

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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**Eddie Tarver,**

*Petitioner*

**v.**

**State of Maryland,**

*Respondent*

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**On Petition for Writ of Certiorari to the Maryland Court of Appeals**

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**Petition for Writ of Certiorari**

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### **Questions Presented**

1. Whether the Court of Special Appeals abused its discretion by deciding that the Circuit Court's error, admitting in evidence certain pictures from a cell phone without proper authentication, was harmless?
2. Whether the Circuit Court erred by admitting in evidence certain other photographs without proper authentication?

## **Parties and Related Cases**

The names of all parties appear in the caption of the case on the cover page.

There are no related proceedings.

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**On Petition for Writ of Certiorari to the Maryland Court of Appeals**

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**Petition for Writ of Certiorari**

Petitioner Eddie Tarver prays for the issuance of a Writ of Certiorari to review the Judgment of the Maryland Court of Appeals.

**Opinions Below**

The first Opinion of the Court of Special Appeals of Maryland, which incorrectly stated the facts, appears at *Appendix A*. It is unpublished. The revised Opinion of the Court of Special Appeals of Maryland appears at *Appendix B*. It is also unpublished. The Circuit Court rulings also appear at *Appendix C*. Likewise, they are unpublished.

## **Jurisdiction**

Jurisdiction of the Supreme Court arises pursuant to the United States Code, because the Supreme Court may review final judgments rendered by the highest court of a State by writ of certiorari, when any right is claimed under the Constitution of the United States. 28 U.S.C. § 1257(a).

On March 19, 2020 the Supreme Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the order denying a timely petition for rehearing. *See* Order, 589 U.S. \_\_\_\_ (Mar. 19, 2020); *see also* Rules 13.1 and 13.3.

On January 29, 2021, the Court of Appeals of Maryland denied reconsideration. The Court of Appeals' Orders denying reconsideration and certiorari appear at *Appendices D* and *E*, respectively.

On January 14, 2020, the Court of Special Appeals of Maryland filed its Opinion in *Eddie Tarver v. State*, No. 2552 September Term, 2018. *App'x A*. On March 9, 2020, the Court of Special Appeals of Maryland denied the Motion for Reconsideration, even though the Opinion erroneously stated that petitioner had been identified as the shooter. The Court of Special Appeals' Order denying reconsideration appears at *Appendix F*. On March 11, 2020, the Court of Special Appeals of Maryland filed a revised Opinion, which just deleted that reference. *App'x B*.

The Court of Appeals of Maryland has tolled deadlines related to the initiation of matters, by the number of days that the courts were closed from March 16, 2020 through July 20, 2020 and extended filing deadlines to initiate matters by

an additional fifteen days. The Second Revised Administrative Order on the Emergency Tolling or Suspension of Statutes of Limitations and Statutory and Rules Deadlines Related to the Initiation of Matters and Certain Statutory and Rules Deadlines in Pending Matters, June 3, 2020 appears at *Appendix G*.

Jurisdiction of the Court of Appeals arises pursuant to Maryland Code, Courts and Judicial Proceedings Article, section 12-201. Jurisdiction in the Court of Special Appeals was based upon Maryland Code, Courts and Judicial Proceedings Article, section 12-301, the final judgment in a criminal case, entered against Mr. Tarver on October 3, 2019 in the Circuit Court for Baltimore City. The Circuit Court's Judgment appears at *Appendix H*. Jurisdiction in the Circuit Court was based upon Maryland Code, Courts and Judicial Proceedings Article, Section 1-501, because the State of Maryland prosecuted petitioner for violations of the common law and the Maryland Code.

### **Constitutional Provision Involved**

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## Statement of the Case

Petitioner Eddie Tarver seeks review of the Maryland Court of Special Appeals' decision, finding harmless error in the Circuit Court admitting in evidence without proper authentication during retrial certain pictures from a cell phone and certain other photographs.

By Indictment No. 113170042 filed on June 20, 2013 the Grand Jury charged that petitioner conspired with Cornell Harvey, Rashid Mayo, and certain other unknown persons to commit first-degree murder of Rashaw Scott in violation of the common law and Maryland Code, Criminal Law section 2-205. R. for Ct. of Spec'l Appeals No. 455, Sep. Term, 2016 at 10 – 11.<sup>1</sup>

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<sup>1</sup> By Indictment No. 113170041 also filed on June 20, 2013 the Grand Jury charged petitioner with: i) first degree murder of Carter Scott in violation of the common law and Maryland Code, Criminal Law section 2-201, ii) using a firearm in a crime of violence in violation of Maryland Code, Criminal Law section 4-204, iii) wearing or carrying a handgun on his person in violation of Maryland Code, Criminal Law section 4-203. R. for Ct. of Spec'l Appeals No. 455, Sep. Term, 2016 at 7 – 9. The jury acquitted of first degree murder and using a firearm. App'x to Opening Br. at 24. Wearing or carrying a handgun was not submitted. Ibid.

By Indictment No. 113170043 also filed on June 20, 2013 the Grand Jury charged that Mr. Tarver attempted the first degree murder of Mr. Rashaw Scott in violation of the common law and Maryland Code, Criminal Law section 2-205, ii) using a firearm in a crime of violence in violation of Maryland Code, Criminal Law section 4-204, iii) wearing or carrying a handgun on his person in violation of Maryland Code, Criminal Law section 4-203 (Indictment No. 113170043). R. for Ct. of Spec'l Appeals No. 455, Sep. Term, 2016 at 12 – 14. The jury was unable to reach a verdict for first degree murder and using a firearm. App'x to Opening Br. 29. Wearing or carrying a handgun was not submitted. Ibid. The Circuit Court declared a mistrial, and the State entered *nolle prosequi*. Ibid.

After a mistrial in 2015, and after the Court of Special Appeals ordered a new trial in 2017 (*Tarver v. State*, Ct. of Spec'l Appeals No. 455, Sep. Term, 2016, Slip Op. at 43 (unreported)), Mr. Tarver again appeared for trial in the Circuit Court for Baltimore City from August 13, 2018 through August 29, 2018.

On May 24, 2013, Ms. Tessa Simmons looked out her window and saw several African American men wearing white or tan hospital gloves and coming over a fence. Tr. Aug. 16, 2018 at 6:14 – 28:24. Two of the men fired guns toward a red car. Id. One or two of them had on blue jeans, but Ms. Simmons was not close enough to see their faces, and she was unable to identify any of the men whom she saw. Id. After the shooting, the red car immediately backed up and drove in the same direction where the men had run. Subsequently, she was prescribed eyeglasses. Id. There were four dumpsters between the parking space where the car was parked during the shooting and the entrance to the apartment complex where the car ultimately stopped. Id. The car drove directly past the opening of the dumpsters, and it got a bit slower when it was passing the dumpsters. Tr. Aug. 16, 2018 at 6:14 – 28:24. The car was probably two feet from the dumpsters, if that. Id.

On May 24, 2013, Ms. Joyce Martin looked out her window and saw a red car pull up, a little fellow get out of the passenger side, and the shooting. Id. at 29:7 – 50:22. The fellow, who got out of the car, sat on some steps. Id. Then, when the shooting started, he got up and ran. Id. Ms. Martin saw three or four men firing into the red car before they ran. Id. She saw three guns shooting. Id. Although she thought the man in the car was dead, the car started moving, pulled out a little

bit, then stopped, started up, stopped, and then just went on towards the rental office. Id. Ms. Martin wears glasses. She saw the red car go by the dumpsters, and when it was four or five feet from them, she thought it was going to hit them. Id. She saw the car stop and start multiple times. Id.

On May 24, 2013, Officer John Zohios saw a man jump over a fence, run towards a parked car, get in the passenger side of a Toyota Solara, which was already running, and sit in the driver's seat. Id. at 51:6 – 79:18. Officer Zohios told the individual, "Police. Don't move[.]" but he did not comply and proceeded to drive off. Id. Officer Zohios tried to give chase on foot. Id. He was focused on the driver and only saw one person in the car. Id. He did get a partial plate that he immediately broadcast over the police radio. Id. Later, he looked at a photo array, and identified the person whom he saw jump the fence, get in the Toyota, and drive away; who was NOT Eddie Tarver. Tr. Aug. 16, 2018 at 51:6 – 79:18.

On May 24, 2013, Officer James Brooks was driving a patrol car with Sergeant Troy Blackwell, when Officer Brooks heard gunshots to his left. Id. at 80:1 – 115:5. He said, "Hey, did you hear that?" to his Sergeant who responded, "Yeah. I heard that." Id. Where he had heard the gunshots, he saw three men standing around a red car, and it looked like they were shooting into it. Id. One had on a brown or tan hoodie or sweatshirt. Id. A second one had on a white T-shirt, and Officer Brooks did not recall what the third one was wearing. Id. He turned on the lights and siren, told the dispatcher what he had, in order to set up a perimeter, and turned towards the incident. Id. When he got there, he saw the

man in the white shirt and the man in the brown shirt, running down the parking lot away from him. Id. Officer Brooks and Sergeant Blackwell got out of the car to look for the suspects. Id. When they saw the suspects again, the suspects turned around and ran away. Id. When Officer Brooks and Sergeant Blackwell got back in the car, they heard about a gray car fleeing the scene. Id. When they saw it passed in front of them, they joined in the chase. Id. There had to be at least two people in the car, because he saw the passenger, and someone else had to be driving. Id. They tried to set up another perimeter after the suspect car crashed, but Officer Brooks did not see the guys actually jump out the car and run. Id.

The State played a video recording of Mr. Rashaw Scott's prior testimony. Tr. Aug. 16, 2018 at 123:5 – 218:8. In it, he denied remembering anything about the incident or even earlier prior testimony. Id. The video that was played for the jury included another video recording of Mr. Scott's even earlier prior testimony being played, while he was on the witness stand in another proceeding. Id. On May 24, 2013, Mr. Scott and his son Carter Scott were shot in the parking lot of an apartment complex after meeting Mr. Cornell Harvey. Id. Mr. Scott had picked up Mr. Harvey nearby, and when they got to the apartment complex, Mr. Harvey got out of the car and went in a building to speak with a girl. Id. While Mr. Scott waited in the car with his son, someone ran up and shot them. Id. He did not see who it was. Id. After hearing a lot of shots, he tried to pull off. Id. He did not see anyone as he tried to pull off, and then he was stopped by the police, who put him in an ambulance. Id. When Mr. Scott woke from surgery, he found out that his son

had been shot. Id. He told the police that he had come to meet Mr. Harvey. Id. Mr. Scott denied signing a photo array, and he said that the police asked him if he know Cornell Harvey. Id. He said that is why he picked out Mr. Harvey's picture. Id. He said that it was possible that he wrote Cornell Harvey lured him into the apartment complex, where he was shot and his son was killed after he picked him up and drove him there. Id. Mr. Scott did not see the shooter or a gun. Id. He believes that Mr. Harvey lured him there. Id. Mr. Scott denied seeing the shooter wearing a gray hoodie, because he did not see the shooter. Tr. Aug. 16, 2018 at 123:5 – 218:8. He said that the police told him to say the part about the gray hoodie. Id. Although Mr. Scott did not see Mr. Tarver when he got shot, the police showed him a picture of Mr. Tarver and told him that Mr. Tarver is who they arrested. Id. Mr. Scott told the police that he knew Mr. Tarver as "Scoop." Id. Later, Mr. Scott said that while he might have seen Mr. Tarver while driving around, he did not know Mr. Tarver. Id. The police told him the name "Scoop." Id.

The video that was played for the jury also included a recording of Mr. Scott's prior statement to police during which he identified Cornell Harvey and wrote "Cornell Harvey, which I also know him a[s] 'Little Head,' lured me into an apartment complex where I was shot and my son was killed." Id.

Detective Jonathan Jones led the investigation. Tr. August 17, 2018 at 19:23 – 264:11. He walked through the crime scene with Technician Morse, talking about what needed to be collected and then what should be done with things, including ballistics, DNA, and gunshot primer residue testing. Id.



Detective Jones testified that there was no gunshot primer residue on Mr. Tarver's hands or gloves. *Id.* None of the items that were swabbed for DNA, the firearms and clothing at the scene, came back as a DNA match to Mr. Tarver. *Id.* None of five eyewitnesses to the shooting, Tessa Simmons, Joyce Martin, Officer Zohios, Officer Brooks and Sergeant Blackwell, ever identified Eddie Tarver. *Tr.* August 17, 2018 at 19:23 – 261:11. When Rashaw Scott was later shot and killed on July 18, 2017, Eddie Tarver had nothing to do with it, because he has been in continuous custody since he was arrested on May 24, 2013. *Id.*

Detective Jones interviewed Rashaw Scott and showed him photo arrays of Rashid Mayo, Daquan Shields, and Reginald Love. *Id.* On the array of Mr. Mayo, Mr. Scott wrote: “The picture I signed is, his name is Dex. I know him to be with my little cousin and my brother. The last time that he was hanging out, he was dating Breyon.” It was the same day that Officer Zohios identified Mr. Mayo as being the person he had seen fleeing from the scene. On the array of Mr. Shields, Mr. Scott wrote: “Sticks,” he is known to hang out in the Belmont -- in Belmont area with my brother.” *Tr.* August 17, 2018 at 19:23 – 265:13. On the array of Mr. Love, Mr. Scott wrote “I know him as ‘Pickle.’ He is from Popular Grove, known to hang with my brother.” *Id.* Reginald Love’s and Daquan Shields’ DNA were matched to items left at the scene. *Id.*

A black flip cell phone was recovered from the backseat of the Solara. *Id.* He seized Cornell Harvey’s cell phone. *Id.* The Solara was registered to Ms. Breyon Cason, and he seized her cell phone too. *Id.*

While Mr. Tarver did not object to Ms. Cason's cell phone, he did object to the images on it, specifically State Exhibits 40A through 40E, and he moved to strike them. App'x to Opening Br. at 50. The Circuit Court withdrew State Exhibits 40A through 40E from evidence, pending resolution of their authentication. App'x to Opening Br. at 73. Mr. Tarver submitted a Memorandum in Support of his Objection to Pictures from Phone. Id. at 74. Prior to arguments the next day, the Court provided counsel with a handout. Id. at 81. After argument, the Circuit Court admitted Exhibits 40A - 40E over Mr. Tarver's objection that they had not been properly authenticated. Id. at 87.

Detective Jones found Cornell Harvey's phone number in Mr. Scott's phone. Tr. August 17, 2018 at 19:23 – 264:11. He also found Cornell Harvey's phone number in the black flip cell phone, recovered from the backseat of the Solara. Id.

Ms. April Taylor testified that she photographed a 2008 Toyota Solara, recovered clothing and several gloves from it, and checked it for fingerprints and DNA. Tr. Aug. 20, 2018 at 65:25 – 74:14.

Mr. Roy Jones testified that he examined forty-seven lift cards and there were twenty-six suitable prints. Id. at 74:23 – 91:25. Codefendant Reginald Love's fingerprints were found the driver's side door interior release handle of the Toyota Solara and on the outside of the car. Id. Mr. Tarver's fingerprint was on the exterior passenger's side door button, and none of his fingerprints were found inside of the car. Id. Dequan Shields' fingerprints were on driver's side interior glass, the exterior frame above driver's side door, from the passenger side door exterior

surface, and the passenger side door quarter window exterior. Tr. Aug. 20, 2018 at 74:23 – 91:25. Codefendants Breyon Cason, Rashid Mayo, and Cornell Harvey were negative. Id.

Mr. Christopher Faber testified that he had seven .380 auto caliber, nine .40 S&W caliber, two .45 auto caliber cartridge casings. Id. at 92:21 – 122:19. There were a minimum of three firearms, and because of unique markings the .40 was either a Glock or a Smith & Wesson Sigma series firearm. Ibid. Two of the .45 auto cartridge cases were fired with the High Point firearm. Ibid. Seven of the .380 cartridge casings were fired with the same unknown firearm. Ibid. Nine of the cartridges casings were .40 S&W caliber were also fired with an unknown firearm. Ibid. Five of the .380 auto bullets were all fired with the same unknown gun. Ibid. Nine pieces of .40 S&W bullet evidence were all fired with the same unknown firearm, and they have class characteristics common to Smith & Wesson Sigma series firearms. Ibid.

On May 24, 2013, Sergeant Daniel Gillgannon operated the camera on the helicopter that recorded the pursuit of a gray car to where it crashed in the Western District and one of the people who ran from the car. Ibid. at 144:23 – 156:8. He transmitted what he was observing to officers who were on the ground. Ibid.

On May 24, 2013, Detective Timothy Copeland pursued a gray car. Id. at 156:19 – 169:1. When he saw the gray car crashed into a parked car, he saw a man running toward the end of the block. Ibid. He pursued the man, whom he found hiding in some bushes, wearing a latex glove. Tr. Aug. 20, 2018 at 156:19 – 169:1.

Detective Copeland identified him as Mr. Tarver, and he placed gunshot residue bags on Mr. Tarver's hands. Ibid. The police seized a cell phone from Mr. Tarver. Ibid.

Mr. Tarver objected to certain photographs, specifically State Exhibits 51A through 51D. App'x to Opening Br. at 102, 105. On cross-examination, Detective Copeland testified that he was not present when 51A was taken. App'x to Opening Br. at 106. Nor was he present when 51B, 51C, and 51D were taken. Id. at 106 – 107. Mr. Tarver moved to strike State Exhibits 51A through 51D. Id. at 107.

The State recalled Detective Jonathan Jones. Tr. Aug. 20, 2018 at 169:19 – 181:24. Although he saw Eddie Tarver at Homicide, he did not see the clothes depicted in State Exhibits 51C and 51D. Ibid.

Mr. Tarver renewed his objection to State Exhibits 40A through 40E, which were images from Ms. Cason's cell phone, when the State had Detective Jones identify the other people depicted in the images with Eddie Tarver, immediately before having him stand directly in front of the jury while the jurors were holding State Exhibits 40A through 40E. Id. at 116.

After argument, the Circuit Court refused to strike State Exhibits 51A through 51D over Mr. Tarver's objection that they had not been properly authenticated. Id. at 121.

The State played a video recording of Dr. Ana Rubio's prior testimony that Carter Scott's cause of death was gunshot wounds of the lower extremities, and that the manner of death was homicide. Tr. Aug. 20, 2018 at 189:15 – 209:14.

At the close of the State's case in chief on Mr. Tarver moved for judgment of acquittal. App'x to Opening Br. at 128. The Circuit Court denied his motion. Id. at 142.

At the close of all evidence, Mr. Tarver renewed for judgment of acquittal. Id. at 143. The Circuit Court denied his motion. Id. at 144.

The jury i) acquitted Eddie Tarver of charges related to the death of Carter Scott (Indictment No. 113170041), ii) convicted him of conspiracy (Indictment No. 113170042), and hung on charges related to the shooting of Rashaw Scott (Indictment No. 113170043). The same jury acquitted codefendant Cornell Harvey of all charges, including conspiracy. App'x to Opening Br. at 34, 39, 44.

On August 30, 2018, Mr. Tarver filed a Motion for New Trial. Id. at 145. After argument, the Circuit Court denied his Motion. Id. at 170.

On October 3, 2019 the Circuit Court sentenced Mr. Tarver to a term of life imprisonment. Id. at 19.

### **Reasons for Granting the Petition**

#### **I. A State Court Has Decided an Important Question of Federal Law that Has Not Been, but Should Be, Settled by this Court.**

##### **A. Standard of Review.**

When the Supreme Court reviews preserved constitutional trial error, the government must prove that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

**B. Analysis: The Admission of Images from a Cell Phone and Certain Other Photographs Without Authentication Violated Mr. Tarver's Right of Confrontation.**

**1. Mr. Tarver Objected to State Exhibits 40A – 40E.**

While Mr. Tarver did not object to Ms. Cason's cell phone, he did object to the images on it, specifically State Exhibits 40A through 40E, and he moved to strike them. App'x to Opening Br. at 50. The Circuit Court withdrew State Exhibits 40A through 40E from evidence, pending resolution of their authentication. Id. at 73. Mr. Tarver also submitted a Memorandum in Support of his Objection to Pictures from Phone. Id. at 74.

**2. Lack of Proper Authentication.**

First, unlike sixty one other pictures that the State offered (State Exhibits 3, 7A – 7H, 11A – 11J, 13A – 13C, 16A – 16H, 22A – 22J, 29, 31, 32, 33, 34, 35A – 35P), no one testified that State Exhibits 40A – 40E fairly and accurately depicted what they appeared to show. Detective Jonathan Jones indicated that Exhibits 40A – 40E were seized from a cell phone belonging to codefendant Breyon Cason. App'x to Opening Br. at 124.

Second, no evidence was presented describing a process or system that produces an accurate result. All that Detective Jones indicated was that Exhibits 40A – 40E were seized from a cell phone belonging to codefendant Breyon Cason. Ibid.

**3. The Court Abused its Discretion by Admitting in Evidence Printouts of Pictures From a Cell Phone Without the Proper Authentication.**

Although Exhibits 40A – 40E appear to be printed photographs, according to Detective Jones’ testimony, they were in fact digital images, because they were seized from a cell phone. Ibid. There was no evidence presented as a foundation about how they were created.

The images were created by some unknown person, who through some unknown process, put them on Breyon Cason’s cell phone. There was no testimony about the process used, the manner of operation of the camera(s), the reliability or authenticity of the images, or the chain of custody of the pictures.

The State did not lay a proper foundation for the Circuit Court to find that the pictures reliably depict that the defendants knew each other. Without either the testimony of a witness with personal knowledge, or evidence describing a process or system that produces an accurate result, there is no way of knowing whether Exhibits 40A – 40E have been “photoshopped.”<sup>2</sup> That is to say digitally edited or altered.

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<sup>2</sup> Adobe Photoshop is a raster graphics editor developed and published by Adobe Systems for macOS and Windows.

Photoshop was created in 1988 by Thomas and John Knoll. Since then, it has become the de facto industry standard in raster graphics editing, to the point that Photoshop has become a generic trademark leading to its use as a verb such as “to Photoshop an image,” “photoshopping” and “photoshop contest,” though Adobe discourages such use.

In addition, the State offered the pictures as probative evidence in themselves, and not as illustrative evidence to support the testimony of an eyewitness. App'x to Opening Br. at 53. The evidence has been offered by the State to support the charge of conspiracy, by demonstrating that the defendants knew one another. Id. at 53.

The Circuit Court should have been aware of the proper standard, because it provided the handout Admissibility of Electronic Evidence, written by Paul W. Grimm and Kevin F. Brady. *Appendix I*. Despite that, the Circuit Court admitted Exhibits 40A - 40E over Mr. Tarver's objection that they had not been properly authenticated. App'x to Opening Br. at 87.

Clearly, Mr. Tarver has been prejudiced by the admission of Exhibits 40A – 40E, because he was denied the opportunity to cross-examine either a witness with personal knowledge that the photograph fairly and accurately represents the scene or object it purports to depict as it existed at the relevant time, or a witness describing a process or system that produces an accurate result. Such prejudice violated Mr. Tarver's right of confrontation. U.S. Const amend VI; *see Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Crawford v. Washington*, 541 U.S. 36 (2004); but *see Williams v. Illinois*, 567 U.S. 50 (2012).

Worse still, if the pictures have been “photoshopped,” then the jury has been misled into believing something that is not true. That would not be harmless beyond a reasonable doubt. *Chapman, supra*.



**4. Mr. Tarver Objected to State Exhibits 51A – 51D.**

Mr. Tarver objected to certain photographs, specifically State Exhibits 51A through 51D. App'x to Opening Br. at 102, 105. On cross-examination, Detective Copeland testified that he was not present when 51A was taken. Id. at 106. Nor was he present when 51B, 51C, and 51D were taken. Id. at 106 – 107. Mr. Tarver moved to strike State Exhibits 51A through 51D. Id. at 107.

The State recalled Detective Jonathan Jones. Tr. Aug. 20, 2018 at 169:19 – 181:24. Although he saw Eddie Tarver at Homicide, he did not see the clothes depicted in State Exhibits 51C and 51D. Ibid.

After argument, the Circuit Court refused to strike State Exhibits 51A through 51D over Mr. Tarver's objection that they had not been properly authenticated. Id. at 121.

**5. Lack of Proper Authentication.**

Unlike sixty one other pictures that the State offered (State Exhibits 3, 7A – 7H, 11A – 11J, 13A – 13C, 16A – 16H, 22A – 22J, 29, 31, 32, 33, 34, 35A – 35P), Detectives Copeland and Jonathan Jones testified that they were not present when State Exhibits 51A – 51D were taken. App'x to Opening Br. at 106; Tr. Aug. 20, 2018 at 169:19 – 181:24.

**6. The Circuit Court Abused Its Discretion by Admitting in Evidence Pictures of Mr. Tarver Without Proper Authentication. State Exhibits 51A – 51D.**

While authentication of a photograph does not always require testimony of the person who took the photograph (*Kortz v. Guardian Life Ins. Co. of America*, 144

F.2d 676, 679 (10<sup>th</sup> Cir. 1944), *cert. denied*, 323 U.S. 728, 65 S.Ct. 63, 89 L.Ed. 584 (1944)); the photograph must be authenticated or identified as a condition precedent to admissibility. Md. R. 5-901(a).

Testimony of a witness with knowledge that the offered evidence is what it is claimed to be, such as the person who took the photograph or someone else who was present when it was taken, would satisfy the requirement. Md. R. 5-901(b)(1). However, Detectives Copeland and Jonathan Jones testified that they were not present when State Exhibits 51A – 51D were taken. App’x to Opening Br. at 106; Tr. Aug. 20, 2018 at 169:19 – 181:24.

While courts have admitted surveillance tapes and photographs made by surveillance equipment that operates automatically when “a witness testifies to the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system.” *United States v. Stephens*, 202 F.Supp.2d 1361, 1368 (N.D.Ga.2002) (*citing United States v. Rivera-Maldonado*, 194 F.3d 224, 237 (1st Cir. 1999); *United States v. Sivils*, 960 F.2d 587, 597 (6th Cir.1992); *United States v. Rembert*, 863 F.2d 1023, 1028 (D.C. Cir. 1988); *United States v. Taylor*, 530 F.2d 639, 641 – 42 (5th Cir.1976)). However, there was no such evidence to support the admission of Exhibits 51A – 51D.

The Circuit Court should have been aware of the proper standard, because it provided the handout Admissibility of Electronic Evidence, written by Paul W. Grimm and Kevin F. Brady. *Appendix I*; see App’x to Opening Br. at 81. Despite

that, the Circuit Court admitted Exhibits 51A – 51D over Mr. Tarver’s objection that they had not been properly authenticated. *Id.* at 102, 105.

**II. A State Court Has Decided an Important Federal Question in a Way that Conflicts with Relevant Decisions of this Court.**

The Maryland Court of Special Appeals’ decision, finding harmless error in the Circuit Court admitting pictures from a cell phone and certain other photographs without proper authentication conflicts with Supreme Court precedents in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Crawford v. Washington*, 541 U.S. 36 (2004); and likely *Williams v. Illinois*, 567 U.S. 50 (2012).

**III. Importance of the Case.**

Cell phones are “a pervasive and insistent part of daily life....” *Riley v. California*, 573 US 373, 134 S. Ct. 2473, 2484, 189 L. Ed. 2d 430 (2014). Likewise, electronic records are pervasive. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007).

**Conclusion**

The Circuit Court should have recognized the error in admitting the pictures without proper authentication. Likewise, the Court of Special Appeals should have recognized the prejudice. Eddie Tarver prays for the issuance of a Writ of *Certiorari* to review the Judgment of the Court of Special Appeals of Maryland.

The Court should grant a writ of certiorari.

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