a referral by a Judge to a Commissioner of a reverse amenability petition for proposed findings of fact and recommendations pursuant to Rule 62, the hearing shall be scheduled and the proposed Findings of Fact and Recommendations shall be filed consistent with an expedited schedule to be included within the Order of Reference. In the event of an appeal from the Commissioner's Findings of Fact and Recommendations, the assigned Judge will make a de novo determination within the time allowed by Rule 19(c) and (d).

Super. C. Crim. R. 41. Search and seizure

(a) In general. -- The procedure governing search and seizure shall be as provided by 11 Del. C., c. 23 or other applicable law.

(b) Property or person which may be seized with a warrant. -- [Omitted].

(c) Issuance and contents. -- [Omitted].

(d) Execution and return with inventory. -- [Omitted].

(e) Motion for return of property. -- A person aggrieved by the deprivation of property seized by the police may move the court for the return of the property on the ground that such person is entitled to lawful possession of the property. The motion may be made in the county where criminal proceedings are pending for which the state is holding the property or,

if criminal proceedings are not pending, in the county where the property was seized. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings.

(f) Motion to suppress. -- A motion to suppress evidence may be made in the county of trial as provided in Rule 12. The motion shall set forth the standing of the movant to make the application and shall state the grounds upon which it is made with sufficient specificity to give the state reasonable notice of the issues and to enable the court to determine what proceedings are appropriate to address them. The court shall receive evidence on any issue of fact necessary to the decision of the motion, but the court shall not receive evidence on motions challenging the manner of execution of a search warrant or the veracity of a sworn statement used to procure a search warrant unless the motions are supported by affidavits, or their absence is satisfactorily explained in the motion, and the allegedly false statement is necessary to the finding of probable cause.

(g) Return and filing of papers. -- The committing magistrate or judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith. The committing magistrate shall file them with the clerk of the committing magistrate's court and the judge shall file them with the prothonotary.

(h) Scope and definition. -- [Omitted].

(i) Records. -- The prothonotary shall keep a record of all applications for warrants sought in Superior Court and shall have custody of all original papers in connection therewith.

Super. C. Crim. Rule 48. Dismissal

(a) By attorney general. -- The attorney general may without leave of the court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant or after conviction without leave of the court.

(b) By court. -- If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer in Superior Court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

Trial Practice

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Tasha M. Stevens-Gueh, Esquire graduated from Milford High School (1996), Virginia State University (2000), and Howard University School of Law (2003). She has practiced with Fuqua, Willard, Stevens & Schab, P.A. (or its predecessors) since her 2003 admission to the Delaware Bar. She provides representation primarily in criminal defense, personal injury, civil rights, and general civil litigation and is currently admitted to practice in Delaware's state and federal courts and the United States Supreme Court. She formerly served on the Board of Bar Examiners as an associate member, the Preliminary Investigatory Committee of the Court on the Judiciary, the Permanent Ethics Advisory Committee on the Rules of Professional Conduct and the DSBA Executive Committee. She currently serves on the Court of Chancery Rules Commission.

Erika Flaschner began her career at the Delaware Department of Justice in 2015 in the Misdemeanor Trial Unit. She later transferred to the New Castle County Trial Unit followed by the Wilmington Felony Trial Unit. In 2019, she became the Assistant Supervisor of the Wilmington Felony Trial Unit and in March of 2020, she became the Assistant Supervisor of the Violent Criminal Enterprises Unit. Her caseload currently consists of complex gang and racketeering investigations.

Thomas A. Foley has been practicing law since 1989. His practice is devoted entirely to criminal defense. Mr. Foley, a Fellow of the American College of Trial Lawyers, is licensed in Delaware and the District of Columbia. He is also admitted to practice before the U.S. Court of Appeals for the Third Circuit, and the United States Supreme Court.

Mr. Foley grew up in Rochester, NY. After graduating from Miami University (Ohio) in 1982, Mr. Foley was commissioned as a lieutenant in the United States Marine Corps, serving over 4 years as an infantry officer.

Mr. Foley graduated cum laude from the University of Detroit School of Law in 1989, and began his legal career as a prosecutor with the Delaware Department of Justice. Mr. Foley established his solo private practice in 1995.

Mr. Foley and his family live in Wilmington.

Opening and Closing Arguments

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Mr. Wood is a partner in the Business Litigation and White Collar Defense and Investigations groups of McCarter & English. Before joining that firm, he served for more than 30 years as a Deputy Attorney General with the Department of Justice of the State of Delaware. He was the Department's most senior and experienced trial prosecutor, and as such he represented the State as lead prosecutor in hundreds of jury trials, including dozens of complex homicide cases. He has developed a particular expertise in cases involving psychiatric and other medical or scientific defenses. From 2001 through 2007 he headed the Department's Criminal Division as State Prosecutor. Mr. Wood is a member of the Delaware Supreme Court's Advisory Committee on the Delaware Uniform Rules of Evidence.

Mr. Wood's expertise and accomplishment as a trial lawyer led to his induction as a fellow of the American College of Trial Lawyers. He is one of only 36 Delaware lawyers who has been so honored. Mr. Wood is also an experienced trial advocacy instructor. He is a graduate of the National Institute for Trial Advocacy's (NITA) Teacher Training Program, and he works extensively with NITA as an instructor in its programs all across the United States. Mr. Wood has been a member of the out-of-town faculty at the Emory University School of Law Trial Techniques Program since 1994, and he is also a faculty adjunct at the Rutgers-Camden School of Law's trial advocacy program.

OPENING STATEMENT

The Best Story Wins

Steven P. Wood
McCarter & English
Wilmington, Delaware

WIN YOUR CASE IN OPENING

- First impressions are formed quickly
- First impressions tend to be stable
- Most jurors make up their mind after opening
  - 2006 study: mock capital murder trial: **70%**
  - 2000 study: Arizona Jury Project: **50%**
  - 1993 study: **40%**“no longer neutral”

THE BEST STORY WINS

- The purpose of opening is to give the jury a framework to organize, analyze and remember the evidence.
- Your story must be
  - based on a powerful theme
  - compelling
  - complete
  - credible

WHY THE BEST STORY WINS

- We organize, analyze, and remember new facts using **schemata**.

  "an organized pattern of thought or behavior that organizes categories of information and the relationships among them."

- New information relevant to the **schemata** is interpreted by and incorporated into the **schemata**.

WHY THE BEST STORY WINS

- Information that fits the **schema** is more likely to be noticed.
- **Schemata** have a tendency to remain unchanged, even in the face of contradictory information.
- Information that contradicts the **schema** is often ignored or distorted to fit it.
- New information presented without a **schema** is reorganized and recalled using a **schema** of the listener's design.

THE BEST SCHEMA WINS

- The more complete the schema, the more authoritative it is
- Mock criminal trial study: **the first side to offer a detailed opening is most likely to persuade**
- Greatest effect on verdict: detailed opening followed by a short, vague opening.
- Your schema, your verdict!

THE PURPOSE OF OPENING

- Establish a convincing, persuasive schema
- Give the jury its framework to organize, analyze and remember the evidence
- Explain your theme
- Explain your theory
- Describe the evidence

OPENING: ORGANIZATION

- Start strong!
- Start with a grabber
- A compelling introduction of theme
- Eye contact is crucial – no notes
- Short version of the story – 1 or 2 minutes

OPENING: ORGANIZATION

- Short introduction of yourself and the charges
- Long version of the story
- Acknowledge weaknesses
- Link the facts with the law and the charges
- Short version reprise
- End with an ask!

OPENING: THEORY

- The legal framework into which theme and evidence must fit
- Elements of the offense
- Relevant jury charges
- Case theory **MUST** include all facts beyond change

OPENING: YOUR THEME

- The story of your case reduced to a powerful theme that can be reduced to a simple phrase.
- Theme can be moral, emotional, legal or factual
- A theme which, if accepted by the trier of fact, means you win
- What do you want a juror on your side to say to convince another juror ?
- **THE THEME WILL BE REPEATED THROUGHOUT THE OPENING AND TRIAL**

OPENING: YOUR GRABBER

- State your theme powerfully
- Use:
  - analogies
  - buzzwords
  - alliterations
  - trilogies
  - proverbs
  - famous quotes
  - quotes from the case

OPENING: LONG VERSION

- Tell the jury, in detail, what happened
- Tell the jury, in detail, why it happened
- Introduce and humanize your witnesses
- Relate the witnesses to each other
- Tell the jury why they should believe your witnesses by linking them to facts that corroborate
- Relate the evidence to places and things

OPENING: LONG VERSION

- Relate the evidence to your theme
- Relate the evidence to the law
- Acknowledge weaknesses
  - Towards the end
  - Explain them away if you can with good facts
  - Don’t dwell on them

THE LONG VERSION: STORY TELLING TECHNIQUES

- Told from the perspective of a credible narrator
  - A single narrator
  - Multiple narrators whose perspectives are parallel and finally collide
  - Narrator(s) can use present tense, future tense or past tense

THE LONG VERSION: STORY TELLING TECHNIQUES

- Told from the perspective of a credible narrator
- Have a beginning, middle and end
- Events in the story are arranged strategically to feel as if they are leading somewhere
- Character (witness) development
- Drama and suspense
- Use powerful and plain advocacy language

- NEVER witness by witness: **BORING!**

FIGHT THE BOREDOM

- Trials are BORING
- Constancy = Boredom
- Introduce CHANGE into the courtroom environment

- **CHANGE = ATTENTIVENESS**

CHANGE = ATTENTIVENESS

- Exhibits = Change
- Visuals = Change
- PowerPoint / Sanction
  - If it's admissible you can show it
  - Words can't be argumentative
- Change with your voice
- Change with your movement

OPENING: DONT'S

- **DON'T** make promises you can't keep
- **DON'T** discuss evidence that might not come in
- **DON'T** discuss the other side's case right away
- **DON'T** argue the facts
  - If a witness will say it, you can
  - You can't add facts together
  - Watch your adjectives and adverbs

OPENING: DONT'S

- **DON'T** argue the law
  - You can and SHOULD state the important legal principles
- **DON'T** misstate the law
- **DON'T** appeal to passion or the societal consequences of a verdict
- **DON'T** state personal opinions or beliefs
- **DON'T** ask the jury to place itself in a victim or witness's shoes

OPENING: DONT'S

DON'T BE AFRAID TO WIN YOUR CASE IN OPENING

THE BEST STORY WINS!

Sentencing, PSI, Mitigation

John P. Deckers, Esquire
John P. Deckers, P.A.

Sonia lives and works in Wilmington, after graduating from Delaware Law School. She has been an attorney with the Office of Defense Services, as an assistant public defender for the past two years. Prior to that, she worked for the Delaware Dept of Justice for 11 years in various roles within the Criminal Division, and ending her time in the office with the Civil Rights and Public Trust Division.

ABA CRIMINAL JUSTICE STANDARDS

Fourth Edition (2017) of the *CRIMINAL JUSTICE STANDARDS* for the *DEFENSE FUNCTION*

Standard 4-8.3 Sentencing

(a) Early in the representation, and throughout the pendency of the case, defense counsel should consider potential issues that might affect sentencing. Defense counsel should become familiar with the client's background, applicable sentencing laws and rules, and what options might be available as well as what consequences might arise if the client is convicted. Defense counsel should be fully informed regarding available sentencing alternatives and with community and other resources which may be of assistance in formulating a plan for meeting the client's needs. Defense counsel should also consider whether consultation with an expert specializing in sentencing options or other sentencing issues is appropriate.

(b) Defense counsel's preparation before sentencing should include learning the court's practices in exercising sentencing discretion; the collateral consequences of different sentences; and the normal pattern of sentences for the offense involved, including any guidelines applicable for either sentencing and, where applicable, parole. The consequences (including reasonably foreseeable collateral consequences) of potential dispositions should be explained fully by defense counsel to the client.

(c) Defense counsel should present all arguments or evidence which will assist the court or its agents in reaching a sentencing disposition favorable to the accused. Defense counsel should ensure that the accused understands the nature of the presentence investigation process, and in particular the significance of statements made by the accused to probation officers and related personnel. Defense counsel should cooperate with court presentence officers unless, after consideration and consultation, it appears not to be in the best interests of the client. Unless prohibited, defense counsel should attend the probation officer's presentence interview with the accused and meet in person with the probation officer to discuss the case.

(d) Defense counsel should gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible; and in an appropriate case, with the consent of the accused, counsel should suggest alternative programs of service or rehabilitation or other non-imprisonment options, based on defense counsel's exploration of employment, educational, and other opportunities made available by community services.

(e) If a presentence report is made available to defense counsel, counsel should seek to verify the information contained in it, and should supplement or challenge it if necessary. Defense counsel should either provide the client with a copy or (if copying is not allowed) discuss counsel's knowledge of its contents with the client. In many cases, defense counsel should independently investigate the facts

relevant to sentencing, rather than relying on the court's presentence report, and should seek discovery or relevant information from governmental agencies or other third-parties if necessary.

(f) Defense counsel should alert the accused to the right of allocution. Counsel should consider with the client the potential benefits of the judge hearing a personal statement from the defendants as contrasted with the possible dangers of making a statement that could adversely impact the sentencing judge's decision or the merits of an appeal.

(g) If a sentence of imprisonment is imposed, defense counsel should seek the court's assistance, including an on-the-record statement by the court if possible, recommending the appropriate place of confinement and types of treatment, programming and counseling that should be provided for the defendant in confinement.

(h) Once the sentence has been announced, defense counsel should make any objections necessary for the record, seek clarification of any unclear terms, and advise the client of the meaning and effects of the judgment, including any known collateral consequences. Counsel should also note on the record the intention to appeal, if that decision has already been made with the client.

(i) If the client has received an imprisonment sentence and an appeal will be taken, defense counsel should determine whether bail pending appeal is appropriate and, if so, request it.

ABA CRIMINAL JUSTICE STANDARDS

Fourth Edition (2017) of the *CRIMINAL JUSTICE STANDARDS* for the *PROSECUTION FUNCTION*

Standard 3-7.2 Sentencing

(a) The severity of sentences imposed should not be used as a measure of a prosecutor's effectiveness.

(b) The prosecutor should be familiar with relevant sentencing laws, rules, consequences and options, including alternative non-imprisonment sentences. Before or soon after charges are filed, and throughout the pendency of the case, the prosecutor should evaluate potential consequences of the prosecution and available sentencing options, such as forfeiture, restitution, and immigration effects, and be prepared to actively advise the court in sentencing.

(c) The prosecutor should seek to assure that a fair and informed sentencing judgment is made, and to avoid unfair sentences and disparities.

(d) In the interests of uniformity, the prosecutor's office should develop consistent policies for evaluating and making sentencing recommendations, and not leave complete discretion for sentencing policy to individual prosecutors.

(e) The prosecutor should know the relevant laws and rules regarding victims' rights, and facilitate victim participation in the sentencing process as the law requires or permits.

ABA CRIMINAL JUSTICE STANDARDS

Fourth Edition (2017) of the *CRIMINAL JUSTICE STANDARDS* for the *PROSECUTION FUNCTION*

Standard 3-7.3 Information Relevant to Sentencing

(a) The prosecutor should assist the court in obtaining complete and accurate information for use in sentencing, and should cooperate fully with the court's and staff's presentence investigations. The prosecutor should provide any information that the prosecution believes is relevant to the sentencing to the court and to defense counsel. A record of such information provided to the court and counsel should be made, so that it may be reviewed later if necessary. If material incompleteness or inaccuracy in a presentence report comes to the prosecutor's attention, the prosecutor should take steps to present the complete and correct information to the court and defense counsel.

(b) The prosecutor should disclose to the defense and to the court, at or before the sentencing proceeding, all information that tends to mitigate the sentence and is known to the prosecutor, unless the prosecutor is relieved of this responsibility by a court order.

(c) Prior to sentencing, the prosecutor should disclose to the defense any evidence or information it provides, whether by document or orally, to the court or presentence investigator in aid of sentencing, unless contrary to law or rule in the jurisdiction or a protective order has been sought.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DARIUS O. HARDEN,	§	
	§	No. 290, 2017
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware
v.	§	
	§	I.D. No. 1305019629
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: January 24, 2018
Decided: February 6, 2018

Before **STRINE**, Chief Justice; **SEITZ** and **TRAYNOR**, Justices.

Upon appeal from the Superior Court. **REVERSED** and **REMANDED**.

Christopher S. Koyste, Esquire, Law Office of Christopher S. Koyste, LLC, Wilmington, Delaware, *Attorney for Appellant, Darius O. Harden.*

Martin B. O'Connor, Deputy Attorney General, Department of Justice, Wilmington, Delaware, *Attorney for Appellee, State of Delaware.*

STRINE, Chief Justice:

I.

This petition for post-conviction relief argues that defendant Darius Harden suffered prejudice because his attorney did not represent him effectively at his sentencing hearing. Sentencing was a critical stage for Harden because he committed an awful crime of violence, and did so in front of the victim's five-year-old child. As originally charged, Harden faced potential convictions for Home Invasion, Assault Second Degree, Terroristic Threatening, Theft, Offensive Touching, and Endangering the Welfare of a Child. Eventually, he pled guilty to Assault Second Degree and Endangering the Welfare of a Child, and the State agreed to cap its sentencing recommendation to 15 years.

This agreement was important because Harden, due to his habitual offender status, faced a potential maximum sentence of life imprisonment for the crimes to which he pled guilty. This was not Harden's first act of violence, and there were plenty of good reasons why a sentencing judge could have given Harden a longer sentence than the 15 years the State agreed to recommend. Even worse, after he committed the crime, Harden blamed the assault on the victim, claiming it was in self-defense, and also attempted to threaten the victim into recanting her story.

Before his sentencing hearing, Harden's trial counsel from the Public Defender's Office changed jobs. Rather than seek a continuance to prepare for sentencing with Harden and develop a sound strategy, Harden's new sentencing

counsel proceeded to the sentencing hearing after, at best, a fleeting discussion with Harden on the day of the hearing either in lock-up or in the courtroom itself. Sentencing counsel did not prepare Harden for allocution or make any effort to discuss with him whether there was mitigating evidence that might support a more lenient sentence. Instead, Harden's new counsel acted on the supposed strategy of seeking less than the 15 years that the State agreed not to exceed in its recommendation. That this strategy was not a strategy in the sense of involving any overarching plan to achieve the intended objective showed in counsel's brief argument that the court should give Harden three years less than the State's recommendation of 15 years, without articulating any plausible reason why that was so.[1]

Counsel then let Harden speak. Although Harden attempted to explain that he was sorry for his gruesome crime, he started off by indicating that he had experienced a "difficult" year and had "lost a lot" as a result of his conviction.[2] After listening to Harden, the Superior Court judge sentenced him to 18 years at Level V supervision: three years more than the State sought. In that decision, the judge specifically cited to Harden's allocution and his focus on himself, rather than on the effect of his crime on his victims.

[1] Sentencing Tr. 12:8.
[2] *Id.* at 12:18.

Harden did not appeal his conviction. After his *pro se* motion for a sentence reduction was denied, Harden brought a Rule 61 petition alleging that his counsel's performance in the sentencing phase was ineffective and prejudiced him.[3] In addressing Harden's petition, the Superior Court assumed that Harden's counsel had performed unreasonably under *Strickland*, but held that there was no prejudice because the record supporting a sentence of 18 years was so strong.

We agree with the proposition that the objective facts would support a sentence of 18 years for Harden as a proper exercise of judicial discretion. But that does not answer the inquiry under *Strickland*. The question under *Strickland* is whether there is a reasonable probability that the outcome at sentencing would have been different if counsel had acted with reasonable diligence and skill. In a case where the whole point of the defense is to use a plea to get the best sentence, it is critical that counsel undertake reasonable efforts to prepare for sentencing, consider whether there is mitigating evidence (and if so, develop it), and make a rational determination about how to approach the sentencing hearing. In this case, for example, it was important to decide whether to argue against the 15 years that the State agreed to recommend, recognizing the hazards of that approach, or to argue that Harden was sorry, recognized that what he did was terribly wrong, and accepted the State's recommendation and simply would ask the court to enter a sentence at

[3] Appellant's Opening Br. 2.

that level. Instead, without any reasonable investigation or basis to do so, counsel argued that the court should give three years less than the State recommended, and then had Harden give an unprepared allocution statement.

Even more than preparing a witness to testify—a process that also helps determine *whether* a witness should testify, if not testifying is an option—preparing a defendant who has pled guilty for allocution is a duty of fundamental importance. The impression a defendant makes on a sentencing judge is critical, especially in a case where the crime is serious and the defendant tried to interfere with the victim's testimony earlier in the proceedings. All witnesses face nerves, even experienced corporate executives. So too do criminal defendants. The right to representation includes having a lawyer who makes a reasonable effort to prepare you for allocution, decides if you can do so effectively, and helps you put your best foot forward if you decide you wish to speak. Harden got no help of that kind, and his awkward, spontaneous presentation—despite including statements of contrition—started with references to the effect of the crime on himself. Harden's self-centered commentary was specifically referenced in the judge's sentencing decision as the "most troubling aspect" of the case, and was an indicator of at least one of the four aggravating factors cited in the sentencing order: lack of remorse.[4]

[4] Sentencing Tr. 15:7; Sentence Order (May 30, 2014), at 5.

Given the objective reality that Harden's unprepared allocution aggravated his sentence and the undisputed fact that counsel developed no rational strategy for arguing for a shorter sentence than the State sought, there is a reasonable probability that had counsel acted reasonably, Harden could have received a sentence in accord with the State's recommendation of 15 years, rather than the 18 years he got. In so determining, we do not fault the trial judge in any way. Rather, we only acknowledge the importance of the sentencing hearing in making difficult sentencing decisions in cases like these and the reality that how a defendant presents himself is a rational factor in determining the ultimate sentence. When a defendant's counsel fails to prepare himself or his client, and the sentencing decision itself reflects the negative effects of that failure, prejudice under *Strickland* exists. For these reasons, we reverse and remand for resentencing before a different judge.

II.

To understand the key questions in this case, it is critical to understand the seriousness of Harden's crime and the other factors aggravating toward harsh punishment for it. Harden assaulted his girlfriend, Ms. Ellison, kicking and punching her repeatedly, and eventually waking up her five-year-old son, who "came downstairs to see his mother being kicked and punched in the face numerous times while she lay on the ground."[5] "After the beating ceased, [Harden] ripped

[5] *State v. Harden*, Nos. 1305019629 and 1312003017, at 1 (Del. Super. June 19, 2017).

[Ms. Ellison's] phone and cash from her breast pocket," and "threatened her not to call the police or he would kill her."[6] As a result of the assault, Ms. Ellison received "injuries to her face, stomach, and ribs; including a nasal fracture and two [lost] teeth."[7]

Days later, Harden visited a hospital under an alias to seek treatment for "an infection and wound on his right hand."[8] Harden explained the injury as resulting from him closing his car door on his hand, but medical staff did not believe him—"presumably because of the human teeth marks visible on his hand—and contacted police."[9] When the police arrived, Harden changed his story, stating instead that Ms. Ellison bit his right hand "like a puppy" in order to prevent him from leaving the house the night of the assault.[10] In turn, "he struck her three or four times in the face—as if he was acting in self-defense."[11]

Harden was indicted on charges of Home Invasion, Assault Second Degree, Terroristic Threatening, Theft, Offensive Touching, and Endangering the Welfare of a Child on July 8, 2013. While these charges were pending, Harden tried to convince Ms. Ellison to lie about that evening's events in an effort to "minimize"

[6] *Id.* at 2.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* (internal citations omitted).

Harden's assault.[12] "As a result, [Harden] was indicted for charges of Tampering with a Witness and Act of Intimidation."[13]

Harden's case went to a jury trial on February 18, 2014.[14] But, because of a prejudicial comment made during Ms. Ellison's testimony, that trial was declared a mistrial.[15] "After the aborted trial and before [Harden] was retried, [Harden] contacted [Ms. Ellison] to again attempt to influence her testimony regarding the incident. This correspondence was handed over to the State and Defense counsel."[16]

On March 10, 2014, Harden pled guilty to Assault Second Degree and Endangering the Welfare of a Child. "As part of the negotiations to reach [the plea] agreement, the State [sought] to declare [Harden] a habitual offender before sentencing," and its request was granted.[17] In return, "the State agreed to cap its recommendation for Level V supervision at 15 years."[18] Because of his status as a habitual offender, Harden faced a minimum sentence of eight years and a maximum sentence of life imprisonment.

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[12] *Id.* at 3.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] State's Answering Br. 6.
[18] *Id.*

III.

On May 16, 2014—a little over two months after Harden's guilty plea was entered—Harden's trial counsel, who was a Public Defender, took a new job and "ceased active representation of clients."[19] By May 28th, new sentencing counsel had been assigned to the case by the Public Defender's Office, but the prosecutor had still "not been informed of [who would] be handling the sentencing."[20]

Harden's sentencing counsel's first affidavit, filed in response to Harden's original, *pro se* petition for post-conviction relief, states in a single paragraph that he discussed with Harden his "intent to adopt prior counsel's position and argue for the sentencing cap" before the sentencing hearing and that Harden "affirmatively acknowledged his acceptance of [sentencing counsel's] representation and litigation goal to argue for the sentencing cap outlined in the plea agreement."[21]

Harden's amended petition for post-conviction relief, which was filed after he requested and received Rule 61 counsel, asked sentencing counsel specific questions. Harden's sentencing counsel's supplemental affidavit responding to those questions includes the original paragraph from his first affidavit, suggesting that his intent was to accept the State's recommendation, but adds three words to the description of his litigation goal, stating that Harden acknowledged his litigation

[19] Trial Counsel's Affidavit (Aug. 5, 2015), ¶ 1–2.
[20] Email from Zoe Plerhoples to Judge Medinilla (May 28, 2014).
[21] Sentencing Counsel's Affidavit (Aug. 13, 2015), ¶ 1.

goal to argue "for *no more than*" the sentencing cap.[22] And counsel's supplemental affidavit also states that his strategy at Harden's sentencing hearing was to "request that the Court consider less (12 years Level V) contrary to the sentencing cap [of 15 years]."[23] That is, contrary to his first affidavit, which suggests that counsel was going to argue for the 15 years the State accepted as a cap on its recommendation, counsel's second affidavit suggests that he was going to seek 20% less than the agreed upon cap.

Counsel's supplemental affidavit provides additional details about his representation, stating that he received the case file "at best 2-3 days" before Harden's sentencing hearing took place on May 30th.[24] Counsel's affidavit also states that he met with Harden for the first time for 15 to 20 minutes in "lock-up" before the sentencing hearing began.[25] But the sentencing hearing transcript suggests a slightly different reality, which is that sentencing counsel spoke to Harden for the first time right before Harden's sentencing hearing started, when counsel requested and received permission from the court to speak with Harden.[26]

[22] Sentencing Counsel's Supplemental Affidavit (Aug. 17, 2016), ¶ 1 (emphasis added).
[23] *Id.* at ¶ 2(1).
[24] *Id.* at ¶ 2(3).
[25] *Id.* at ¶ 2(4).
[26] Sentencing Tr. 3:2–10 ("[Sentencing Counsel]: I was reassigned from [trial counsel]. If I can have a moment when Mr. Harden comes out. . . . (Discussion held off the record.) [Sentencing Counsel]: We are ready to proceed.").

During Harden's sentencing hearing, the State spoke first, and advocated for a 15-year sentence, in accordance with its plea agreement with Harden. The State discussed Harden's lack of remorse in its presentation:

> [Harden] refuses to accept responsibility for his actions. He blames the victim. He says that she provoked him. He says that she attacked him first, which is not consistent with the physical evidence in the case nor consistent with the version of the facts given to me by either the State's witnesses or Ms. Ellison. I'm not saying there wasn't an argument. We don't know, we were not there, but certainly to say that he was [not] the physical instigator of this is very specious.[27]

Harden's counsel then made his presentation and did not stick to asking the court to accept the sentencing cap agreed to by the State. Instead, counsel sought to have Harden receive less than the cap, and suggested that "12 years, give or take, as opposed to 15 is a good starting point."[28] This was a 20% reduction from the State's agreed recommendation. In making this argument, counsel discussed Harden's choice to plead and cooperation on unrelated matters as mitigating his criminal history and the violent nature of the assault:

> Thankfully, with clearly a history of bad decision making, wrong choices, perhaps finally [Harden] ma[d]e a correct choice in pleading . . . . I think Mr. Harden understands that you simply cannot hit someone hard enough to knock their teeth out and cause injury. That is what happened in this case. . . .
>
> [H]e is eight years minimum right out of the gate, which is a significant punishment. . . . For my part, I can only bring a few points to the Court's attention, *perhaps something slightly less than [the State's*

[27] *Id.* at 7:13–22.
[28] *Id.* at 12:7–9.

> *recommendation of 15 years] would be appropriate*, because at the end of the day even Mr. Harden understands he has to get a significant punishment off of what happened here. . . . He made a good [choice] by pleading. This is not a defensible case. He also made a good choice by cooperating with the State in collateral matters. The difficulty there is it has not come to fruition yet . . . . So it is premature to say he should get the benefit right now of that cooperation . . . .
>
> I think it is one of few positive[s] that he cooperated with the State, as he should. It is a good choice. Good choices do not outweigh bad choices but it is a start.[29]

After Harden's counsel concluded his presentation, Harden spoke and said this during his allocution:

> *[B]een a year for me right here difficult, lost a lot this year, not just my freedom, also Ms. Ellison, difficult, man. I can't explain how I feel right now, crazy, like, modify life right here. I can sit here and sugar coat what happened that night, I can't at the end of the day, made a decision I shouldn't have did, shouldn't have put my hand on her.* Regardless of what happened, I should have been man enough to walk away. *At the end of the day is all I can say [is] I apologize.* I mean, I know I am not allowed to speak to her. I know she is back there listening. At the end of the day all I can say is sorry. I'm not holding any kind of grudges, over and done with. Still love her. So, you know, supposed to get married [and] all type of stuff. Here I am.[30]

The sentencing judge then issued her decision, emphasizing Harden's lack of remorse:

> I think to add insult to injury, my understanding [is] that you actually turned up at a medical center in Pennsylvania to see if you could press charges against her for biting you. I recognize you do not deny hitting her, but to claim even during your interview, nobody ever asked her what provoked me. She attacked me first. What was I supposed to do?

[29] *Id.* at 9–12 (emphasis added).
[30] *Id.* at 12:17–23, 13:1–8 (emphasis added).

> I was protecting myself. Pictures don't show that. Medical evidence certainly does not show that. . . . Obviously and lack of remorse, to the extent you had any contact with this victim, I do not blame her, it was, again, you trying to control her, and try[ing] to play the system in order to try to escape the punishment.[31]

The sentencing judge also discussed Harden's criminal history at length:

> Factors that I am also considering in this is your prior history of violence. It is extremely concerning to have seven felony convictions that include Rape Fourth, six convictions for failing to register as a sex offender, 19 violations of probation. 2003, my understanding [is] you were convicted of carrying a concealed deadly weapon, for threatening, being one of a group who threatened and robbed two victims at gunpoint.
>
> 2004, convicted for forcibly raping a 13-year-old girl. You have a history of domestic violence-related charges, and convictions including a threat in 2006, to shoot an ex-girlfriend, and arrests and other domestic-related charges in 2009, 2010, and 2011. . . .
>
> Looks like your criminal history began at age 11 with other sexual[ly] violent crimes, at least an adjudication. At that age, I see also [a July 2012] charge [for] strangulation, unlawful imprisonment second degree against a pregnant woman.[32]

But the sentencing judge noted that Harden's allocution was the "most troubling aspect" of the case:

> *To tell me this has been a terrible year for you, first thing you tell me, first thing I should hear before I impose sentence is* ***the most troubling aspect*** *because it continues to tell me that you are worrying about what this has done to you, the impact this has had on you. You never once mentioned what you—the violence has been that you have inflicted on Ms. Ellison, and [her] child*.[33]

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[31] *Id.* at 14:5–13, 15:17–20.
[32] *Id.* at 14:13–23, 15:1–4, 15:21–23, 16:1–2.
[33] *Id.* at 15:5–12 (emphasis added).

The Superior Court then sentenced Harden to 18 years at Level V supervision, three years more than the prosecution sought.[34]

IV.

Harden's Rule 61 petition argued that his sentencing counsel's ineffective and prejudicial representation caused him to "receiv[e] a three-year upward departure from the agreed-upon plea agreement between himself and the State."[35] The Superior Court referred the petitioner's case to a Superior Court Commissioner who recommended Harden's petition be denied.[36] The same judge who presided over Harden's sentencing hearing heard Harden's objections to the Commissioner's recommendation and issued a thorough decision explaining why she agreed that his petition should be dismissed. The Superior Court judge explained that:

> [I]t rings hollow when Defendant argues that Sentencing Counsel's comments tainted his opportunity to express remorse; Defendant was free to express remorse notwithstanding Sentencing Counsel's comments, but, instead, Defendant chose to reiterate his tired claims that he acted in self-defense when repeatedly beating the victim, stealing her possessions, and threatening to kill her if she reported the incident to the police.[37]

The judge also noted that three of the four aggravating factors for Harden's sentence, vulnerability of the victim, need for correctional treatment, and undue depreciation

[34] *Id.* at 16:14–15.
[35] *Harden*, Nos. 1305019629 and 1312003017, at 1.
[36] *State v. Harden*, 2017 WL 698506 (Del. Super. Feb. 21, 2017).
[37] *Harden*, Nos. 1305019629 and 1312003017, at 16 (internal citations omitted).

of the offense, "bore no connection to [Harden's] opportunity to allocute regarding his remorse at sentencing."[38] Even assuming that counsel's representation was deficient under *Strickland*, the judge found that Harden's claims failed to establish prejudice because the presentence investigation left her already "well aware and amply prepared to impose what [she] considered an appropriate sentence in this case."[39]

On appeal, Harden argues that, "as a result of meeting sentencing counsel for the first time mere moments before sentencing, counsel failed to discuss with [Harden] what the objectives of the sentencing hearing were and the means by which his objectives were to be accomplished" and, more specifically, "failed to alert [Harden] to the dangers of making prejudicial statements during allocution."[40] Harden further argues that: (1) because of a lack of guidance from counsel, his allocution demonstrated a lack of remorse and had a "particularly detrimental effect on the Superior Court's sentencing decision,"[41] and (2) his counsel's presentation at the sentencing hearing, which repeatedly mentioned Harden's history of making bad choices, was "prejudicial" and "undermined" the mitigation of his sentence.[42]

[38] *Id.*
[39] *Id.* at 12.
[40] Appellant's Opening Br. 16 (internal citations omitted).
[41] *Id.* at 21.
[42] *Id.* at 28.

There is no question that there is plenty of evidence in the record to justify an 18-year sentence. But the question under *Strickland* is not whether Harden's sentence is of a reasonable length in comparison to his offense. Instead, *Strickland* requires that a court assess whether "counsel's representation fell below an objective standard of reasonableness," and whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[43] And a reasonable probability is the probability sufficient to "swa[y] a reasonable sentencing judge to decide [Harden's] sentence differently."[44]

A.

Harden, his sentencing counsel, and the State all agree that sentencing counsel met with Harden for the first time and only briefly on the day of his sentencing hearing. And Harden's counsel does not state in either of his sworn affidavits that he discussed with Harden the importance of being apologetic, and only apologetic, if he was going to speak in allocution and, as important, expressing sincere contrition for the harm he caused, not just to Ms. Ellison, but also to the child who witnessed his attack. If Harden was unapologetic, then sentencing counsel should have encouraged him not to speak at allocution. Even further, if Harden did not tell sentencing counsel he was sorry for his actions, his lawyer could not have expressed

[43] *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).
[44] *Taylor v. State*, 32 A.3d 374, 386 (Del. 2011).

contrition on his behalf to the court, as that would have been misleading. But, having the discussion about Harden's contrition was critical, because absent contrition there was no plausible basis to seek less than 15 years. Indeed, in this case, without counsel understanding that Harden wished to accept responsibility for his wrongful acts and apologize, sentencing counsel's stated strategy lacked any rational basis.

The substantial changes between sentencing counsel's affidavits underscore this point: the first describes counsel's litigation goal as arguing "for" the 15 years, and the second describes his goal as arguing "for no more than" the 15 years and requesting a 12-year sentence instead.[45] Counsel's affidavits remain confusing because the second affidavit also continues to say that counsel told Harden he "inten[ded] to adopt prior counsel's position and argue for the sentencing cap," not to seek to get substantially less than that amount.[46]

But, there is a critical consistency in the affidavits. Absent from both affidavits is any discussion of how Harden's allocution would help achieve counsel's objectives. Nor do the affidavits address whether counsel discussed the relative wisdom of Harden not speaking but instead expressing contrition, remorse, and acceptance of responsibility through counsel.

[45] Sentencing Counsel's Affidavit (Aug. 13, 2015), ¶ 1; Sentencing Counsel's Supplemental Affidavit (Aug. 17, 2016), ¶ 1, 2(1).
[46] Sentencing Counsel's Supplemental Affidavit (Aug. 17, 2016), ¶ 1.

Consistent with these omissions, counsel's affidavits also neglect to discuss *how* he would pursue his strategy of getting Harden the minimum sentence proposed by the State, or *why* he thought it was a good tactical decision to request a 12-year sentence instead of agreeing to the State's 15-year recommendation. And, by his own admission, Harden's counsel spent no longer than 20 minutes with Harden—a length of time too short to address these critical strategic decisions.

As the Supreme Court of the United States has recognized, "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what [constitutes] reasonable [representation]."[47] And the ABA Standards for Criminal Justice advise that sentencing counsel should: (1) "be fully informed regarding available sentencing alternatives"; (2) consider and explain the consequences of the various dispositions available to the accused; (3) "alert the accused to the right of allocution"; and (4) "consider with the client the potential benefits of the judge hearing a personal statement from the defendan[t] as contrasted with the possible dangers of making a statement that could adversely impact the sentencing judge's decision or the merits of an appeal."[48] As the National Legal Aid and Defender Association's Performance Guidelines state:

[47] *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (collecting cases) (quoting *Strickland*, 466 U.S. at 688).

[48] ABA STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION, Standard 4-8.3(a), (b), (f) (4th ed. 2015).

> In preparing for sentencing, counsel should consider the need to . . . maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing[,] . . . obtain from the client relevant information concerning such subjects as his or her background and personal history, prior criminal record [etc., and] . . . inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to be made to the court.[49]

Through communication with the client, sentencing counsel must then develop a sentencing strategy: "Just as a theory of defense is essential to a trial, so too is a theory of sentencing essential to the sentencing phase. Further, the sentencing theory needs to be supported and promoted as forcefully as the theory of defense would be at trial, mandating investigation, preparation, and presentation."[50]

After being assigned to Harden's case "2-3 days prior to sentencing,"[51] counsel should have found time to discuss with Harden the importance of allocution and possible mitigating factors, or requested a postponement in order to do so. To decide whether and how Harden would allocute, and whether to match the State's 15-year sentence recommendation, Harden's counsel needed to communicate with his client and investigate Harden's strategic options.

For example, Harden's counsel should have asked Harden what he would say during allocution, listened to Harden's response, and made an informed decision

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[49] NAT'L LEGAL AID AND DEF. ASS'N., PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 8.3 (2006).
[50] 3 CRIM. PRAC. MANUAL § 104:6 (West 2017) (citing ABA STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION, Standard 4-8.1 (3d ed. 1993)).
[51] Sentencing Counsel's Supplemental Affidavit (Aug. 17, 2016), ¶ 2(3).

about whether or not it was in Harden's best interest to speak at the hearing at all.[52] Here, the record suggests that Harden wished to say he was sorry, as he attempted to do during his allocution, but he was unable to do so in a way that the trial judge deemed genuinely remorseful. But if, after meeting with Harden, it was determined that he could not express contrition in a sufficiently clear and convincing way, and that there was no rational basis for arguing for less than 15 years, counsel might well have concluded with Harden to argue to the court that Harden was sorry and was willing to accept the punishment the State recommended by saying something like this:

> Mr. Harden wishes for me to accept the sentence the State recommended, and to convey on his behalf his sincere apologies to the victim and her child for the horrible crime he committed and for trying to avoid responsibility for it. Because he accepts responsibility and understands that his prior record is unacceptable, he agrees with the State's recommendation of 15 years, and would ask the court to enter a sentence at that level. He wanted me to say to the court that he recognizes that what he did was wrong, and even worse, that it was done in the presence of a child. He asked me to say that he is deeply sorry for what he did to the victims, and the best way he can express that is to accept the sentence the State recommends.

[52] *See, e.g.*, Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges' Views on Allocution in Sentencing*, 65 ALA. L. REV. 735, 767 (2014) (surveying all federal district court judges and finding that "[t]he responding judges agreed that defense counsel should participate actively in allocution preparation. Some even advocated rehearsing with the defendant. Many judges suggested, for example, that defense counsel '[d]o a practice session and offer coaching in response' and 'listen to the allocution and help the defendant avoid saying things that can hurt him or her.' Many judges also suggested that defense counsel should encourage the defendant to write out a statement so the defense lawyer can preview the message.").

By this means, counsel would have positioned Harden to get the benefit of his plea bargain, and been able to call on the court's natural inclination to uphold, where it can reasonably do so, good faith agreements made between the prosecution and defense. Instead, counsel urged the court to depart downward from the position taken by the State, and to use its own judgment freely based on the record before it to determine Harden's sentence. Counsel did so without developing any reasoned presentation to support a lower sentence or preparing his client to allocute, knowing that the record facts reasonably supported a sentence higher than 15 years.

Before selecting a strategy for the sentencing hearing, Harden's counsel should have explained the risks of proposing a sentence shorter than the State's recommendation, asked Harden if there was any mitigating evidence to support a request for a shorter sentence, and discussed why, without additional mitigating evidence, in the case of a defendant with such a horrific record of violence, it might make sense to accept the State's recommendation instead. But because counsel did not meet with Harden until the day of the sentencing hearing, there was no time to investigate mitigating factors, interview possible witnesses, discuss a sentencing strategy, or prepare Harden to allocute (or decide that he should not allocute). And because Harden's counsel needed more time to have these fundamental conversations and investigate any leads that came out of them, he should have

requested a postponement from the sentencing judge. There was no disadvantage to sentencing counsel simply saying the following to the judge:

> Your Honor, I have just been appointed. Mr. Harden has made an important decision to accept responsibility for his serious crime. I have an obligation to meet with him to determine how to address the sentencing proceeding, and I cannot do that in 20 minutes today, the first day I have met with him. Mr. Harden is in jail, poses no threat to the public, and I would ask for a postponement. I regret very much wasting the court's time, but circumstances beyond our control are at work.

Although a "defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy,'"[53] uninformed decisions do not qualify as sound strategy. "[S]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation."[54] And "if counsel has failed to conduct a reasonable investigation to *prepare* for sentencing, then he cannot possibly be said to have made a reasonable decision as to what to *present* at sentencing."[55]

In his supplemental affidavit, sentencing counsel stated that his strategy was to argue for "no more than" the sentencing cap and to "request that the Court consider less (12 years Level V) contrary to the sentencing cap [of 15 years]."[56] But

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[53] *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).
[54] *Wiggins v. Smith*, 539 U.S. 510, 512 (2003) (internal quotations omitted) (quoting in part *Strickland*, 466 U.S. at 690–91).
[55] *Blystone v. Horn*, 664 F.3d 397, 420 (3d Cir. 2011).
[56] Sentencing Counsel's Supplemental Affidavit (Aug. 17, 2016), ¶ 1, 2(1).

that is not a strategy, it is just a goal of getting Harden less time in prison. Sentencing counsel's key failure was not his goal, it was his lack of effort to test out whether that goal was feasible by taking reasonable steps to develop a strategy to achieve it. To the extent Harden's counsel made any arguments at the hearing in favor of a 12-year sentence, those were only that Harden pled guilty to the assault and Harden was serving as a witness in other unresolved cases that had yet to "come to fruition."[57] Instead of requesting a postponement so that he could investigate mitigating factors and discuss allocution with Harden before his sentencing hearing, Harden's counsel presented an uninformed defense requesting a 12-year sentence that cannot be justified as strategic.

We have no doubt that sentencing counsel subjectively did the best that he could, and we acknowledge that the heavy caseloads that too many of our defense counsel carry may impel them to push ahead without reflecting on the need for more time. We also note that this case is meaningfully distinct from a common scenario in which defense counsel proceeds immediately to sentencing after striking a plea bargain. In those situations, defense counsel has usually spent the preceding period forging an agreement with the State, with the full input of the client. The point of a plea agreement is to secure the client the most certainty he can get as to his sentence by reaching an agreement with the State about the recommended sentence, and then

[57] Sentencing Tr. 11:11–16.

advocating to the court that it should accept the parties' good faith agreement. In that context, it is precisely because defense counsel has included the client in the bargaining process and is seeking to call on the court's natural inclination to uphold good faith plea agreements that counsel acts reasonably in proceeding right to sentencing.

Because Harden's sentencing counsel was not the one who worked with him on the plea, had never spoken to him until fleetingly before the sentencing hearing itself, and did not adhere to arguing that the court should accept the State's agreed recommendation, the circumstances here are far different and compelled sentencing counsel to take the time necessary to develop a reasoned approach to sentencing with the client's input. That did not happen.

Not even in a civil case would a lawyer approach the remedy phase by meeting his client for the first time for 20 minutes on the day of the proceedings to piece together an unprepared closing. Nor does any typical witness in even a civil deposition give testimony without extensive preparation by his lawyer, much less give testimony in court directly to the tribunal without preparation. When what is at stake is the liberty of a human being, preparation of this kind is more important, not less important, than when what is at stake is whether a witness for a corporate defendant stands up well to questioning in his deposition.

As is often the case with plea bargains,[58] Harden pled guilty to help secure a sentence shorter than he could potentially receive. Here, Harden could have received eight years to life. By pleading guilty to Assault Second Degree and Endangering the Welfare of a Child and getting the State to recommend a 15-year sentence, Harden ensured he would receive a sentence substantially shorter than life in prison. Counsel's strategy of arguing as new counsel without sufficient preparation or basis that a 12-year sentence was more appropriate than the State's recommendation without preparing Harden for allocution or providing mitigating evidence falls below an objective standard of reasonableness. "Judges are inclined to honor a prosecutor's recommendation on sentencing,"[59] and if Harden's counsel did not have sufficient mitigating evidence to support an argument for a 12-year sentence, he should have accepted the State's 15-year recommendation.

B.

To determine whether Harden has shown the necessary prejudice under *Strickland*'s second prong, the question this Court must ask is whether there is a reasonable probability that, had Harden's counsel fulfilled his advisory obligations, Harden would have received a shorter sentence. By choosing to argue for a 12-year

[58] *See, e.g., Brady v. United States*, 397 U.S. 742, 756 (1970) ("Often the decision to plead guilty is heavily influenced by . . . the apparent likelihood of securing leniency should a guilty plea be offered and accepted.").
[59] 2 CRIM. PRAC. MANUAL § 45:16 (West 2017).

sentence instead of accepting the State's recommendation without having time to investigate mitigating evidence or prepare Harden for allocution, sentencing counsel risked the judge's further review of the ample evidence in the record supporting a sentence longer than 15 years, including Harden's criminal history, the violent nature of the assault, and Harden's attempts to threaten Ms. Ellison into corroborating his self-defense story. And, given the evidence in the record indicating Harden's refusal to take responsibility for the crime, it is unsurprising that the judge focused on Harden's self-centered allocution as the "most troubling aspect" of the case in her discussion of his sentence.[60]

The reality is that regardless of sentencing guidelines, statutory minimums, or presentencing reports, there is an inescapably human element to sentencing. How a judge perceives the defendant's contrition, acceptance of responsibility, and self-awareness of wrongdoing is understood to be important to the sentencing decision, as those factors rationally bear on the relevant sentence. As one judge put it, "[e]motion comes into play in every sentencing decision."[61] And academic research shows that allocution is an important data point judges use to arrive at a final sentence.[62] The point of having contact between the judge and the defendant is to

[60] Sentencing Tr. 15:7.
[61] *See, e.g.*, Benjamin Weiser, *A Judge's Education, A Sentence At A Time*, N.Y. TIMES (Oct. 7, 2011) (quoting Judge of the United States Court of Appeals for the Second Circuit Denny Chin).
[62] *See, e.g.*, Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges' Views on Allocution in Sentencing*, 65 ALA. L. REV. 735, 758 (2014) (noting that over

allow the judge to assess for himself whether the defendant's own words and demeanor support the arguments made on his behalf, or are in tension with them. For this reason, "[a] really bad allocution can earn you a longer sentence, sometimes, with an upward variance, a *much* longer sentence[.]"[63]

Even if three of Harden's sentence's four aggravating factors were unrelated to his lack of remorse, as the Superior Court judge stated in her Rule 61 opinion,[64] that does not change the fact that there is a reasonable probability that the sentencing judge's disturbance by Harden's lack of remorse influenced his sentence. There is also a reasonable probability that the Superior Court would have adopted the State's suggested sentence had Harden's counsel accepted it, and accepted responsibility for the horrible crime and profusely apologized to the victims on Harden's behalf or prepared Harden to do so in allocution unequivocally and unconditionally. Harden has therefore established prejudice.

V.

For these reasons, we reverse and remand to the Superior Court for resentencing before a different judge. We remand for resentencing before a new judge, but not because the original trial judge did anything wrong. To the contrary,

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80% of federal district judges viewed allocution as either extremely, very, or somewhat important in arriving at a final sentence).

[63] Mark W. Bennett, *Heartstrings or Heartburn: A Federal Judge's Musings on Defendants' Right and Rite of Allocution*, THE CHAMPION (Nat'l Ass'n of Criminal Def. Lawyers), Mar. 2011, at 26, 27.

[64] *Harden*, 1305019629 and 1312003017, at 16.

it is clear that she was well prepared for sentencing, knew the record, and gave a reasonable sentence in light of the record before her. But, given the nature of this case and the fact that the original judge also handled Harden's Rule 61 petition, the only way to ensure that Harden's new sentence is not tainted by counsel's inadequate representation is to have a new sentencing hearing before a different judge, who will make a sentencing decision based solely on the presentations at the new hearing.

SENTAC

Delaware Sentencing Accountability Commission

Benchbook 2020*

*INCLUDES RELEVANT LEGISLATION OF THE FIRST SESSION OF THE 150th GENERAL ASSEMBLY

SUMMARY OF PRESUMPTIVE SENTENCES

Crime Classification	Presumptive Sentence	Statutory	Page Ref.
Felonies			
Class A (Other than Murder)	15 yrs @ Level V	15 yrs. to Life	28
Class B	2 to 5 yrs (1st 2 yrs @ Level V)	2 to 25 yrs	31
Class C (Violent)	Up to 30 m @ Level V	up to 15 yrs	37
Class C (Nonviolent)	Up to 1 yr @ Level V	up to 15 yrs	41
Class D (Violent)	Up to 2 yrs @ Level V	up to 8 yrs	43
Class D (Nonviolent)	Up to 12 m @ Level II or III	up to 8 yrs	47
Class E (Violent)	Up to 15 m @ Level V	up to 5 yrs	49
Class E (Nonviolent)	Up to 12 m @ Level II	up to 5 yrs	53
Class F (Violent)	Up to 9 m @ Level V	up to 3 yrs	57
Class F (Nonviolent)	Up to 12 m for Title 11; Up to 18 m for Title 16 @ Level II	up to 3 yrs	60
Class G (Violent)	Up to 6 m @ Level V Title 16, §§4767,4768: 3-9 m @ Level V	up to 2 yrs	64
Class G (Nonviolent)	Up to 12 m @ Level II	up to 2 yrs	67
Misdemeanors			
Class A (Violent) MA1	Up to12 m @ Level II	up to 1 yr	72
Class A (Escape) MA2	Up to 3 m @ Level IV	up to 1 yr	74
Class A (Property) MA3	Up to 12 m @ Level I	up to 1 yr	75
Class A (Order/Decency) MA4	Up to 12 m @ Level I	up to 1 yr	77
Class A (Controlled substances)	1st offense 12m @Level II	up to 1 yr	80
Class B	Fine, Costs & Restitution	up to 6 m.	81
Unclassified	Fine, Costs & Restitution	up to 30 d	83
Violations	Fine, Costs & Restitution	$0 to $345	85
Habitual Criminal	Up to Life	Up to Life	143
Violation of Probation	1 Level Higher	1 Level Higher	156

SUMMARY OF ACCEPTANCE OF RESPONSIBILITY GUIDELINES

Crime Classification	Presumptive Sentence	Acceptance of Responsibility Guideline	Page
Felonies			
Class C (violent)	Up to 30 mos. @ Level V	Up to 22 mos. @ Level V	37
Class C (non-violent)	Up to 1 yr. @ Level V	Up to 9 mos. @ Level V	41
Class D (violent)	Up to 2 yrs. @ Level V	Up to 18 mos. @ Level V	43
Class D (non-violent)	Up to 12 mos. @ II or III	Up to 9 mos. @ II or III	47
Class E (violent)	Up to 15 mos. @ Level V	Up to 11 mos. @ Level V	49
Class E (non-violent)	Up to 12 mos. @ Level II	Up to 9 mos. @ Level II	53
Class F (violent)	Up to 9 mos. @ Level V	Up to 7 mos. @ Level V	57
Class F (non-violent)	Up to 12 mos. @ L II for T 11 Up to 18 mos. @ L II T 16	Up to 9 mos. @ L II for T 11 Up to 14 mos. @ L II for T 16	60
Class G (violent)	Up to 6 mos. @ Level V	Up to 4 mos. at Level V	64
Class G (non-violent)	Up to 12 mos. @ Level II	Up to 9 mos. @ Level II	67
Misdemeanors			
Class A (violent)	Up to 12 mos. @ Level II	Up to 9 mos. @ Level II	72
Class A (escape)	Up to 3 mos. @ Level IV	Up to 2 mos. @ Level IV	74
Class A (property)	Up to 12 mos. @ Level I	Up to 9 mos. @ Level I	75
Class A (order/decency)	Up to 12 mos. @ Level I	Up to 9 mos. @ Level I	77
Class A (con. sub.)	Up to 12 mos. @ Level II	Up to 9 mos. @ Level II	80

Class A Felony (Violent)

(FAV):

Sentence Range (Violent Category) FAV (Exclusive of 1st Degree Murder (11-4209))	
Statutory Range	15 yrs to life (First 15 yrs @ Level V may not be suspended. 11-4205(d))
Presumptive Sentence	15 yrs @ Level V
Probation or Suspension of Sentence (11-4333)	• (b)(1) 2 years for violent felonies; (b)(2) 18 months for Title 16 offenses; (b)(3) 1 year for all others • (c) Consecutive sentence shall not amount to more than limitations herein. • (d) Limitations shall not apply to: (1) sex offenses, (2) violent felonies if public safety requires, or (3) if restitution remains unpaid at the end of the term. Additional probation for restitution purposes must be served at Level I. Record must be noted accordingly. • (e) Limitations may be exceeded for a 90-day period to ensure the completion of a court-ordered substance abuse program.

Crimes in Category:

11-634	**Child Murder by Abuse/Neglect 1st Degree** (a) Reckless: Death of Vt<14 y.oa. by (1) abuse/ neglect/ (2) previous pattern
11-635	**Murder 2nd Degree (see note)** (1) Reckless:Cruel,Wicked,DepravedIndiff/ (2) Neg: Comm.Fel
11-636	**Murder1st Degree (see note)** (a)(1)Intentional/ (2)Reckless:Comm.Fel/ (3)Causes Suicide by Force/ (4)Reckless: Death LEO, CO, FF/ (5)Death Detonation/ (6)Prevent Arrest
11-773	**Rape 1st Degree (see note)** (a)(1)W/out Consent & SeriousInjury/ (2)Comm.Crime/ (3)DeadlyW/ (4)Principle-Accomp/ (5)Vt<12,D>18/ (6)Vt<16 & D=Trust
11-777A(e)(5)	**Sex Offender Unlawful Sexual Conduct Against a Child (see note)**
11-778(1)	**Sexual Abuse of a Child by a person in a position of trust, authority, or supervision in the first degree (see note)**
11-787(b)(1)	**Trafficking of Persons and Involuntary Servitude (see note)**
11-787(b)(2)	**Trafficking of Persons and Involuntary Servitude (see note)**
11 787(b)(3)	**Trafficking of Persons and Involuntary Servitude (see note)**
11-1304	**Hate Crime (Underlying Offense: Class A Felony) (see note)**
11-1339	**Adulteration: Death**
16-1136(a)	**Abuse/Neglect of Patient: Death**
31-3913(c)	**Abuse/Neglect of Infirm Adult: Death**

Description of AGGRAVATING FACTORS For Exceptional Sentences

Violent Felonies Only:

EXCESSIVE CRUELTY

a. Those facts surrounding the commission of a violent felony which demonstrate such a callousness and cruelty towards the victim as to shock the conscience of the Court.
b. Allowable Penalty: Up to the statutory maximum for the instant offense.

PRIOR VIOLENT CRIMINAL CONDUCT

a. Defendant has demonstrated, by his prior criminal history, a propensity for violent criminal conduct. (SEE POLICY NO. 4)
b. Recommended Penalties:
    1. With two or more prior, separate violent felonies --Up to the statutory maximum.
    2. With one prior violent felony -- up to 50% of the statutory maximum.

Summary: Standard Prior History Categories for Violent Felonies

Category	Factor	Fel A	Fel B	Fel C	Fel D	Fel E	Fel F	Fel G
A	One or less prior felonies	Presumptive Sentence						
B	While on release or pending trial/sentencing	Level V for up to the time shown below:						
		25 yrs	10 yrs	5 yrs	4 yrs	2.5 yrs	1.5 yrs	1 yr
C	Two or more prior felonies	25 yrs	10 yrs	5 yrs	4 yrs	2.5 yrs	1.5 yrs	1 yr
D	One prior **violent** felony	25 yrs	10 yrs	5 yrs	4 yrs	2.5 yrs	1.5 yrs	1 yr
E	Two or more prior **violent** felonies	Life	25 yrs	15 yrs	8 yrs	5 yrs	3 yrs	2 yrs
F	Excessive Cruelty	Life	25 yrs	15 yrs	8 yrs	5 yrs	3 yrs	2 yrs

If violent crime is a secondary offense, use up to the presumptive sentence.

Aggravated Prior History Sentences at Level V for Nonviolent Felonies								
H	Repetitive criminal history	NA	NA	24 months	Up this number of months:			
					24	15	9	6
J	Lack of amenability to lesser sanctions	NA	NA	24 months	Up to this number of months:			
					24	15	9	6

If nonviolent crime is a secondary offense, use the nonaggravated presumptive sentence.

Any Offense:

REPETITIVE CRIMINAL CONDUCT

Definition: Repetitive Criminal Conduct is conviction or adjudication for the same or similar offense on two or more previous, separate occasions. (SEE POLICY NO. 14)

NEED FOR CORRECTIONAL TREATMENT

The defendant is in need of correctional treatment which can be most effectively provided if he is placed in total confinement.

UNDUE DEPRECIATION OF OFFENSE

It would unduly depreciate the seriousness of the offense to impose a sentence of other than total confinement.

MAJOR ECONOMIC OFFENSE OR SERIES OF OFFENSES:

Identified by a consideration of any of the following factors:

a. The offense involved multiple victims or multiple incidents per victim;
b. The offense involved attempted or actual monetary loss substantially greater than typical for the offense;
c. The offense involved a high degree of sophistication or planning, or occurred over a lengthy period of time;
d. The defendant used his/her position of trust, confidence or fiduciary responsibility to facilitate the offense.

PRIOR ABUSE OF VICTIM:

On prior occasions, the defendant has harassed, threatened, or physically abused the victim of the current offense.

CUSTODY STATUS AT TIME OF OFFENSE:

The offender was on bail, early release from incarceration, or was serving a sentence in other than Level V at the time the offense was committed.

LACK OF REMORSE

The offender has demonstrated a total lack of remorse or acceptance of responsibility with regard to the offense.

BETRAYAL OF PUBLIC TRUST

The offender, in attempting to gain, or while holding, public office by appointment or election, betrayed the Public Trust by his or her unlawful conduct.

SUPERVISION TO MONITOR RESTITUTION

A long period of supervision is necessary to monitor the offender's restitution responsibilities. Penalty Note: Applicable to sentences involving less than Level V time only.

LACK OF AMENABILITY

The defendant has demonstrated a lack of amenability to lesser restrictive sanctions through violation of a prior period of probation, or a failure to meet the conditions of a prior or current period of probation.

VULNERABILITY OF VICTIM

The Defendant knew, or should have known, that the victim of the offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health.

STATUTORY AGGRAVATION

The current offense carries with it a statutory minimum mandatory period of incarceration which exceeds the sentencing guidelines.

STATUTORY HABITUAL OFFENDER

The Court, on motion, determined the defendant to be an habitual offender under the provisions of 11 Del.C., s4214, thus calling for a sentence of incarceration which exceeds the sentencing guidelines.

CHILD DOMESTIC VIOLENCE VICTIM

The person who is a victim in domestic violence is a child.

OFFENSE AGAINST A CHILD

The victim in the offense was a child under 16 years old.

CRIMES COMMITTED AGAINST PERSONS 62 YEARS OF AGE OR OLDER

An additional penalty of $100.00 shall be imposed on all crimes committed against persons 62 years of age or older. The penalty assessment shall be placed in a special fund called the Senior Trust Fund.

Description of MITIGATING FACTORS for Exceptional Sentences

VICTIM INVOLVEMENT:

To a significant degree, the victim was an initiator, willing participant, aggressor, or instigator of the incident.

VOLUNTARY REDRESS OR TREATMENT:

Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained, or, before detection, he voluntarily sought professional help for drug/alcohol treatment, or for any other recognized compulsive behavioral disorders related to the offense.

UNDER DURESS OR COMPULSION:

The defendant committed the crime under duress, coercion, emotional distress, threat or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

INDUCEMENT BY OTHERS:

The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

PHYSICAL/MENTAL IMPAIRMENT:

The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this circumstance.

CONCERN FOR VICTIM BY NON-PRINCIPAL:

The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

NO PRIOR CONVICTIONS

TREATMENT NEED EXCEEDS NEED FOR PUNISHMENT:

The offender is in greater need of an available treatment program than of punishment through incarceration.

COULD LOSE EMPLOYMENT:

The offender is gainfully employed and will more than likely lose his/her job if the sentencing standard is imposed.

STATUTORY MITIGATION

ASSISTANCE TO PROSECUTION:

Defendant rendered substantial assistance to Authorities in the investigation and/or prosecution of this or other crimes.

MENTAL RETARDATION

a. Defendant is "significantly sub average in general intellectual function" (usually interpreted as an IQ score of 70 or less); AND
b. "has deficits in adaptive behavior" (has insufficient life skills to get along without constant assistance from others); AND
c. "manifested the above handicaps during the developmental period". (usually interpreted as having experienced the onset of handicap at the age of 21 or younger).

Appeals and Postconviction Relief

The Honorable Andrea Maybee Freud
Superior Court of the State of Delaware

Nicole Marie Walker, Esquire
Office of Defense Services

Maria T. Knoll, Esquire
Department of Justice

The Honorable Andrea M. Freud became a Commissioner of the Superior Court on October 19, 1994.

Prior to her appointment as Commissioner of the Superior Court, Commissioner Freud was a Deputy Attorney General of the State of Delaware in the Criminal Appellate Division from 1992 to 1994. Commissioner Freud also practiced in the law firm of Terry, Terry, Wright & Speakman from 1987 to 1992.

She received her B.A., in history, from George Washington University in 1981 and her J.D. from Catholic University Columbus School of Law in 1987. Commissioner Freud also earned a degree from the Catholic University Communications Law Institute in 1987. She is admitted to practice law before the Delaware and United States Supreme Courts.

Commissioner Freud is a past member of the board of directors of the Terry-Carey American Inn of Court. She also belongs to the Kent County and Delaware Bar Associations.

NICOLE WALKER BIO

Nicole Walker graduated from Pennsylvania State University in 1992 and Widener University School of Law in 2000. Ms. Walker joined the Office of the Public Defender in 2000. As an Assistant Public Defender, she has tried misdemeanor and felony cases, including capital murder. In 2006, she was assigned as one of the lead attorneys in the office's Appellate Division. During the last 15 years, she has argued numerous cases before the Delaware Supreme Court. In 2020, she became the head of the Appellate Division at the Office of the Public Defender. She also routinely consults with trial attorneys on various legal issues that arise during the course of litigation. In addition to case consultation, Ms. Walker provides numerous resources to the criminal defense bar. She also created and directs the Office of the Public Defender Law Clerk program. Additionally, Ms. Walker has served on various rules committees and working groups at the request of the Delaware Supreme Court.

Maria T. Knoll

Maria T. Knoll graduated from the Catholic University of America in 1990 and obtained her J.D. from the Georgetown University Law Center in May of 1995. Maria began her career at the Delaware Department of Justice in June of 1995 in the Misdemeanor Trial Unit. She later transferred to the Felony Screening Unit followed by the Domestic Violence Unit, and then the Felony Trial Unit, before transferring to the Felony Drug Unit. In 2002, Maria became the Assistant Supervisor of the Sex Crimes Unit and in 2005, she became the Supervisor of the Domestic Violence Unit. In 2010, she joined the Appeals Unit and in 2018, she became the Chief of Appeals.

Perspectives from Young Practitioners

Meghan E. Crist, Esquire
Office of Defense Services

Kimberly A. Price, Esquire
Collins & Associates

Alexander W. Funk, Esquire
Curley, Dogde, Fizgerald & Funk, LLC

Meghan Crist is an Assistant Public Defender at the Office of Defense Services. She was admitted to practice law in Delaware in December 2016 and began her legal career at the Office of Defense Services. In 2017, she became the Juvenile Justice Policy Specialist and a Family Court Juvenile Defender. In this role, she was responsible for, representing youth charged in Family Court, advancing juvenile defense reform issues statewide, and working with community partners to assist justice involved children. Meghan is now an attorney in the Superior Court Unit, representing adults charged with felonies. Meghan was born and raised in Wilmington, Delaware—attending John Dickinson High School, the University of Delaware, and Widener University—Delaware Law School.

Ethical Considerations and Candor to the Court

(Brady/Experts/Candor to Opposing Counsel)

Robert M. Goff, Jr., Esquire
City of Wilmington Law Department

The Honorable Mary M. Johnston
Superior Court of the State of Delaware