No. _____

IN THE

Supreme Court of the United States

ANTHONY SIMS, JR.,
Petitioner

v.

STATE OF NEW JERSEY,
Respondent

APPENDIX
ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

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SUPREME COURT OF NEW JERSEY

A-53 September Term 2020

085369

State of New Jersey,

Plaintiff-Appellant,

v.

Anthony Sims, Jr.,

Defendant-Respondent.

On appeal from and certification to the Superior Court, Appellate Division, whose opinion is reported at 466 N.J. Super. 346 (App. Div. 2021).

Argued	Decided	Revised
October 12, 2021	March 16, 2021	March 16, 2022

Monica do Outeiro, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for appellant (Lori Linskey, Acting Monmouth County Prosecutor, attorney; Maura K. Tully, Assistant Prosecutor, of counsel and on the briefs).

Rochelle M. Watson, Deputy Public Defender II, argued the cause for respondent (Joseph E. Krakora, Public Defender, attorney; Rochelle M. Watson, and Robert Carter Pierce, Designated Counsel, on the briefs).

Frank Muroski, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Andrew J. Bruck, Acting Attorney General, attorney; Frank Muroski, of counsel and on the brief).

Appendix A

John McNamara, Jr., Special Deputy Attorney General/Acting Chief Assistant Morris County Prosecutor, argued the cause for amicus curiae County Prosecutors Association of New Jersey (Esther A. Suarez, President, County Prosecutors Association of New Jersey, attorney; John McNamara, Jr., of counsel and on the brief).

Aidan P. O'Connor argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey (Pashman Stein Walder Hayden, attorneys; CJ Griffin, on the brief).

JUSTICE PATTERSON delivered the opinion of the Court.

In this appeal, defendant Anthony Sims, Jr. challenges his conviction of attempted murder and weapons offenses arising from the April 9, 2014 shooting of a twenty-eight-year-old man, P.V., outside his grandmother's home.

The appeal requires that we consider two issues. First, we review as of right the decision of a divided Appellate Division panel vacating defendant's convictions and remanding for a new trial on the ground that the police officers who interrogated defendant violated his rights under Miranda v. Arizona, 384 U.S. 436 (1966). State v. Sims, 466 N.J. Super. 346, 361-69 (App. Div. 2021). Deciding an issue that defendant did not raise before the trial court, the Appellate Division adopted a new rule requiring police officers, prior to interrogation, to inform an arrestee of the charges that will be filed

against him, even when no complaint or arrest warrant has been issued identifying those charges. Id. at 369. We decline to adopt the rule prescribed by the Appellate Division and find no plain error in the trial court's denial of defendant's motion to suppress his statement to police.

Second, we consider the Appellate Division's ruling that defendant was deprived of a fair trial because of an evidentiary determination by the trial court. The Appellate Division held that the trial court's decision to admit at trial P.V.'s prior testimony at a pretrial hearing, in which P.V. claimed that he had no recollection of an earlier out-of-court statement to police implicating defendant in the crime, violated the rule against hearsay and the Confrontation Clause. Id. at 377-78. We concur with the trial court that the victim's testimony at the pretrial hearing was admissible under N.J.R.E. 804(b)(1)(A)'s exception to the hearsay rule for the prior testimony of a witness unavailable at trial, and that the admission of that testimony did not violate defendant's confrontation rights.

Accordingly, we reverse the Appellate Division's judgment and remand this matter to the appellate court so that it may consider two issues raised by defendant that it did not reach.

I.

A.

We derive our summary of the facts from the record presented to the trial court in pretrial motions and the trial record.

On April 9, 2014, P.V.'s grandmother heard P.V. calling for help outside her home in Red Bank. She found her grandson "partially in the driveway on the pavement" and "partially in the car." P.V. had sustained twelve bullet wounds to the torso, leg, buttocks, and upper arm, and was bleeding "in two, three places very badly." According to P.V.'s grandmother's trial testimony, she asked P.V. "who did this to you," and he responded, "Sims." She stated that when she pressed her grandson to tell her who "Sims" was, he responded, "B.J.'s brother." P.V.'s grandmother testified that the nickname "B.J." denoted defendant's brother, whom she knew because he was a friend of several members of her family.

P.V.'s uncle called 9-1-1, and P.V. was taken to a hospital. Police officers were initially unable to speak with P.V. because he was intubated. On April 13, 2014, four days after the shooting, P.V.'s mother informed Detective Robert Campanella of the Red Bank Police Department that P.V. was no longer intubated. Later that day, Detective Brian Weisbrot of the Monmouth County Prosecutor's Office, accompanied by Campanella and another Red

Bank officer, Detective James DePonte, went to the hospital and met with P.V., who agreed to give them a recorded statement.

In his statement, P.V. said that on the evening of the shooting, he was sitting in his car talking on his phone and "noticed a man crouched down holding a gun with two hands aiming in a like crouching position" and that the man "started shooting" at him. P.V. stated that "[t]he minute that I looked at him, I knew what it was and I knew who it was, Anthony Sims, Jr.," whom P.V. had known for ten years through defendant's brother, B.J. According to the statement, P.V. told the detectives that he and defendant's brother "had a falling out," "were supposed to fight," and that "B.J. and Anthony Sims are brothers." P.V. said that he thought that defendant's brother was involved in the shooting incident because he did not have "any other problems with Anthony Sims, Jr." and because, when he saw defendant's brother B.J. two hours before the shooting, B.J. "pulled off." P.V. identified the weapon used by defendant in the shooting as a "black semiautomatic."

P.V. identified a photograph of defendant, marked it with defendant's name, and wrote the date and time of the identification and his initials on defendant's photograph.

On April 14, 2014, prior to the issuance of any complaint or warrant or the filing of formal charges against defendant, Campanella and Weisbrot

arrested defendant. According to Campanella's trial testimony, he advised defendant "that he was being placed under arrest," handcuffed him, and told him that they would transport him to a satellite facility of the prosecutor's office. Campanella recalled that defendant asked "what was going on and why he was being placed under arrest," and that he told defendant that the officers "would get into the details" when they reached the prosecutor's office. Weisbrot, Campanella, and DePonte then transported defendant to the prosecutor's office and escorted him to an interview room.

Weisbrot and Campanella then conducted a videorecorded interview. Using a Miranda waiver form, Weisbrot read defendant his Miranda rights. Defendant asked, "[s]o I'm under arrest or something?" Weisbrot told defendant, "[y]ou are under arrest yes. . I'm sure you have a ton of questions. I'll be happy to get into all that, okay, in just a few minutes. Let's just finish this form. Okay?" Defendant then acknowledged and waived his Miranda rights.

In an interview that lasted just over two hours, defendant gave a statement in which he said that he knew P.V., that he was aware of the shooting, and that his girlfriend owned a blue Ford Explorer, a vehicle that matched the description of a vehicle observed near the scene of P.V.'s

shooting. Defendant denied that he was involved in the shooting and stated that his brother, B.J., had no "beef or issues" with P.V. or his family.

B.

1.

A grand jury indicted defendant for first-degree attempted murder, with a sentencing enhancer that the crime had been committed with a firearm; first-degree unlawful possession of a weapon, later downgraded by the trial court to a second-degree offense; second-degree possession of a weapon for an unlawful purpose; and second-degree certain persons not to possess weapons, a charge that the State dismissed before trial.

2.

Defendant moved to suppress his April 14, 2014 statement to police. He conceded that the officers had informed him of his Miranda rights and that he had acknowledged those rights and signed a waiver form. Defendant argued, however, that because the detectives were aware that he was on parole on the date of his arrest, they should have refrained from questioning him until they determined whether he had an attorney. He also contended that the officers used deceptive techniques in a lengthy interrogation, and that they should have either repeated the Miranda warnings or terminated questioning. Defendant did not claim before the trial court that his statement should be suppressed

because he was not informed before his interrogation of the reason for his arrest or the charges that he would later face.

The trial court conducted a hearing pursuant to N.J.R.E. 104 with respect to defendant's motion to suppress his statement. Based on the totality of the circumstances, the court held that the State had proven beyond a reasonable doubt that defendant's waiver of his Miranda rights was knowing and voluntary, and accordingly denied defendant's motion to suppress.

3.

Defendant also moved to suppress P.V.'s April 13, 2014 statement to police at the hospital, in which P.V. identified defendant as the man who shot him.

On April 14, 2016, the trial court held a hearing pursuant to United States v. Wade, 388 U.S. 218 (1967) and State v. Henderson, 208 N.J. 208 (2011). The State called P.V. as a witness at the Wade/Henderson hearing. During his direct examination, P.V. claimed that because of the "traumatic experience" of the shooting, he remembered nothing about the incident. P.V. testified that he had no recollection of telling Campanella, Weisbrot, or DePonte that defendant was the person who shot him. He claimed that he did not recall describing to the officers the weapon used in the shooting, providing them with details of the incident, discussing with them a dispute with

defendant's brother B.J., or initialing a photograph of defendant at their request. P.V. confirmed the accuracy of his date and place of birth, address, social security number, and other biographical details set forth in his April 13, 2014 statement, but said that he did not recall providing those details to the detectives.

Defense counsel cross-examined P.V. at the Wade/Henderson hearing. P.V. suggested that he had learned details of the shooting in later conversations with his mother and reiterated that he had no recollection of the incident or his conversation with detectives on April 13, 2014. P.V. stated that since the date of his statement to the officers, he had cut back on prescription medication that had affected his memory. He acknowledged his prior convictions and insisted that his testimony at the Wade/Henderson hearing was truthful. P.V. said that the officers had not threatened him, but that he feared the prosecutor's office and believed that the Red Bank Police Department was conducting a "witch hunt" against him.

Following P.V.'s testimony at the hearing, the State advised the trial court that it viewed P.V.'s stated lack of recollection of the shooting to be feigned. The court agreed that P.V. was apparently feigning a lack of recollection but noted that the jury would determine P.V.'s credibility. The

trial court denied defendant's motion to suppress P.V.'s out-of-court statement and granted the State's motion to admit that statement into evidence.

On June 6, 2017, the State notified the trial court that P.V. had been indicted for the murder of defendant's brother, B.J. The State told the court that it understood that if P.V. were called as a witness at defendant's trial, he would likely invoke his Fifth Amendment privilege against self-incrimination and decline to testify. The State represented that it had been advised that P.V. would refuse to testify even if he were offered immunity. It urged the court to hold that P.V. was "unavailable" to testify at trial pursuant to N.J.R.E. 804(a)(2), which provides that a witness who "persists in refusing to testify concerning the subject matter of the statement despite an order of the court to do so" is "unavailable" for purposes of N.J.R.E. 804. The State asked the trial court to admit P.V.'s testimony at the Wade/Henderson hearing as the testimony of an unavailable witness at a prior hearing pursuant to N.J.R.E. 804(b)(1)(A).

Defendant opposed the admission of P.V.'s testimony on the ground that the attorney who had represented him at the Wade/Henderson hearing had not asked P.V. all of the questions that his trial counsel would ask P.V. were he to testify before the jury at trial. Defendant argued that he had the right to confront P.V. at trial so that the jury could observe his demeanor. He asserted

that there were insufficient indicia of reliability to admit P.V.'s prior testimony under an exception to the hearsay rule, in light of the uncertainty of P.V.'s identification of defendant as the shooter.

The trial court ruled that if P.V. refused to testify on Fifth Amendment grounds, he would be deemed unavailable to testify at trial pursuant to N.J.R.E. 804(a)(2) and his testimony at the Wade/Henderson hearing would therefore be admissible at defendant's trial as the prior testimony of an unavailable witness under N.J.R.E. 804(b)(1)(A).

4.

At defendant's trial, the State played for the jury his videorecorded statement given to police on April 14, 2014.

At a hearing outside of the presence of the jury, P.V.'s counsel informed the trial court that the State, with the approval of the Monmouth County Prosecutor and the Attorney General, had offered P.V. an immunity agreement pursuant to N.J.S.A. 2A:81-17.3, and that P.V. had nonetheless decided to assert his Fifth Amendment privilege if called as a witness at trial. The trial court ordered P.V. to testify, but P.V. maintained his position that he would refuse to do so. The trial court declared P.V. to be "unavailable" as a witness pursuant to N.J.R.E. 804(a)(2), thus permitting the State to present his

testimony at the Wade/Henderson hearing as the prior testimony of an unavailable witness.

P.V. did not testify at defendant's trial. The trial court instructed the jury that P.V. was alive but "legally unavailable" and cautioned the jury not to speculate about the reason for P.V.'s unavailability or draw any inference from either party's failure to call him as a witness.

During the direct examination of Weisbrot, the State presented to the jury P.V.'s testimony at the Wade/Henderson hearing, sanitized to remove information about P.V.'s prior convictions. The prosecutor read to the jury the questions that the State had posed to P.V. at the hearing, which incorporated details provided by P.V. during his April 13, 2014 statement to police. Weisbrot read P.V.'s answers to those questions, in which P.V. denied any recollection of the shooting and said that he remembered nothing about his conversation with the officers on that date.

In addition to defendant's statement and the testimony of P.V. at the Wade/Henderson hearing, the State presented the testimony of: (1) a witness who said that she heard a sound like "firecrackers" and saw a man wearing a black hoodie get into a blue SUV; (2) a witness who said he was an acquaintance of defendant and that he saw defendant wearing a black hoodie at around 6:00 or 6:30, the evening of the shooting; (3) a witness who lived near

the scene of the shooting and stated that when she ran out of her home to investigate the sound of gunshots, she saw defendant carrying a gun, and he raised the gun in her face; and (4) surveillance video showing a person wearing dark clothing and carrying a black semiautomatic pistol running near the location of the shooting shortly after it occurred.

The jury convicted defendant of all charges. The trial court sentenced him to an aggregate term of fifty years' imprisonment subject to an eighty-five percent period of parole ineligibility under the No Early Release Act, N.J.S.A. 2C:43-7.2, on the attempted murder charge, and concurrent terms of imprisonment on the weapons charges.

C.

Defendant appealed his conviction and sentence. He asserted for the first time that the police did not tell him why he was arrested and that the admission of his April 14, 2014 statement to police therefore violated his Miranda rights and constituted plain error. Defendant contended that all evidence obtained as a result of his statement should have been excluded as the "fruit of the poisonous tree." Defendant also challenged the admission of P.V.'s testimony at the Wade/Henderson hearing as a violation of the Rules of Evidence and his Sixth Amendment confrontation rights. In addition, defendant argued for the first time that the State committed prosecutorial

misconduct by virtue of a comment made by the prosecutor in summation and asserted that his sentence was excessive.

In a published opinion written by Judge Rothstadt, with Judge Susswein concurring in part and dissenting in part, the Appellate Division vacated defendant's conviction and remanded the matter to the trial court for a new trial. Sims, 466 N.J. Super. at 354-55, 379.

By a vote of two to one, the Appellate Division held that the trial court violated defendant's Miranda rights and committed plain error when it admitted into evidence defendant's April 14, 2014 statement to police. Id. at 361-69.

The Appellate Division majority relied on our decision in State v. A.G.D., in which we held that a Miranda waiver is invalid if police do not inform a defendant that a criminal complaint has been filed or an arrest warrant has been issued against him. Sims, 466 N.J. Super. at 364 (citing A.G.D., 178 N.J. 56, 58-59 (2003)). The majority also invoked our decision in State v. Vincenty, in which we held that if charges have been filed against a suspect prior to his interrogation, law enforcement officers should provide him with a "simple declaratory statement" identifying those charges before questioning him. Sims, 466 N.J. Super. at 364 (quoting Vincenty, 237 N.J. 122, 134 (2019)).

The Appellate Division majority construed A.G.D. and Vincenty to require that a defendant who has been arrested "be advised of the 'actual' and 'specific' charges he is facing," whether or not any such charges have been formally filed. Id. at 367 (quoting Vincenty, 237 N.J. at 135). It reasoned that a defendant, "[o]nce arrested," must be "informed of the charge for which he was being placed under arrest before deciding whether to waive his right against self-incrimination." Ibid. The Appellate Division majority held that "in response to defendant's inquiry as to whether he was arrested, the interrogating officers not telling defendant the charges for which he was arrested did not satisfy the requirements of A.G.D. and Vincenty." Ibid.

Two footnotes in the majority opinion defined the scope of the Appellate Division's new rule. First, the Appellate Division stated that "in this case we are only addressing where an officer's probable cause to arrest is developed through an investigation, not when an arrest is made spontaneously when responding to a crime scene or after witnessing a crime being committed." Id. at 368 n.6. The court added that its holding did "not address custodial interrogation that occurs after an 'unforeseeable and spontaneous' arrest because those facts are not in this case." Ibid. (quoting State v. Witt, 223 N.J. 409, 450 (2015)).

Second, the Appellate Division majority dismissed the dissenting judge's concern "that our holding will create logistical problems for law enforcement," noting that

> [o]ur opinion is not intended to suggest that the charge upon which an officer believes he or she has probable cause to arrest must be the specific charge with which a defendant is ultimately charged. Rather, our holding is limited to requiring that the interrogating officer inform the arrested interrogee of the charge that, at the time of arrest, the officer had probable cause to believe defendant committed. We recognize that the charge may morph into a different degree crime or even a totally different offense as a post-interrogation investigation develops. We still conclude the law requires an officer be transparent and truthful about why a defendant was arrested before a request is made for a waiver of his or her Miranda rights.
>
> [Id. at 368-69 n.7.]

Acknowledging "that the trial court did not have an opportunity to consider the issue that we determined warrants a new trial in this case," the Appellate Division majority left to the trial court's determination on remand the scope of the evidence to be barred on retrial by virtue of its holding. Id. at 369.

In his concurring and dissenting opinion, Judge Susswein parted company with the majority on the Miranda issue. Id. at 379-86 (Susswein, J., concurring and dissenting). He noted that when a judge has issued a criminal

complaint or arrest warrant, police officers are in a position "to provide a 'simple declaratory statement' to inform an interrogee accurately and definitively as to the nature and seriousness of the charges that have been filed as of the time of a custodial interrogation." Id. at 381 (quoting Vincenty, 237 N.J. at 134). Judge Susswein observed that, in such a setting, "there is no ambiguity as to the essential nature and gradation of the charge(s) the defendant is facing because the specific offense(s) for which a judge found probable cause are set forth in the charging document." Ibid. (citing R. 3:2-1(a)(1)). Judge Susswein explained that in a case in which a judge has not approved charges against a suspect, an officer may "have a lawful basis for an arrest but insufficient information, pending further investigation, to determine which exact offense(s) have been committed." Ibid. In Judge Susswein's view, "extending the bright-line rule established in Vincenty could put the proverbial cart before the horse by requiring a police officer to advise the custodial interrogee as to the specific charges he is facing before an informed charging decision can be made." Id. at 383.

The Appellate Division unanimously concluded that the trial court abused its discretion when it admitted P.V.'s testimony at the Wade/Henderson hearing because the testimony revealed to the jury P.V.'s assertions in his April 13, 2014 statement to police. Id. at 378. It rejected the trial court's

holding that P.V.'s hearing testimony met the requirements of N.J.R.E. 804(b)(1)(A), ruling that defendant lacked an opportunity and similar motive in the Wade/Henderson hearing "to develop the victim's testimony by cross-examination." Id. at 377 (citing State v. Coder, 198 N.J. 451, 467 (2009)). The Appellate Division held that because "the purpose of the hearing was limited to the victim's out-of-court identification of defendant," defendant could not achieve the objective he would have pursued at trial: "to attack the victim's credibility in the eyes of the factfinder, specifically the veracity of his identification of defendant as the shooter." Ibid.

The Appellate Division also ruled that the admission of P.V.'s testimony at the Wade/Henderson hearing violated defendant's rights under the Confrontation Clause. Ibid. The court held that because P.V. claimed that he had no recollection of the shooting, defendant had no "meaningful opportunity to cross-examine" him. Id. at 378. The court held that because P.V.'s statement was elicited through the testimony of Weisbrot -- not the testimony of P.V. himself -- "defendant was deprived of the jury being able to assess the victim's demeanor." Ibid. The Appellate Division concluded that by admitting P.V.'s testimony at the Wade/Henderson hearing, the trial court had also admitted P.V.'s April 13, 2014 statement to police at the hospital, because

the State's questioning of P.V. incorporated the contents of that statement. Id. at 371-72, 377-78.

The Appellate Division did not reach the prosecutorial misconduct and sentencing issues raised by defendant. Id. at 378.

D.

Pursuant to Rule 2:2-1(a)(2) and based on Judge Susswein's dissent, the State appealed as of right the Appellate Division's decision vacating defendant's conviction based on a violation of his Miranda rights. We granted the State's petition for certification, in which it challenged the Appellate Division's holding regarding the trial court's admission of P.V.'s testimony at the Wade/Henderson hearing, as well as its decision regarding defendant's waiver of his Miranda rights. 246 N.J. 146 (2021). We also granted the motions of the Attorney General, the County Prosecutors Association of New Jersey, and the Association of Criminal Defense Lawyers of New Jersey to appear as amici curiae.

II.

A.

The State urges the Court to reverse the Appellate Division's determination that defendant's Miranda waiver was not knowing, intelligent, and voluntary because the detectives who questioned him did not identify the

charges that were later brought against him. It argues that the new rule announced by the Appellate Division is an unwarranted extension of A.G.D. and Vincenty that would introduce ambiguity and uncertainty into police interrogations of arrestees. The State concurs with Judge Susswein that the Appellate Division's rule is unworkable because it would require police officers to speculate on the charges that an arrestee might eventually face when no judge has issued a complaint-warrant or arrest warrant.

The State also challenges the Appellate Division's ruling regarding the admission at defendant's trial of P.V.'s testimony at the Wade/Henderson hearing. According to the State, P.V. was clearly "unavailable" under N.J.R.E. 804(a)(2) because he invoked his Fifth Amendment rights and declined to testify despite an offer of immunity, and the requirements of N.J.R.E. 804(b)(1)(A) were satisfied because defendant had a sufficient opportunity and similar motive to cross-examine P.V. at the hearing. The State contends that pretrial testimony admissible under N.J.R.E. 804(b)(1) also satisfies the mandate of the Confrontation Clause.

B.

Defendant concurs with the Appellate Division majority that our decisions in A.G.D. and Vincenty compel interrogating officers to advise an individual arrested without a warrant about the charges that he faces before

questioning him. He asserts that absent such a disclosure, the arrestee's Miranda waiver is invalid because he is not in a position to assess his sentencing exposure or limit the scope of his statement. Defendant argues that the concerns expressed by Judge Susswein and the State about the practical impact of the Appellate Division's new rule are unfounded because law enforcement officers are thoroughly trained to assess probable cause and make charging determinations.

Defendant also urges that we affirm the Appellate Division's decision reversing his conviction because the trial court admitted into evidence P.V.'s testimony at the Wade/Henderson hearing. He contends that the admission of that testimony violated the Rules of Evidence because he did not have a "similar motive" to cross-examine P.V. at the hearing and at trial, and that portions of the hearing transcript admitted into evidence disclosed to the jury P.V.'s out-of-court statement. Defendant also asserts that the evidence violated his confrontation rights because the jury had no opportunity to observe P.V.'s demeanor.

C.

Amicus curiae the Attorney General argues that the Appellate Division's new Miranda waiver rule is unprecedented, unnecessary, and impractical, and urges us to reject that rule. The Attorney General contends that the admission

of P.V.'s pretrial testimony satisfied N.J.R.E. 804(b)(1)(A) and the Confrontation Clause because defendant had both an opportunity to cross-examine the witness and a motive to do so similar to the motive defendant would have had if his counsel had cross-examined P.V. at trial.

D.

Amicus curiae the County Prosecutors Association of New Jersey agrees with the State and the Attorney General that the Appellate Division majority's expanded Miranda rule unnecessarily impedes interrogations of uncharged suspects.

E.

Amicus curiae the Association of Criminal Defense Lawyers of New Jersey contends that the Appellate Division majority's Miranda ruling is a logical extension of A.G.D. that is easily implemented because officers know what crimes are at issue when they arrest suspects and can identify those crimes to arrestees before interrogating them. Amicus asserts that defendant lacked a motive to cross-examine P.V. that was similar to the motive that he would have had at trial and argues that defendant was deprived of meaningful confrontation because P.V. did not testify at trial.

III.

A.

We first consider the trial court's decision denying defendant's motion to suppress his statement to police.

When we review a trial court's decision on a motion to suppress a defendant's statement, we defer to the factual findings of the trial court if those findings are supported by sufficient credible evidence in the record. State v. S.S., 229 N.J. 360, 374 (2017). Because defendant did not argue before the trial court that his Miranda waiver was invalid because he was not informed, prior to his interrogation, of the offenses for which he was later charged, we review the trial court's determination on that question for plain error. R. 2:10-2; State v. Funderburg, 225 N.J. 66, 79 (2016). We review de novo the Appellate Division's legal determination expanding the Miranda rights of arrestees in cases in which no complaint-warrant or arrest warrant has been issued. Vincenty, 227 N.J. at 132; State v. Hubbard, 222 N.J. 249, 263 (2015).

B.

"The privilege against self-incrimination, as set forth in the Fifth Amendment to the United States Constitution, is one of the most important protections of the criminal law." State v. Presha, 163 N.J. 304, 312 (2000)

(citing U.S. Const. amend. V; State v. Hartley, 103 N.J. 252, 262 (1986)). Although New Jersey has no constitutional provision addressing the privilege against self-incrimination, our "common law has granted individuals the 'right against self-incrimination since colonial times.'" Vincenty, 237 N.J. at 132 (quoting A.G.D., 178 N.J. at 66). Our law maintains "an unyielding commitment to ensure the proper admissibility of confessions." Ibid. (quoting State v. Reed, 133 N.J. 237, 252 (1993)).

Under New Jersey law, "[a] confession obtained during a custodial interrogation may not be admitted in evidence unless law enforcement officers first informed the defendant of his or her constitutional rights." State v. Hreha, 217 N.J. 368, 382 (2014) (citing Miranda, 384 U.S. at 444). We impose on the State the burden to prove beyond a reasonable doubt that a suspect's waiver of his privilege against self-incrimination prior to an inculpatory statement "was knowing, intelligent, and voluntary in light of all the circumstances." Presha, 163 N.J. at 313.

Generally, when a court determines whether an interrogee has knowingly, intelligently, and voluntarily waived his right against self-incrimination in the setting of a custodial interrogation, it considers the totality of the circumstances. State v. Nyhammer, 197 N.J. 383, 402-03 (2009); State v. Dispoto, 189 N.J. 108, 124-35 (2007); State v. O'Neill, 193 N.J. 148, 181

(2007). "Only in the most limited circumstances have we applied a per se rule to decide whether a defendant knowingly and voluntarily waived Miranda rights." Nyhammer, 197 N.J. at 403 (discussing A.G.D., 178 N.J. at 68; Reed, 133 N.J. at 261-64).

In A.G.D., officers investigating the alleged sexual abuse of a minor obtained a warrant for the defendant's arrest but "neither executed the arrest warrant nor informed defendant that such a warrant had been issued" before interrogating him. 178 N.J. at 59. Reviewing the trial court's denial of defendant's motion to suppress his statement, we departed from the totality-of-the-circumstances rule and required police officers to inform a suspect that a criminal complaint has been filed or an arrest warrant has been issued before interrogating him. Id. at 68-69. As we explained, the "defendant was disadvantaged by a lack of critically important information. The government's failure to inform a suspect that a criminal complaint or arrest warrant has been filed or issued deprives that person of information indispensable to a knowing and intelligent waiver of rights." Id. at 68. We reasoned that "a criminal complaint and arrest warrant signify that a veil of suspicion is about to be draped on the person, heightening the risk of criminal liability." Ibid. Thus, "[w]ithout advising the suspect of his true status when he does not otherwise know it, the State cannot sustain its burden to the Court's satisfaction that the

suspect has exercised an informed waiver of rights, regardless of other factors that might support his confession's admission." Ibid.

In Nyhammer, we made clear that the A.G.D. rule was limited to the circumstances of that appeal. 197 N.J. at 404-05. There, we applied the totality-of-the-circumstances test, not a bright-line rule as in A.G.D., to a setting in which law enforcement officers questioned the defendant about his uncle's role in alleged child abuse without disclosing that he was also a suspect. Ibid. Comparing that case to A.G.D., we observed that

> [t]he issuance of a criminal complaint and arrest warrant by a judge is an objectively verifiable and distinctive step, a bright line, when the forces of the state stand arrayed against the individual. The defendant in A.G.D. was purposely kept in the dark by his interlocutors of this indispensable information. Unlike the issuance of a criminal complaint or arrest warrant, suspect status is not an objectively verifiable and discrete fact, but rather an elusive concept that will vary depending on subjective considerations of different police officers. A suspect to one police officer may be a person of interest to another officer. Moreover, we emphasized that "our holding [in A.G.D.] is not to be construed as altering existing case law . . . other than imposing the basic requirement to inform an interrogatee that a criminal complaint or arrest warrant has been filed or issued."
>
> [Ibid. (alteration and omission in original) (quoting A.G.D., 178 N.J. at 68-69).]

We accordingly concluded that Nyhammer did not "fall within the limited category of cases in which we have applied a bright-line rule," and that

the officers' failure to disclose to the defendant his status as a suspect before interrogating him should instead "be a factor in the totality-of-the-circumstances test." Id. at 405.

In Vincenty, police officers failed to inform a suspect of formal charges filed against him prior to his interrogation, in which he made self-incriminating statements. 237 N.J. at 126-29. We reiterated A.G.D.'s mandate that law enforcement officers "make a simple declaratory statement at the outset of an interrogation that informs a defendant of the essence of the charges filed against" that defendant. Id. at 134. We viewed the interrogation in Vincenty to be "precisely what A.G.D. prohibits," as it "illustrates that suspects cannot knowingly and intelligently determine whether to waive their right against self-incrimination if, when making that determination, they have not been informed of the charges filed against them." Ibid. We accordingly reversed the trial court's denial of the defendant's motion to suppress and vacated his conviction. Id. at 136.

The rule announced in A.G.D. is clear and circumscribed. If a complaint-warrant has been filed or an arrest warrant has been issued against a suspect whom law enforcement officers seek to interrogate, the officers must disclose that fact to the interrogee and inform him in a simple declaratory statement of the charges filed against him before any interrogation. Id. at 134;

Nyhammer, 197 N.J. at 404-05; A.G.D., 178 N.J. at 68-69. The officers need not speculate about additional charges that may later be brought or the potential amendment of pending charges. Nyhammer, 197 N.J. at 404-05; A.G.D., 178 N.J. at 68-69.

C.

We concur with Judge Susswein that the Appellate Division's expansion of the rule stated in A.G.D. is unwarranted and impractical. See Sims, 466 N.J. Super. at 379-86 (Susswein, J., concurring and dissenting).[1]

The rule of A.G.D. mandates disclosure of factual information about pending charges that the officer can readily confirm and clearly convey. Vincenty, 237 N.J. at 132-35; A.G.D., 178 N.J. at 68-69. A complaint issued by either a judge or another judicial officer authorized by N.J.S.A. 2B:12-21, based on a finding of probable cause, is "a written statement of the essential

[1] As Judge Susswein observed, neither the Appellate Division majority nor the parties have cited any federal or state case law prescribing a rule analogous to the Appellate Division's new rule. Id. at 383 n.5. As we noted in Nyhammer, "we are not aware of any case in any jurisdiction that commands that a person be informed of his suspect status in addition to his Miranda warnings or that requires automatic suppression of a statement in the absence of a suspect warning." 197 N.J. at 406; accord United States v. Whiteford, 676 F.3d 348, 362 (3d Cir. 2012) (observing that the court is aware of no authority "holding that a defendant must know of the charges against him to validate a Miranda waiver); United States v. Clenney, 631 F.3d 658, 668 (4th Cir. 2011) ("[Miranda] does not require that the suspect be informed of the charges against him.").

facts constituting the offense charged." R. 3:2-1(a)(1); see also R. 3:2-3(a), (b) (addressing the contents of arrest warrants, which include the "initial charge" against the defendant).[2] A complaint-warrant or arrest warrant notifies an interrogating police officer that a judge, or other judicial officer, has found probable cause with respect to one or more charges, and enables a police officer to make the "simple declaratory statement" that A.G.D. requires. Vincenty, 237 N.J. at 134.[3] So informed, the arrestee knows his "true status" before waiving his Miranda rights, and may knowingly, intelligently, and voluntarily waive those rights. A.G.D., 178 N.J. at 68.

The principle stated in A.G.D. stands in stark contrast to the Appellate Division's expanded definition of an arrestee's Miranda rights. See Sims, 466 N.J. Super. at 361-69. The Appellate Division's rule relies not on an objective statement of the charges pending against the arrestee, but on an officer's

[2] Under N.J.S.A. 2B:12-21(a), "[a]n administrator or deputy administrator of a municipal court, authorized by a judge of that court, may exercise the power of the municipal court to administer oaths for complaints filed with the municipal court and to issue warrants and summonses." See also R. 3:2-3(a) ("The warrant shall be signed by a judicial officer, which for these purposes shall be defined as the judge, clerk, deputy clerk, authorized municipal court administrator, or authorized deputy municipal court administrator.").

[3] The CD-1 complaint-summons and CD-2 complaint-warrant forms identify the original charges and amended charges filed against the defendant. See R. 3:2-1 to -3.

prediction, based on information learned to date in a developing investigation, of what charges may be filed. As Judge Susswein observed, even when there is probable cause for an arrest, there may be insufficient information about the victim's injuries, the arrestee's mental state, and other key issues to enable an officer to accurately identify the charges. See id. at 381-83 (Susswein, J., concurring and dissenting). An officer acting in good faith might inadvertently misinform an arrestee as to the charges that he will eventually face.[4] We do not share the Appellate Division's conclusion that law enforcement officers can resolve any ambiguities or disputes about charging decisions before a judicial officer has reviewed the showing of probable cause and issued a complaint-warrant or arrest warrant.

Defendant suggests that if we do not adopt the Appellate Division's new rule, law enforcement officers will deliberately delay seeking a complaint-warrant or arrest warrant in order to avoid disclosing to an arrestee the charges

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[4] We do not agree with the Appellate Division that the risk of misinformation evaporates because the new rule applies only to arrests arising from an investigation, not "spontaneous" arrests. See Sims, 466 N.J. Super. at 368 n.6. The fact that an investigation has commenced does not mean that police officers can be certain about the charges that will be brought against the defendant. Nor do we subscribe to the majority's view that any logistical concerns are resolved if the new rule requires that an officer disclose only "the charge that, at the time of arrest, the officer had probable cause to believe [the] defendant committed." See id. at 368 n.7. Prior to the issuance of a complaint-warrant or arrest warrant, an officer cannot definitively determine the charges that a given interrogee will face.

that he faces. In a case in which there is evidence of such bad-faith conduct on the part of law enforcement officers, the trial court should consider such conduct as part of the totality-of-the-circumstances test. The potential for improper conduct by law enforcement to evade A.G.D. and Vincenty, however, does not justify abandoning the core principles of those decisions.

Our dissenting colleagues unaccountably characterize our decision as a change in our law on the right-against self-incrimination, venturing so far as to suggest that the issue in this case is "whether we will abandon our own jurisprudence," post at ___ (slip op. at 14), and that our ruling creates a "shortcut" that will "erode faith in our criminal justice system," post at ___ (slip op. at 9). To the contrary, it is the dissent that presses for a change in our jurisprudence: a substantial expansion of the rule stated in A.G.D. and Vincenty that confers on suspects broader rights in the interrogation setting than those conferred by federal Fifth Amendment jurisprudence and the State Constitution. See Vincenty, 237 N.J. at 132-35; A.G.D., 178 N.J. at 68-69. Were the dissent's view to prevail, the rule imposed on law enforcement would not comport with our prior precedent, but starkly depart from that precedent and from the law of every other jurisdiction.

In short, we share Judge Susswein's reservations about the Appellate Division's new rule requiring officers to tell an arrestee, not subject to a

complaint-warrant or arrest warrant, what charges he faces before interrogating him. We decline to adopt that rule.

D.

Affording to the trial court's findings of fact the deference which our law requires, we affirm the court's application of the totality-of-the-circumstances standard to deny defendant's motion to suppress his statement.

That standard requires that we "consider such factors as the defendant's 'age, education, and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved.'" Nyhammer, 197 N.J. at 402 (quoting Presha, 163 N.J. at 313). The interrogee's "previous encounters with the law" may also be a relevant factor. Presha, 163 N.J. at 313 (quoting State v. Miller, 76 N.J. 392, 402 (1978)). In short, "the root of the inquiry is whether a suspect's will has been overborne by police conduct." Ibid.

As the trial court noted and the record makes clear, defendant was read his Miranda rights and waived those rights verbally and in writing. The court found no evidence that before or during the two-and-a-half-hour interrogation, the detectives threatened defendant, subjected him to mental exhaustion or physical stress, ignored a request to leave, or acted in any manner to overbear

his will. As the trial court noted, defendant, who had prior experience with the criminal justice system, repeatedly denied involvement in the shooting during his interrogation.

We find the trial court's findings to be supported by sufficient credible evidence in the record. We concur with the trial court that the totality of the circumstances warranted the denial of defendant's motion to suppress his April 14, 2014 statement to police, and we accordingly reverse the Appellate Division's determination on that issue.

IV.

A.

We next consider the trial court's decision to admit into evidence P.V.'s testimony at the Wade/Henderson hearing at defendant's trial.

Generally, we "review evidentiary rulings under a deferential standard and will 'uphold [the trial court's] determinations absent a showing of an abuse of discretion.'" State v. Trinidad, 241 N.J. 425, 448 (2020) (alteration in original) (quoting State v. Scott, 229 N.J. 469, 479 (2017)). We entrust to trial judges "'a wide latitude of judgment,'" and, therefore, the trial court's evidentiary ruling "will not be upset unless . . . there has been a clear error of judgment." State v. Koedatich, 112 N.J. 225, 313 (1988) (quoting State v. Balthrop, 92 N.J. 542, 548 (1983) (Schreiber, J., dissenting)). We review de

novo the court's legal determinations, including its ruling that the admission at trial of P.V.'s testimony at the Wade/Henderson hearing did not violate defendant's confrontation rights. See State v. Wilson, 227 N.J. 534, 544 (2017).

The Appellate Division reversed the trial court's evidentiary determination on two grounds: that P.V.'s prior testimony did not meet the requirements of N.J.R.E. 804(b)(1)(A), and that the admission of that testimony violated defendant's confrontation rights. We consider each issue in turn.

B.

1.

N.J.R.E. 801(c) defines hearsay as a statement that "(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." "Hearsay is generally inadmissible unless an exception applies." State v. Williamson, 246 N.J. 185, 199 (2021); accord N.J.R.E. 802.

Subject to the notice requirements of N.J.R.E. 807, N.J.R.E. 804(b)(1)(A) authorizes the admission of an unavailable declarant's testimony from a prior proceeding if the testimony

> (i) was given by a witness at a prior trial of the same or a different matter, or in a hearing or deposition taken in

> compliance with law in the same or another proceeding; and (ii) is now offered against a party who had an opportunity and similar motive in the prior trial, hearing or deposition to develop the testimony by examination or cross-examination.
>
> [N.J.R.E. 804(b)(1)(A).]

First, N.J.R.E. 804(b)(1)(A) requires that the witness who gave the prior testimony be "unavailable," as defined by N.J.R.E. 804(a). N.J.R.E. 804(a) identifies four settings in which a witness is declared "unavailable" for purposes of N.J.R.E. 804, "[e]xcept when the declarant's unavailability has been procured or wrongfully caused by the proponent of declarant's statement for the purpose of preventing declarant from attending or testifying." In one of those settings, a declarant who "persists in refusing to testify concerning the subject matter of the statement despite an order of the court to do so" is deemed "unavailable" to testify at trial. N.J.R.E. 804(a)(2); see also Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1 on N.J.R.E. 804(a) (2022) ("A declarant is 'unavailable' under N.J.R.E. 804(a)(2) if they refuse to testify despite a court order to do so."); State v. Cabbell, 207 N.J. 311, 336 (2011) ("[A] witness is effectively absent from trial and does not 'appear' for cross-examination if he invokes his Fifth Amendment privilege in response to every question.").

Second, N.J.R.E. 804(b)(1)(A) requires that the party against whom the prior testimony is offered had an "opportunity" in the prior trial, hearing, or deposition "to develop the testimony by examination or cross-examination." The 1991 Supreme Court Committee Comment to this rule makes clear that the term, "develop the testimony by examination or cross-examination" is "intended to include direct and redirect examination as well as cross-examination as in Fed. R. Evid. 804(b)(1)." Official Comment to N.J.R.E. 804(b)(1)(A); see, e.g., United States v. Salim, 855 F.2d 944, 953-54 (2d Cir. 1988) (observing that, under Fed. R. Evid. 804(b)(1), a defendant is entitled to "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985))).

Finally, N.J.R.E. 804(b)(1)(A) mandates that the party against whom the prior testimony is offered has a "similar motive in the prior trial, hearing, or deposition to develop the testimony by examination or cross-examination." Construing Fed. R. Evid. 804(b)(1), which is closely analogous to N.J.R.E. 804(b)(1)(A),[5] the Second Circuit has held that

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[5] Fed. R. Evid. 804(b)(1) authorizes the admission of an unavailable declarant's prior testimony that

> (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current

> [t]he proper approach . . . in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue. The nature of the two proceedings -- both what is at stake and the applicable burden of proof -- and, to a lesser extent, the cross-examination at the prior proceeding -- both what was undertaken and what was available but forgone -- will be relevant though not conclusive on the ultimate issue of similarity of motive.
>
> [United States v. DiNapoli, 8 F.3d 909, 914-15 (2d Cir. 1993) (en banc).]

As the Ninth Circuit has observed, "[t]he 'similar motive' requirement is inherently factual and depends, at least in part, on the operative facts and legal issues and on the context of the proceeding." United States v. Geiger, 263 F.3d 1034, 1038 (9th Cir. 2001) (citing United States v. Salerno, 505 U.S. 317, 324-25 (1992)); see also United States v. Feldman, 761 F.2d 380, 385 (7th Cir. 1985) ("[A] court must evaluate not only the similarity of the issues, but also the purpose for which the testimony is given.").

The State, as the proponent of the evidence, bears the burden to demonstrate both that the declarant is unavailable and that, at the prior trial,

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> proceeding or a different one; and (B) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

hearing, or deposition, the defendant had an opportunity and similar motive to cross-examine the declarant. See, e.g., State v. Maben, 132 N.J. 487, 500 (1993) (recognizing that the State is required "to prove unavailability and a good-faith effort to procure the witness before allowing the introduction of hearsay testimony").

2.

We view the trial court's admission of P.V.'s prior testimony to constitute a proper application of N.J.R.E. 804(b)(1)(A).

First, the trial court correctly concluded that at the time of defendant's trial, P.V. was a declarant who "persists in refusing to testify concerning the subject matter of the statement despite an order of the court to do so," and was therefore "unavailable" under N.J.R.E. 804(a)(2). P.V. confirmed in a hearing outside the jury's presence during trial that he would invoke his right against self-incrimination under the Fifth Amendment if called as a witness. P.V. maintained that position despite the State's offer of immunity pursuant to N.J.S.A. 2A:81-17.3 and the trial court's order that he testify. Accordingly, the State met the "unavailability" requirement of N.J.R.E. 804(a) under subsection (a)(2).

Second, the Wade/Henderson hearing at which P.V. testified was a "hearing" in the "same . . . proceeding" as defendant's trial within the meaning of N.J.R.E. 804(b)(1)(A).

Third, the State demonstrated that at the Wade/Henderson hearing, defendant had "an opportunity . . . to develop the testimony by examination or cross-examination." N.J.R.E. 804(b)(1)(A). Indeed, when cross-examined by defense counsel, P.V. claimed not to recall the April 9, 2014 shooting. He suggested that some of the responses attributed to him in the transcript of his statement constituted his mother's comments, not his. P.V. implied that his statement to police was affected by the medication that he was taking. He stated that he did not have a close relationship with defendant or his brother. P.V. denied any recollection of identifying defendant as the man who shot him. He expressed fear of the prosecutor's office and the police, and confirmed his prior convictions and prison sentences. In short, defense counsel not only had the opportunity to cross-examine P.V., as N.J.R.E. 804(b)(1)(A) requires, but thoroughly and skillfully questioned P.V. The jury had the benefit of that cross-examination when it considered P.V.'s Wade/Henderson hearing testimony and assessed his credibility.

Fourth, the State also demonstrated that defendant had a "similar motive" at the Wade/Henderson hearing "to develop the testimony by

examination or cross-examination." N.J.R.E. 804(b)(1)(A). At the hearing, as at trial, defendant's motive was to impeach P.V.'s credibility, underscore P.V.'s claimed lack of recollection, suggest that police coercion was a factor in P.V.'s identification of defendant, and attack P.V.'s statement as unreliable. In short, defendant's objectives in the two settings were similar, if not identical.

Accordingly, the trial court properly ruled that P.V.'s prior testimony was admissible pursuant to N.J.R.E. 804(b)(1)(A).

C.

1.

We next consider defendant's argument that the introduction of P.V.'s statement violated his rights under the Confrontation Clause.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; see also N.J. Const. art. I, ¶ 10 ("In all criminal prosecutions the accused shall have the right . . . to be confronted with the witnesses against him . . . .").

Our confrontation jurisprudence "traditionally has relied on federal case law to ensure that the two provisions provide equivalent protection." State v. Roach, 219 N.J. 58, 74 (2014); see also State v. Miller, 170 N.J. 417, 425 (2002) (explaining that "[t]he New Jersey Constitution contains a cognate

guarantee" to that of the Sixth Amendment); Cabbell, 207 N.J. at 328 n.11 (noting that for purposes of the Court's discussion in that case, "references to the Sixth Amendment are interchangeable with Article I, Paragraph 10 of our State Constitution").

In Crawford v. Washington, the United States Supreme Court held that the framers of the Constitution intended the Confrontation Clause to bar the admission of "testimonial statements of a witness who did not appear at trial unless [the declarant is] unavailable to testify, and the defendant had . . . a prior opportunity for cross-examination." 541 U.S. 36, 53-54 (2004).

The State need not demonstrate that the defendant undermined the credibility of the unavailable witness at the prior proceeding to satisfy the constitutional test; as the Supreme Court has noted, "successful cross-examination is not the constitutional guarantee." United States v. Owens, 484 U.S. 554, 560 (1988); accord Cabbell, 207 N.J. at 337. Instead, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Fensterer, 474 U.S. at 20. Although "Crawford does not provide a specific standard for determining whether a defendant had an opportunity to cross-examine a witness, . . . it

does suggest that the prior opportunity must be adequate." Rolan v. Coleman, 680 F.3d 311, 327 (3d Cir. 2012) (citing Crawford, 541 U.S. at 57).

Federal courts have held that a witness's testimony at a preliminary hearing, such as the Wade/Henderson hearing at issue here, can provide the constitutionally mandated opportunity to cross-examine. See Gibbs v. Covello, 996 F.3d 596, 601 (9th Cir.) (holding that the government did not offend the Confrontation Clause when it introduced the preliminary hearing testimony of a witness unavailable at trial as long as the defendant had a prior opportunity to cross-examine), cert. denied, 142 S. Ct. 453 (2021); United States v. Ralston, 973 F.3d 896, 911 (8th Cir. 2020) (affirming the district court's decision rejecting a confrontation challenge to an unavailable witness's testimony at a preliminary hearing); Williams v. Bauman, 759 F.3d 630, 634-35 (6th Cir. 2014) (holding that the defendant's confrontation rights were not violated by the admission of preliminary hearing testimony of a witness who died before trial); Rolan, 680 F.3d at 326-37 (affirming the district court's holding that the defendant had an opportunity to cross-examine a witness at a prior trial and preliminary hearing that satisfied the Confrontation Clause).

Moreover, the defendant may be deemed to have had a prior opportunity for cross-examination even if the witness denies recollection of relevant events. The Supreme Court has noted that the Confrontation Clause provides

"no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion," but rather "is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." Owens, 484 U.S. at 558 (quoting Fensterer, 474 U.S. at 21-22); accord State v. Brown, 138 N.J. 481, 543 (1994) ("[A] witness's feigned lack of recollection . . . [does] not rise to the level of denying a defendant's federal and state constitutional right to confront witnesses."). As Justice Harlan has observed,

> The fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence. The prosecution has no less fulfilled its obligation simply because a witness has a lapse of memory. The witness is, in my view, available. To the extent that the witness is, in a practical sense, unavailable for cross-examination on the relevant facts, . . . I think confrontation is nonetheless satisfied.
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> [California v. Green, 399 U.S. 149, 188-89 (1970) (Harlan, J., concurring).]

In Owens, the Supreme Court held that "[i]t is sufficient [under the Confrontation Clause] that the defendant has the opportunity to bring out such

matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination . . .) the very fact that he has a bad memory." 484 U.S. at 559 (citation omitted). Moreover, "[t]he weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee." Id. at 560; see also United States v. Milton, 8 F.3d 39, 47 (D.C. Cir. 1993) ("When a witness has forgotten the basis for and the giving of testimony under oath in an earlier proceeding and that testimony is then introduced into evidence, defense questioning, though impaired, is not futile for the reasons given in Owens.").

Accordingly, the Confrontation Clause is not violated by the admission of an unavailable witness's prior testimony simply because that witness claims that he does not recall the event at issue. Owens, 484 U.S. at 559.

2.

We agree with the trial court that P.V.'s Wade/Henderson hearing testimony met the requirements of the Confrontation Clause.

First, just as P.V. was an "unavailable" declarant as defined in N.J.R.E. 804(a)(2), he was "unavailable to testify" at trial for purposes of the Confrontation Clause. See Crawford, 541 U.S. at 53.

Second, defendant had the adequate "prior opportunity for cross-examination" envisioned by the Supreme Court's confrontation jurisprudence. See ibid.; Owens, 484 U.S. at 558.

We disagree with the Appellate Division's conclusion that the trial court's admission of P.V.'s Wade/Henderson hearing testimony violated the Confrontation Clause because "[d]efendant did not have the opportunity to cross-examine [P.V.] about his statement to police -- either at the pretrial hearing or in front of the jury," and had "nothing to cross-examine [P.V.] about at the Rule 104 hearing." Sims, 466 N.J. Super. at 377-78.

To the contrary, at the Wade/Henderson hearing, defendant had the opportunity to attack the credibility of P.V.'s statement identifying defendant as the shooter. Indeed, defendant elicited P.V.'s testimony disclaiming recollection of any statement, implying that comments attributed to him were his mother's, and inferring that he acted out of fear of some of the investigating officers. By virtue of the direct and cross-examination at the Wade/Henderson hearing, the jury was fully informed that P.V. denied any recollection of the shooting or his statement to police. See Owens, 484 U.S. at 558 (noting that the Confrontation Clause is satisfied when the defendant has the "full and fair opportunity to probe and expose" the witness's claim not to

recall critical events, thus underscoring for the jury the reasons why it should give his testimony little or no weight (quoting Fensterer, 474 U.S. at 21-22)).

Nor do we subscribe to the Appellate Division's view that defendant's rights were violated because he "never had the opportunity to cross-examine the victim before the factfinder that was to decide his fate." Sims, 466 N.J. Super. at 378. If the Confrontation Clause required every declarant to appear before the jury for cross-examination, it would prohibit the admission of an unavailable witness's prior testimony as an exception to the hearsay rule, which it clearly does not. As the Supreme Court has observed, it has "never insisted on an actual face-to-face encounter at trial in every instance in which testimony is admitted against a defendant" and has instead "repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial." Maryland v. Craig, 497 U.S. 836, 847-48 (1990).

Finally, we do not share the Appellate Division's view that the trial court improperly admitted P.V.'s April 13, 2014 statement to police at the hospital through the State's questioning of P.V. at the Wade/Henderson hearing. Sims, 466 N.J. Super. at 371-72, 376-78. P.V.'s April 13, 2014 statement was not offered into evidence -- let alone admitted into evidence -- at defendant's

trial.[6] No recording or transcript of that statement was presented to the jury. When the trial court overruled defendant's evidentiary and constitutional objections to the admission of P.V.'s Wade/Henderson testimony, it was not asked to exclude any portion of that testimony on the ground that questions posed to P.V. revealed the contents of his prior statement to police. Neither the Appellate Division nor defendant cited authority that would require the exclusion of the prior testimony on that ground.[7]

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[6] Our dissenting colleagues contend that P.V.'s statement to police in the hospital was admitted into evidence at trial. Post at ___ n.5 (slip op. at 16 n.5). As the record reveals, that is simply incorrect. Immediately after the trial court told the jury that it would hear P.V.'s statement from "a prior proceeding" and that it may consider it as substantive evidence, the State presented P.V.'s testimony at the Wade/Henderson hearing during Weisbrot's direct examination. The trial court's comments clearly referred to P.V.'s prior testimony, not the hospital statement. The State made no attempt to introduce the transcript of P.V.'s hospital statement at trial into evidence, and the jury was not presented with any portion of that statement, other than in the prosecutor's reading of questions posed to P.V. during his testimony at the Wade/Henderson hearing.

[7] The decisions by this Court cited by the Appellate Division on this point do not suggest that prior testimony admissible under N.J.R.E. 804(b)(1) violates the Confrontation Clause because questions posed to the witness in the prior trial, hearing, or deposition incorporated the contents of an out-of-court statement. See generally Sims, 466 N.J. Super. at 375-78. In Cabbell, we held that the defendant's confrontation rights were violated because the trial court admitted the out-of-court statement of a witness who was available at trial and subject to direct examination but did not provide the defendant the opportunity to cross-examine the witness. 207 N.J. at 329-33. In State v. Coder, we held that the admission of an unavailable child witness's out-of-court statement pursuant to the "tender years" exception to the hearsay rule, N.J.R.E. 803(c)(27), did not violate the Confrontation Clause. 198 N.J. 451, 467-70

Trial courts should be alert to the potential for the improper admission of hearsay within hearsay and for confrontation issues that may arise in such settings. See N.J.R.E. 805 ("Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule."). In this case, we find no such error.

Accordingly, we reverse the Appellate Division's determination that the admission of P.V.'s Wade/Henderson hearing testimony at trial violated the hearsay rule and offended the Confrontation Clause.

V.

The judgment of the Appellate Division is reversed, and the matter is remanded to the appellate court for its review of the prosecutorial misconduct and sentencing issues raised by defendant on appeal.

CHIEF JUSTICE RABNER and JUSTICE SOLOMON join in JUSTICE PATTERSON's opinion. JUSTICE ALBIN filed a dissent, in which JUSTICE PIERRE-LOUIS joins.

(2009). Finally, in Nyhammer, we affirmed the admission of a child victim's out-of-court statement because the defendant had the opportunity to cross-examine the victim at trial and elected not to exercise that right. 197 N.J. at 389.

State of New Jersey,

Plaintiff-Appellant,

v.

Anthony Sims, Jr.,

Defendant-Respondent.

JUSTICE ALBIN, dissenting.

In a free society that values individual liberty, no person should be taken from his home or off the streets by the police, placed in handcuffs and kept in custody, and not told the reason for his arrest. Most people will be surprised to learn that they can be detained without explanation for a period of hours, if not longer, as the majority now holds.

Four law enforcement officers arrested Anthony Sims, but not one told him why he was under arrest -- not even when he asked for an explanation. Sims was handcuffed, placed in a police vehicle, and transported to a satellite office of the Monmouth County Prosecutor's Office -- not knowing why he was in custody. In that satellite office, the interrogating officers advised Sims

of his Miranda[1] rights and elicited from him a waiver of his rights without revealing to him that he was in custody for the attempted murder of P.V. Concealing from Sims the charges that he was facing did not comport with the guarantees afforded to the accused under our state law against self-incrimination or our state's jurisprudence.

When police officers make an arrest based on probable cause, they must have a reason for doing so -- they must have determined that the person arrested violated a specific law. That being the case, the officers should have no difficulty telling the person the charge or charges that they believe justify the defendant's detention. Even when a complaint-warrant has not been secured in advance, no interrogation should proceed until the accused is told the charges for which he is then held in custody. Without that critical information, a defendant cannot intelligently decide whether to waive his right against self-incrimination. That other charges may develop during the investigation is no excuse for officers to withhold the specific charges that prompted a defendant's arrest.

I therefore would affirm the Appellate Division's suppression of Sims's statement.

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

I would also affirm the Appellate Division's suppression of the out-of-court statements made by P.V. incriminating Sims. P.V. testified at the Wade[2] hearing that he did not recall making those statements against Sims and later refused to testify before the jury, even when offered immunity and threatened with contempt. Sims therefore was denied the opportunity to cross-examine P.V. at trial. Sims's cross-examination of P.V. at the Wade hearing was not an adequate substitute for his Sixth Amendment confrontation rights at trial. At the Wade hearing, Sims did not have a similar opportunity or motive to cross-examine P.V. as he would have had at trial.

I would reverse Sims's conviction, substantially for the reasons given by the Appellate Division. Accordingly, I respectfully dissent.

I.

New Jersey's privilege against self-incrimination is codified in our statutory law, N.J.S.A. 2A:84A-19, and rules of evidence, N.J.R.E. 503, and "is so venerated and deeply rooted in this state's common law that it has been deemed unnecessary to include the privilege in our State Constitution." State v. O'Neill, 193 N.J. 148, 176 (2007) (citing State v. Reed, 133 N.J. 237, 250 (1993)). Indeed, "[w]e have treated our state privilege as though it were of

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[2] United States v. Wade, 388 U.S. 218 (1967).

constitutional magnitude." Ibid. In our case law, we have highlighted "[t]he textual differences between the plain language of our state privilege and the Fifth Amendment" and have found that our state law privilege "offers broader protection than its Fifth Amendment federal counterpart."[3] Id. at 176-77 (citing State v. Muhammad, 182 N.J. 551, 568 (2005)). That is a point largely ignored by the majority.

The issue is not whether we should adhere to federal jurisprudence but whether we will abandon our own jurisprudence. If our way is lighted by our jurisprudence, then we should find that, before the start of an interrogation, the failure to advise a defendant of the specific charges that were the basis for his arrest is a violation of our state law against self-incrimination. In suppressing Sims's statement, the Appellate Division did nothing more than follow the inescapable logic of this Court's case law.

In State v. A.G.D., a detective obtained a warrant to arrest the defendant for the sexual abuse of a child. 178 N.J. 56, 59-60 (2003). The detective and another detective visited the defendant's home and explained to him that they

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[3] N.J.S.A. 2A:84A-19 and N.J.R.E. 503, provide in identical language that "every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate." In contrast, the Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

wanted to question him about sexual abuse allegations, and he accompanied them to the prosecutor's office. Ibid. The detectives kept from the defendant the arrest warrant they had in hand and did not advise him he was under arrest. Id. at 59. Instead, in the usual course, the detectives informed the defendant of his Miranda rights, and the defendant waived those rights without knowing his true predicament. Id. at 60. During the interrogation that followed, the defendant incriminated himself. Ibid.

We found that, in securing a waiver of rights from the defendant, the detectives deprived him of "critically important information" -- knowledge of the criminal complaint filed against him and of the arrest warrant in the detective's pocket. Id. at 68. We held that the detectives had concealed "information indispensable to a knowing and intelligent waiver of rights." Ibid. We concluded that "[w]ithout advising the [defendant] of his true status," the State did not satisfy its burden of proving that he "exercised an informed waiver of rights," and accordingly we suppressed his incriminating statements. Id. at 68-69.

In deciding A.G.D., we relied on "the New Jersey common law privilege against self-incrimination[, which] affords greater protection to an individual than that accorded under the federal privilege." Id. at 67 (quoting In re Grand Jury Proc. of Guarino, 104 N.J. 218, 229 (1986)). We stated that our Court has

"actively embraced the opportunity to move beyond the guidelines of federal directives in pursuit of an unyielding commitment to ensure the proper admissibility of confessions." Ibid. (quoting Reed, 133 N.J. at 252).

In State v. Vincenty, we elaborated on A.G.D., stating that our decision in that case "calls for law enforcement officials to make a simple declaratory statement at the outset of an interrogation that informs a defendant of the essence of the charges filed against him." 237 N.J. 122, 134 (2019). "That information," we added, "should not be woven into accusatory questions posed during the interview." Ibid. The defendant in Vincenty, as in A.G.D., was "[u]naware that charges had been filed against him" in a criminal complaint when he waived his right against self-incrimination. Id. at 128-29, 134. We pointedly stated in Vincenty that detectives "failed to inform [the defendant] of the specific criminal charges filed against him" and withheld from him "critically important information." Id. at 135. Because the detectives "deprived [the defendant] of the ability to knowingly and voluntarily waive the right against self-incrimination," we suppressed his statement. Id. at 135-36.

The only distinction between A.G.D. and Vincenty and this case is that, here, the detectives had probable cause to charge Sims with attempted murder but did not bother to secure a judicially authorized criminal complaint and arrest warrant before taking Sims into custody and questioning him. The

detectives knew why they had arrested Sims, but Sims did not. The detectives purposely withheld from Sims "critically important information" -- "information indispensable to a knowing and intelligent waiver of rights." A.G.D., 178 N.J. at 68; see also Vincenty, 237 N.J. at 135.

This case is unlike State v. Nyhammer, where the defendant was merely a suspect -- and not under arrest -- before the police began questioning him. 197 N.J. 383, 404-05 (2009). There, we held that the police did not have to disclose their motives to the defendant before commencing the interrogation. Ibid. In Nyhammer, we drew the line for disclosure at arrest because an arrest is "an objectively verifiable and distinctive step, a bright line, when the forces of the state stand arrayed against the individual." Id. at 404. Suspect status, we noted, is "an elusive concept that will vary depending on subjective considerations of different police officers." Id. at 405.

Sims was more than a suspect. He was under arrest. He was the accused. The forces of the State were already arrayed against him. The detectives were going to charge Sims with attempted murder whether or not he submitted to questioning. Surely, the detectives' timing of when to obtain the arrest warrant and criminal complaint should not be the decisive factor in determining whether the accused is provided the critical information necessary to make an informed decision whether to waive his rights.

I agree with the majority that "officers need not speculate about additional charges that may later be brought or the potential amendment of pending charges" when interrogating a defendant. Ante at ___ (slip op. at 28) (citing Nyhammer, 197 N.J. at 404-05; A.G.D., 178 N.J. at 68-69). In my view, the officers simply must act in good faith, be honest with the defendant, and advise him of the charge or charges for which he was arrested. In this case, no one seems to dispute that the detectives arrested defendant for attempted murder. The detectives denied Sims critical information necessary to make an informed decision whether to waive his rights.

The majority opinion encourages law enforcement officers to game the system. Officers will now know that a delay in the filing of the criminal complaint will allow them to withhold from the arrested defendant the true nature of the charges before the interrogation begins, as occurred here. The State should be made to walk square corners. The shortcut the majority permits, allowing the police to arrest a person and keep him in the dark about the reasons for his arrest, will erode faith in our criminal justice system.

The State failed to prove the voluntariness of Sims's statement beyond a reasonable doubt as required under our law. See State v. Burris, 145 N.J. 509, 534 (1996). Accordingly, the Appellate Division correctly ruled that his statement should have been suppressed and not admitted at trial.

II.

Four days after he was shot multiple times in his grandmother's driveway, P.V. gave a signed statement to the detectives in the hospital where he was recovering from his wounds. In the statement, P.V. named Sims, whom he had known for more than ten years, as the shooter and identified a photograph of Sims.

At the Wade hearing, P.V. denied having any recollection of the shooting or of making any of the statements recorded by the police. P.V. then refused to testify at trial, despite offers of immunity. The jury was denied the opportunity to see P.V. on the stand and to assess his credibility firsthand.

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009) (citing Crawford v. Washington, 541 U.S. 36, 54 (2004)). A prior opportunity for cross-examination means that the defendant must have had the opportunity to conduct a meaningful cross-examination. See United States v. Owens, 484 U.S. 554, 561-62 (1988). Even when a witness takes the stand in

a criminal trial, a defendant's confrontation rights are not satisfied unless he is given "a full and fair opportunity to probe and expose [the] infirmities" of the witness's testimony. See id. at 558 (quoting Delaware v. Fensterer, 474 U.S. 15, 22 (1985)).

A witness's claim of lack of recollection will not bar the hearsay admission of some out-of-court statements, provided the witness testifies at trial, permitting the jury to gauge the witness's credibility. Ibid. However, "[i]n that situation . . . the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness's demeanor satisfy the constitutional requirements." Id. at 560 (citing California v. Green, 399 U.S. 149, 158-61 (1970)).

For example, in Owens, from his hospital room, the victim-witness provided officers a statement identifying Owens as the perpetrator of an assault against him. Id. at 556. At trial, however, the witness could no longer recall seeing his assailant. Ibid. The Court found the cross-examination of the witness before the jury to be sufficient for Confrontation Clause purposes because, in that scenario, the jury had the opportunity to "be persuaded that [the witness's] opinion [was] as unreliable as his memory." Id. at 558 (quoting Fensterer, 474 U.S. at 19).

Similarly, under the New Jersey exception to the hearsay rule, a witness's prior inconsistent statements are admissible to allow the jury to determine whether "the witness is lying, and to give the jury an alternative account of the events that it may choose to use as substantive evidence rather than the account offered by the witness. The jury, however, must observe the witness and make a decision about which account is true." State v. Brown, 138 N.J. 481, 544 (1994).

Under the Confrontation Clause and our evidence rules, P.V.'s statements to the detectives at the hospital were admissible at the Wade hearing, despite his claimed lack of recollection. See Owens, 484 U.S. at 560-62; Brown, 138 N.J. at 542-43. However, unlike in Owens and Brown, here P.V. did not appear at trial. The jury did not have the opportunity to hear from or scrutinize P.V. on the witness stand to determine whether his lack of memory at the Wade hearing was feigned or real or whether he gave an honest or accurate account of his identification of Sims as his assailant at the hospital.

At the time of Sims's trial, P.V. was awaiting trial for murdering Sims's brother and refused to testify. P.V.'s hearsay statement at the hospital was laundered through the Wade hearing intact and presented fresh at trial but without a witness to confront. Under the circumstances in this case, the damning hearsay statement was too many steps removed from its source to be

credited for Confrontation Clause purposes. See Preston v. Superintendent Graterford SCI, 902 F.3d 365, 379 (3d Cir. 2018) ("[T]he use of a witness's prior statement against a criminal defendant violates the defendant's Confrontation Clause rights when the witness refuses to answer any substantive questions on cross-examination."). The bootstrapping of the hearsay statement deprived Sims of his right of cross-examination at trial.

Critical to that analysis is that Sims did not have the "prior opportunity" to meaningfully cross-examine P.V. at the Wade hearing in the way he would have if P.V. had testified at trial.

A Wade hearing has a limited purpose. It "is to examine police procedures surrounding an out-of-court identification of the defendant for a taint of suggestiveness," Lynn v. Bliden, 443 F.3d 238, 249 (2d Cir. 2006), and, if the procedures were suggestive, to ascertain the identification's reliability, State v. Henderson, 208 N.J. 208, 238 (2011). It "is not to determine whether there are 'inconsistent identifications' nor to obtain more fodder for cross-examination." Lynn, 443 F.3d at 249. Our judges understand the limitations of a Wade hearing; it is not an occasion for attorneys to rummage for discovery that might be useful at trial for impeachment purposes. Judges corral attorneys who wander afield. Moreover, attorneys ordinarily do not cross-examine a witness at a Wade hearing with the expectation that the

witness, when called to the stand at trial, will refuse to testify, disregarding a grant of immunity and the threat of a contempt citation. In short, the permissible parameters of cross-examination at a Wade hearing and at a trial are not co-extensive. Sims's attorney made clear that his cross-examination of P.V. at trial would have been far more extensive than the one at the Wade hearing.

Our evidence rules do not permit an unavailable witness's prior testimony to be used against a defendant unless the defendant "had an opportunity and similar motive in the prior trial, hearing or deposition to develop the testimony by examination or cross-examination." N.J.R.E. 804(b)(1)(A). For Confrontation Clause purposes as well, a defendant who does not have a similar opportunity or motive to cross-examine the witness at an earlier hearing will not have had the meaningful opportunity to develop the testimony for trial.

That is what occurred here. Sims did not have the same motive or opportunity to cross-examine P.V. at the Wade hearing as he would have at trial had P.V. testified. Sims therefore was denied the meaningful opportunity for cross-examination guaranteed by the Sixth Amendment's Confrontation Clause. See Owens, 484 U.S. at 559-602.

Last, none of the circuit cases cited by the majority support its conclusion that a witness's statement at a Wade hearing is admissible at trial when the witness is unavailable. Ante at ___ (slip op. at 41-42). Each of the four cases cited by the majority concerned a preliminary hearing, a proceeding that is far different and broader in scope than a Wade hearing.[4]

For example, criminal prosecutions in California may proceed by way of the filing of an information rather than the return of a grand jury indictment. An accused charged by information is given a preliminary hearing. At the preliminary hearing, the accused has the right of "confrontation and cross-examination of hostile witnesses, and the opportunity to personally appear and affirmatively present exculpatory evidence." Hawkins v. Superior Ct., 586 P.2d 916, 917-18 (Cal. 1978); see also Holman v. Superior Ct., 629 P.2d 14, 18 (Cal. 1981) (Bird, C.J., concurring) ("[T]he functions of the preliminary

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[4] In addition, three of the cases arose in the context of federal habeas corpus in which the federal courts' power to review a state law conviction is extremely limited. See Gibbs v. Covello, 996 F.3d 596, 603 (9th Cir.) (explaining that the standard governing habeas corpus limits the federal courts' power of review and concluding that the Confrontation Clause claim "is a close one, and if we were answering that question de novo, we might" find there to be a violation), cert. denied, 142 S. Ct. 453 (2021); Williams v. Bauman, 759 F.3d 630, 636 (6th Cir. 2014) (explaining that, given a federal court's limited remedial powers on habeas corpus review, so long as a state court decision on a Confrontation Clause issue leaves "room for reasonable debate," it must be upheld, "even if it turns out to be wrong").

hearing in our criminal process are broad and complex."); State ex rel. Whitehead v. Vescovi-Dial, 950 P.2d 818, 820 (N.M. Ct. App. 1997) ("[T]he preliminary hearing legitimately may provide an opportunity for discovery by either side; it may help a party in preparation for future impeachment; it also may be used to perpetuate testimony for later use at trial." (citing 2 Wayne LaFave & Jerold H. Israel, Criminal Procedure §§ 14.1(b), (c), (d) (1984))).

A preliminary hearing is not comparable to a Wade hearing. The majority cannot point to a single reported case from any jurisdiction where the prosecution was permitted to introduce at trial an unavailable witness's testimony at a Wade hearing.[5]

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[5] The majority is incorrect in declaring that "P.V.'s April 13, 2014 statement was not offered into evidence -- let alone admitted into evidence -- at defendant's trial." Ante at ___ (slip op. at 46-47). The purpose of the prosecutor's reading to the jury the Wade hearing transcript was to get into evidence P.V.'s hospital statement. The Wade hearing transcript had no other value. At the Wade hearing, P.V. had no recollection of the incident or his statement to the detectives. The transcript provided the colloquy between the prosecutor and P.V., which included the substance of P.V.'s statement made to the police at the hospital. Tellingly, the trial court instructed the jury that P.V.'s statement was in evidence, stating "you will be afforded the opportunity to hear [P.V.]'s statement from a prior proceeding that you may now consider as substantive evidence." (emphasis added). In addition, in response to a jury question, the trial court made clear "that the statement of the victim at the hospital is subsumed on this record within the testimony of Detective Weisbrot."

III.

In summary, I would affirm the Appellate Division and reverse defendant's conviction because the admission of Sims's statement to the detectives violated his right against self-incrimination and because the admission of P.V.'s hearsay statements to the detectives implicating Sims violated Sims's confrontation rights.

I therefore respectfully dissent.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2641-17T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY SIMS, JR.,

Defendant-Appellant.

APPROVED FOR PUBLICATION

February 4, 2021

APPELLATE DIVISION

Submitted October 19, 2020 – Decided January 4, 2021
Recalled February 4, 2021.[1]
Resubmitted February 4, 2021 – Decided February 4, 2021

Before Judges Rothstadt, Mayer and Susswein (Judge Susswein concurring in part and dissenting in part).

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 14-08-1335.

Joseph E. Krakora, Public Defender, attorney for appellant (Robert Carter Pierce, Designated Counsel, on the briefs).

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[1] Today, we simultaneously granted the State's motion to correct the record and to reconsider. In the motions, both parties agreed there was an error in the transcription of the video statement defendant gave to the police as to what the officers advised defendant prior to his interrogation about the charges against him when he was arrested. This opinion and the opinion concurring in part and dissenting in part are based upon the corrected record.

Appendix B

Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney for respondent (Maura K. Tully, Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

ROTHSTADT, J.A.D.

This appeal requires us to determine as a matter of first impression whether the Supreme Court's holdings in State v. A.G.D., 178 N.J. 56 (2003), and State v. Vincenty, 237 N.J. 122 (2019), requiring that police inform a defendant subject to custodial interrogation of specific charges filed against him before he can waive his Miranda[2] rights, also apply to an interrogee who was arrested and questioned prior to any charges being filed, where the arrest was based upon information developed through an earlier police investigation. As explained in our opinion today, we hold that the same requirement applies because without being correctly informed of the crime for which he was arrested, a defendant cannot knowingly and intelligently waive his right against self-incrimination.

Defendant Anthony Sims, Jr. appeals from his conviction by jury of having committed attempted murder and violating weapons offenses, and from his aggregate fifty-year sentence. On appeal, he argues the following points:

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[2] Miranda v. Arizona, 384 U.S. 436 (1966).

POINT I

BECAUSE AN ARRESTEE CANNOT KNOWINGLY WAIVE HIS MIRANDA RIGHTS IF THE AUTHORITIES DO NOT EXPLAIN WHY HE IS BEING ARRESTED; IT WAS ERRONEOUS FOR THE TRIAL COURT TO ADMIT [DEFENDANT'S] STATEMENT AT TRIAL.

POINT II

ALL EVIDENCE OBTAINED FROM THE UNCONSTITUTIONAL QUESTIONING OF [DEFENDANT] MUST BE EXCLUDED AS THE FRUIT OF THE POISONOUS TREE.

POINT III

[DEFENDANT'S] SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER WAS VIOLATED BY THE TRIAL COURT'S RULING THAT PERMITTED THE STATE TO ADMIT THE VICTIM'S TESTIMONY AT THE WADE HEARING AS SUBSTANTIVE EVIDENCE OF [DEFENDANT'S] GUILT.

POINT IV

BECAUSE THE ADMISSION OF A PRIOR INCONSISTENT STATEMENT DUE TO FEIGNED MEMORY IS ONLY ADMISSIBLE IF THE WITNESS FEIGNS A LOSS OF MEMORY IN FRONT OF THE JURY; IT WAS ERRONEOUS FOR THE TRIAL COURT TO ADMIT THE VICTIM'S WADE HEARING TESTIMONY AT TRIAL, WHICH INCLUDED HIS PRIOR STATEMENT TO THE POLICE.

POINT V

THE PROSECUTOR COMMITTED MISCONDUCT AT THE END OF HER SUMMATION BY STATING THAT "YOU CAN HOLD [DEFENDANT] ACCOUNTABLE FOR TAKING THAT COMMUNITY, THAT NEIGHBORHOOD, AND TURNING IT INTO HIS OWN PERSONAL CRIME SCENE (BY RENDERING A GUILTY VERDICT)." (NOT RAISED BELOW).

POINT VI

THE SENTENCE IMPOSED WAS MANIFESTLY EXCESSIVE.

Having considered defendant's contentions in light of the record and the applicable principles of law, we reverse the denial of his motion to suppress his statement because defendant was not properly advised of the status of the charges against him prior to his interrogation. We also conclude that the trial court erred by admitting the victim's statement to police through hearsay testimony as defendant was deprived of a meaningful opportunity to challenge the victim's statement at a pretrial hearing or before the jury.

I.

The facts pertinent to this appeal as derived from the trial record are summarized as follows. On April 9, 2014, a man was struck by twelve bullets while sitting in his car in his grandmother's driveway at her home in Red Bank.

The victim's grandmother heard the shots followed by her grandson calling for her to help.

The grandmother ran outside and found the victim partially hanging out of the passenger side of his vehicle and bleeding profusely. She asked him, "Who did this to you?" He answered, "Sims." She asked, "Who is Sims?" He answered, "BJ's brother." She knew BJ by his name, R.P., as he and her grandson had been childhood friends and had spent many nights at her house.[3]

Red Bank Police Department (RBPD) Patrolman Benjamin Springer responded to the scene and provided emergency medical assistance to the victim, who was conscious but appeared to be going into shock. Lieutenant Robert Clayton of the RBPD arrived soon after and asked the victim, who the officer had known for fifteen years, to tell him who had shot him. The victim put his face down toward the ground, said he did not know, and did not answer further even though his grandmother encouraged him to respond. His grandmother then told Clayton that the victim had said it was one of BJ's brothers.[4]

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[3] Defendant's brother R.P. ("BJ") was dead at the time of defendant's trial and the victim here was charged with his murder. The trial court prevented the jury from learning about that fact at defendant's trial.

[4] Clayton knew defendant had an older brother named R.P. and a younger brother named C.S. Clayton had not seen C.S. in about three years, but he believed C.S. and defendant "look[ed] alike."

Emergency medical personnel soon arrived and transported the victim to the hospital where he was treated for his life-threatening wounds. After undergoing several surgeries and spending a number of days in the intensive care unit, the victim was released from the hospital on April 30, 2014.

Prior to the victim leaving the hospital, RBPD Detective Robert Campanella and Monmouth County Prosecutor's Detective Brian Weisbrot interviewed him for almost three hours on April 13. According to Weisbrot, the victim was "scared" but agreed to give a statement. He required pain medication throughout the interview. Nevertheless, during the interview the victim was "cooperative," "alert, oriented, and in control" and eventually identified a photo of defendant and signed the back, confirming it was defendant who had shot him. The victim also signed a copy of his statement that had been typed up while he spoke to the detectives.

In his April 13 statement, the victim recalled sitting in his blue Chevy Camaro in his grandmother's driveway talking on the phone to his friend E.R. when he noticed a man to his left crouched down holding a "black semi-automatic" and pointing it at him. The gunman fired "three or four" bullets through the driver's window. The victim remembered telling E.R. as it was happening to call the police.

The victim also said "[t]he minute I looked at [the gunman] I knew what it was and I knew who it was, [defendant,] Anthony Sims, Jr." The victim said he had "always known [defendant] through [defendant's] brother BJ." He described defendant as a "[b]lack guy" with a "medium" build who stood "about 5-8 or 5-9." "He was wearing a dark sweatshirt with his hoodie up. The hood was pulled tight but [the victim] could immediately recognize him." When asked if he knew why defendant had shot him, the victim answered: "Yeah, me and BJ had a falling out, and me and BJ were supposed to fight. BJ and [defendant] are brothers." The victim then identified the photo of defendant. He also said that defendant had a girlfriend named A.M.

The next day, Weisbrot and Campanella arrested defendant. According to Campanella, he and Weisbrot "advised [defendant that] he was being placed under arrest." The officers "secured him in handcuffs, patted him down, and told him [he] would be transport[ed]" to an Asbury Park satellite office. They did not advise defendant why they were arresting him or about any charges filed against him.

Defendant asked why he was under arrest, and Campanella told him they "would get into the details" when they got to the Asbury Park office. According to the detective, "at this point in time," "[n]o specific charges" had been filed against defendant, but he had been placed under arrest. No further discussions occurred

during the drive to the office. When they arrived at the satellite office, defendant was placed in an interview room with a video recording device. Using a Miranda form, the officers advised defendant of his rights, and he initialed each page and signed the form agreeing to waive them. According to Campanella, when defendant was arrested and asked to waive his rights, the officers did not tell him that he was arrested for attempted murder.

As defendant was going through the form, Weisbrot told defendant he was "under arrest. I'm sure you have a ton of questions. I'll be happy to get into all that, okay, in just a few minutes. Let's just finish this form. Okay?" After the form was completed, there were no additional conversations during the interrogation about the potential charges against him. Defendant proceeded to answer the detectives' questions.

In his statement, defendant told the officers that he lived in Long Branch with his mother and that he had a five-year-old daughter with A.M., who lived in Neptune. He did not drive, so his mother and A.M. gave him rides. A.M. drove a blue Ford Explorer. He also confirmed that he had two brothers, R.P. who was known as BJ, and C.S.

Defendant denied having any "type of issue" with anyone from Red Bank. He denied knowing anything about "an incident" in Red Bank, but then said that

he had read a newspaper article regarding the recent shooting of the victim. Defendant denied knowing the victim and anyone in his family, but then he admitted that he knew him by his first name but had not known his last name. He described the victim as a "tall guy" with a complexion similar to his own. Without identifying the victim's brother, Weisbrot asked: "What about [the victim's] brother?" and defendant answered: "I don't really see him. He's not really around." Defendant denied having any kind of relationship with the victim or his brother but said he knew them "from being in the projects."

When asked if defendant's brother C.S. was "involved with them," defendant answered that his brother "never really came outside too much to be involved in the activities that I was involved in." Defendant denied knowing anything about an issue that anyone in his family may have had with the victim and specifically denied knowing that BJ and the victim had a falling out. He said BJ would have shared that type of information with him.

After some time, Weisbrot and Campanella told defendant that they knew he had been in Red Bank at the time of the shooting because he was recorded on camera. Defendant continued to deny that he was there or that he knew anything about the shooting.

Eventually, defendant asked to make a phone call using his cellular phone, which the officers allowed him to do. After the call, the police seized defendant's phone.

Thereafter, the police conducted a further investigation of the shooting. The officers reviewed surveillance video from the area that depicted the entire event. They also interviewed several witnesses, who placed defendant at the scene of the shooting or were able to describe the person they saw at the scene at or about the time of the shooting. Police also confirmed that A.M. owned a 2005 dark blue Ford Explorer with no front license plate, which was similar to the vehicle the videos depicted the shooter entering after he fled the scene. They attempted to speak with her numerous times, but she was "completely uncooperative." Also, using defendant's cell phone and phone records, they were able to confirm that he was in Red Bank at or about the time of the shooting.

A grand jury later returned an indictment charging defendant with the attempted murder of the victim with a firearm, N.J.S.A. 2C:5-1, N.J.S.A. 2C:11-3, N.J.S.A. 2C:43-6(c) (count one); the unlawful possession of a weapon by a person having been previously convicted of attempted manslaughter, N.J.S.A. 2C:39-5(b) and N.J.S.A. 2C:39-5(f) (count two); the possession of a weapon for

an unlawful purpose, N.J.S.A. 2C:39-4(a) (count three); and committing the offense of certain persons not to have a weapon, N.J.S.A. 2C:39-7(b)(1) (count four).

Before trial, defendant filed several motions, including one under Miranda to suppress his custodial statement to police and another under Wade/Henderson[5] to bar admission of the victim's out-of-court identification of defendant that he made while hospitalized. After conducting a hearing, at which the victim testified that he could not recall making a statement or identifying defendant to police, on June 23, 2016, the court denied defendant's motion to suppress the victim's out-of-court identification.

As to defendant's statement to police, defense counsel argued that suppression of defendant's statement was warranted because: (1) the officers failed to determine whether defendant had an attorney, even though they knew that he was on parole; and (2) over a two-and-one-half-hour period of questioning, they used deceptive tactics regarding the facts and the basis for his arrest. Counsel did not specifically argue, as defendant does on appeal, that suppression was warranted because the

[5] United States v. Wade, 388 U.S. 218 (1976); State v. Henderson, 208 N.J. 208 (2011).

officers did not notify defendant of the potential charges against him that served as the bases for his arrest.

On January 30, 2017, after conducting a hearing, the trial court denied the motion. It found that defendant had knowingly and intelligently waived his Miranda rights and defendant had provided no evidence that the officers' "conduct was overbearing," that their questioning was "threatening," or that defendant had asked them to stop questioning him and they refused.

On June 6, 2017, just before trial began, the State notified the court that the victim would likely invoke the Fifth Amendment privilege against self-incrimination and refuse to testify. At that time, the victim was incarcerated and awaiting trial for the murder of defendant's brother, R.P. The court ruled that if the victim refused to testify, it would admit as evidence the victim's hearing testimony under Rule 804(b)(1)(A) (prior testimony of an unavailable witness).

During the trial, outside the presence of the jury, the victim asserted his Fifth Amendment rights and refused to testify. The trial court declared the victim to be unavailable and allowed Weisbrot to testify about the victim's statement to police while he was hospitalized. The prosecutor also played the video recording of defendant's statement to the detectives for the jury. Defendant did not testify. During its deliberations, the jury requested a read

back of Weisbrot's testimony about the statement the victim gave while hospitalized.

Soon after the read back, on July 11, 2017, the jury returned a guilty verdict on counts one through three. Later, on July 24, 2017, the court granted the State's motion to dismiss count four of the indictment (the certain persons offense). Defendant filed a motion for a new trial, claiming that the victim's out-of-court identification testimony violated defendant's right to confront witnesses and resulted in manifest injustice. On August 18, 2017, the court denied the motion and imposed its sentence. This appeal followed.

II.

We turn first to defendant's contentions in Points I and II of his brief that under the Supreme Court's holdings in State v. A.G.D. and State v. Vincenty, the trial court erred in denying his motion to suppress his statement because the officers failed to advise him that he was arrested for attempted murder. He contends this omission rendered his waiver unknowing and unintelligent, and any evidence obtained from his statement inadmissible as "fruit of the poisonous tree." It is undisputed that these arguments were not raised before the trial court.

Because defendant did not raise this argument before the trial court, we review his challenge under the plain error standard. R. 2:10-2; State v. Funderburg, 225

N.J. 66, 79 (2016). Generally, we decline to consider questions not properly presented to the trial court. State v. Witt, 223 N.J. 409, 419 (2015). "For sound jurisprudential reasons, with few exceptions, 'our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available.'" Ibid. (quoting State v. Robinson, 200 N.J. 1, 20 (2009)). Yet, "our appellate courts retain the inherent authority to 'notice plain error not brought to the attention of the trial court[,]' provided it is 'in the interests of justice' to do so." Robinson, 200 N.J. at 20 (alteration in original). We are satisfied it is in the interests of justice to address defendant's arguments, and therefore we review the trial court's decision for plain error.

"Plain error is [an] 'error possessing a clear capacity to bring about an unjust result and which substantially prejudiced the defendant's fundamental right to have the jury fairly evaluate the merits of his defense.'" State v. Timmendequas, 161 N.J. 515, 576–77 (1999) (quoting State v. Irving, 114 N.J. 427, 444 (1989)). A reversal based on plain error requires us first to find an error capable of producing an unjust result and second that the likelihood the error caused an unjust result is "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached."

State v. Williams, 168 N.J. 323, 336 (2001) (quoting State v. Macon, 57 N.J. 325, 336 (1971)). We will, therefore, disregard the error "unless it is of such a nature as to have been clearly capable of producing an unjust result." Funderburg, 225 N.J. at 79 (quoting R. 2:10-2) (citing State v. Robinson, 165 N.J. 32, 47 (2000)). "The mere possibility of an unjust result is not enough" to warrant relief. Ibid. (citing State v. Jordan, 147 N.J. 409, 422 (1997)).

When we review a trial court's decision on a motion to suppress a statement, we generally defer to the factual findings of the motion court when they are supported by credible evidence in the record. State v. Tillery, 238 N.J. 293, 314 (2019); Vincenty, 237 N.J. at 131–32. Deference to a trial court's factual findings is appropriate "because the trial court has the 'opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy.'" State v. S.S., 229 N.J. 360, 374 (2017) (quoting State v. Elders, 192 N.J. 224, 244 (2007)). Deference is required even if the trial court's factual findings "are based solely on its review of a video recording." Id. at 386. However, we review de novo the trial court's legal conclusions that flow from established facts. Tillery, 238 N.J. at 314.

"The right against self-incrimination is guaranteed by the Fifth Amendment to the United States Constitution and this state's common law, now

embodied in statute, N.J.S.A. 2A:84A-19, and evidence rule, N.J.R.E. 503." S.S., 229 N.J. at 381–82 (quoting State v. Nyhammer, 197 N.J. 383, 399 (2009)). In determining whether a defendant's incriminating statement is inadmissible, "the prosecution [must] 'prove beyond a reasonable doubt that the suspect's waiver [of rights] was knowing, intelligent, and voluntary.'" State v. A.M., 237 N.J. 384, 397 (2019) (quoting State v. Presha, 163 N.J. 304, 313 (2000)). See also Miranda, 384 U.S. at 444 (explaining a suspect may waive rights so long as waiver is made knowingly, intelligently, and voluntarily).

A court evaluates whether the State has satisfied its burden by considering the "totality of the circumstances." A.M., 237 N.J. at 398 (citing Presha, 163 N.J. at 313). Under the totality of the circumstances analysis, a court considers factors such as the defendant's "age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved." Ibid. (quoting State v. Miller, 76 N.J. 392, 402 (1978)).

In order to make a knowing and intelligent waiver of the right to remain silent, a defendant must have been advised of the nature of the charges being brought against him. Vincenty, 237 N.J. at 132–34; A.G.D., 178 N.J. at 68. In A.G.D., the Court held that a defendant's waiver of Miranda rights is invalid when the police

fail to inform the defendant that a criminal complaint has been filed, or arrest warrant has been issued, against him or her. 178 N.J. at 58–59. There, the Court explained:

> a criminal complaint and arrest warrant signify that a veil of suspicion is about to be draped on the person, heightening his risk of criminal liability. Without advising the suspect of his true status when he does not otherwise know it, the State cannot sustain its burden to the Court's satisfaction that the suspect has exercised an informed waiver of rights, regardless of other factors that might support his confession's admission.
>
> [Id. at 68 (emphasis added).]

In Vincenty, the Court reiterated its adherence to A.G.D. and held that interrogating officers must not only inform a suspect that an arrest warrant or complaint has been issued or filed but must also notify the suspect of the charges. 237 N.J. at 126. In its opinion, the Court explained that to ensure a defendant makes a knowing and intelligent waiver of the right against self-incrimination, A.G.D. requires

> law enforcement officials to make a simple declaratory statement at the outset of an interrogation that informs a defendant of the essence of the charges filed against him. That information should not be woven into accusatory questions posed during the interview. The State may choose to notify defendants immediately before or after administering Miranda warnings, so long as defendants are aware of the charges pending against them before they are asked to waive the right to self-incrimination.

[Id. at 134.]

The Court also noted that an interrogating officer's failure to properly advise a defendant of the charges being pursued against him will not be considered harmless error where "[s]ome of [his] statements could be fairly characterized as inculpatory." Id. at 136.

However, in State v. Nyhammer, where the subject of an interrogation was only a suspect who agreed to go to the police station to discuss an investigation into a third party's conduct, and no charges had been filed against him prior to giving his statement, 396 N.J. Super. 72, 79 (App. Div. 2007), rev'd 197 N.J. 383 (2009), there was no need to advise the subject about the charges that he was believed to have committed. Nyhammer, 197 N.J. at 388. As the Court found, police advised the defendant of his Miranda rights an hour before questioning began, he "knew that he was a suspect as soon as the police asked him the first question about his involvement in the sexual abuse of the child-victim," and, "despite having been given his Miranda warnings, he knowingly and voluntarily chose to speak." Ibid.

The Nyhammer Court also explained that "[o]nly in the most limited circumstances have we applied a per se rule to decide whether a defendant knowingly and voluntarily waived Miranda rights." 197 N.J. at 403. One of those circumstances occurred in A.G.D. Id. at 404. The Court explained in

A.G.D. that it held "a Miranda waiver per se invalid when the police who were questioning the defendant withheld from him the fact that they had in hand a criminal complaint and warrant for his arrest." Ibid. (citing A.G.D., 178 N.J. at 68).

Distinguishing between a mere suspect and a suspect that had been charged on an arrest warrant, the Court also explained, "[t]he issuance of a criminal complaint and arrest warrant by a judge is an objectively verifiable and distinctive step, a bright line, when the forces of the state stand arrayed against the individual." Ibid. As the Court highlighted, "[t]he defendant in A.G.D. was purposely kept in the dark by his interlocutors of this indispensable information." Id. at 404–05. Thus, A.G.D. created a bright-line rule requiring law enforcement to advise a person prior to waiver that he or she has been charged with a crime by complaint or warrant, unless the suspect otherwise knows that fact. Ibid.

As to an individual who is merely a suspect, the Court stated the following in distinguishing Nyhammer from A.G.D.:

> Unlike the issuance of a criminal complaint or arrest warrant, suspect status is not an objectively verifiable and discrete fact, but rather an elusive concept that will vary depending on subjective considerations of different police officers. A suspect to one police officer may be a person of interest to another officer. Moreover, we emphasized that "[o]ur holding [in A.G.D.] is not to be construed as altering existing case

> law . . . other than imposing the basic requirement to inform an interrogatee that a criminal complaint or arrest warrant has been filed or issued."
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> [Id. at 405 (alterations in original) (emphasis added) (quoting A.G.D., 178 N.J. at 68–69).]

Our Supreme Court has said that A.G.D., along with State v. Reed, 133 N.J. 237, 269 (1993) (requiring police to notify a person that an attorney is available for advice), confirmed that "police officers conducting a custodial interrogation cannot withhold essential information necessary for the exercise of the privilege." State v. O'Neill, 193 N.J. 148, 179 (2007). With respect to A.G.D., the O'Neill Court reiterated that the police must disclose to the suspect prior to any questioning that a complaint or warrant has been filed or issued. Id. at 179–80. Failure to do so denies the person of "information indispensable to a knowing and intelligent waiver." Id. at 179 (quoting A.G.D., 178 N.J. at 68).

In State v. Henderson, we rejected the defendant's argument that, under A.G.D., his waiver was not made knowingly "because he was not specifically informed that a warrant for his arrest for the murder of [the victim] had been issued." 397 N.J. Super. 398, 403 (App. Div. 2008), aff'd as modified 208 N.J. 208 (2011). We rejected this argument because "the police advised defendant that they had a warrant for his arrest and told him that he was being taken to the homicide unit." Id. at 404. In that case, "although the police did not tell

defendant that he had been arrested for . . . murder . . . defendant responded that he knew 'what it's all about.'" Ibid. Under those circumstances, we explained that "[w]e decline the invitation to hold that the principles announced in A.G.D. extend to also informing an accused of the basis for the arrest warrant, particularly, as here, when defendant well-understood why he was arrested." Ibid.

The Henderson court found the statement was admissible under A.G.D. because the police had notified the defendant that a warrant for his arrest had been issued. Ibid. We rejected Henderson's argument that the police must also notify the suspect of the specific crime charged, but we did not conclude that police have no duty to inform the suspect that the complaint or warrant has been filed or issued charging the defendant with a crime. Ibid. Moreover, following Henderson, the Vincenty Court clarified that A.G.D. required police to notify the suspect of the basis for the warrant or complaint at the outset of an interrogation. Vincenty, 237 N.J. at 134–35.

Here, it is undisputed that defendant was not merely a suspect at the time of his questioning, as he had been placed under arrest. Moreover, in response to defendant's inquiry as to whether he was arrested, the interrogating officers not telling defendant the charges for which he was arrested did not satisfy the

requirements of A.G.D. and Vincenty because, under those cases, a defendant must be advised of the "actual" and "specific" charges he is facing. Id. at 135.

Defendant's arrest, more so than a filed complaint, "signif[ied] that a veil of suspicion [was] draped on [defendant], heightening his risk of criminal liability" for a crime much more serious than an assault. A.G.D., 178 N.J. at 68. Because defendant did not know that he was under arrest for attempted murder when he waived his rights, the waiver was not made knowingly and intelligently. Vincenty, 237 N.J. at 132–34; A.G.D., 178 N.J. at 68. For that reason, we reject the State's contention that it did not matter what defendant was told at the time he was arrested and questioned because defendant was only a suspect and there were no charges filed against him. Once arrested, defendant was entitled to be informed of the charge for which he was being placed under arrest before deciding whether to waive his right against self-incrimination.

It makes no difference whether the charge is an indictable offense stated in a civilian's or law enforcement officer's filed complaint warrant, attesting to facts that establish probable cause to believe the defendant committed the alleged crime, R. 3:2-1(a); R. 3:3-1(a), or if the defendant is arrested without a warrant based on the officer's probable cause to believe the defendant committed the crime. State v. Brown, 205 N.J. 133, 144 (2011). In the former case, a

judicial officer reviews the complaint-warrant and issues an arrest warrant if probable cause is established. R. 3:3-1(a). In the latter case, the officer determines probable cause based on the facts.[6] Brown, 205 N.J. at 144. In either case, a responsible individual determines what charges would warrant an arrest.

Regardless of the process, the analysis for whether a defendant knowingly and intelligently waived the right against self-incrimination is the same. As A.G.D. and Vincenty make clear, a defendant cannot knowingly and intelligently decide to waive the right against self-incrimination unless he or she understands the charges that he or she faces. Vincenty, 237 N.J. at 132–34; A.G.D., 178 N.J. at 68.

Here, because defendant was under arrest, he faced the same risk of self-incrimination as the defendants in A.G.D. and Vincenty. To find that he was not

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[6] To be clear, in this case we are only addressing where an officer's probable cause to arrest is developed through an investigation, not when an arrest is made spontaneously when responding to a crime scene or after witnessing a crime being committed. The difference is akin to the Court's treatment of the automobile exception to the warrant requirement described in Witt, where the Court stated, "Going forward, searches on the roadway based on probable cause arising from unforeseeable and spontaneous circumstances are permissible. However, when vehicles are towed and impounded, absent some exigency, a warrant must be secured." 223 N.J. at 450. Our holding today does not address custodial interrogation that occurs after an "unforeseeable and spontaneous" arrest because those facts are not in this case.

entitled to the same information as those defendants simply because he was arrested without a warrant would contravene both of the Court's holdings.[7]

Moreover, contrary to the State's other contention on appeal, the trial court's error in not suppressing defendant's statement in this matter was not harmless. During the interview, defendant admitted that A.M. was his daughter's mother, that he spent a significant amount of time with her, and that she gave him rides. He described her vehicle, which matched the surveillance recording and description provided by other witnesses, and while he denied being in Red Bank at the time of the shooting, his phone records, which police obtained after seizing his phone during the interview, contradicted defendant's assertion. All of this evidence obtained through the interrogation "could be fairly characterized as inculpatory." Vincenty, 237 N.J. at 136.

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[7] We do not share our concurring colleague's concern that our holding will create logistical problems for law enforcement. Our opinion is not intended to suggest that the charge upon which an officer believes he or she has probable cause to arrest must be the specific charge with which a defendant is ultimately charged. Rather, our holding is limited to requiring that the interrogating officer inform the arrested interrogee of the charge that, at the time of arrest, the officer had probable cause to believe defendant committed. We recognize that the charge may morph into a different degree crime or even a totally different offense as a post-interrogation investigation develops. We still conclude the law requires an officer be transparent and truthful about why a defendant was arrested before a request is made for a waiver of his or her Miranda rights.

Under these circumstances, we are constrained to vacate defendant's conviction and remand for a new trial. We recognize that the trial court did not have an opportunity to consider the issue that we determined warrants a new trial in this case. For that reason, we leave it to the trial court to consider the parties' further arguments and determine pretrial what evidence, in addition to defendant's statement to police, should also be suppressed as "fruit of the poisonous tree" derived from the illegal interrogation, or admitted into evidence despite the taint. See, e.g., State v. Maltese, 222 N.J. 525, 551–52 (2015) (remanding for the trial court to determine whether evidence "discovered directly" from the defendant's illegally obtained confession should be suppressed pursuant to the exclusionary rule); State v. Johnson, 120 N.J. 263, 291 (1990) (addressing the inevitable discovery doctrine).

III.

We reach a similar conclusion as to defendant's argument in points III and IV of his brief in which he contends the trial court erred by relying upon Rule 804(b)(1)(A) to admit the victim's statement to police through a reading of his testimony from the Wade/Henderson hearing. At the hearing, the victim testified that he could not recall ever making the statement to police. He later refused to testify at trial. In light of his refusal to testify, the trial court declared the victim unavailable and allowed the State to introduce his statement from the

hospital through Detective Weisbrot reading a transcript of the victim's prior testimony from the Wade/Henderson hearing.

Under these circumstances, we conclude it was harmful error to admit the hearsay statement, because defendant did not have an opportunity to cross-examine the victim on his testimonial statement that the trial court allowed the officer to recite for the jury. For that reason, the victim's statement to police while hospitalized cannot be reintroduced at defendant's new trial unless the victim testifies.

A.

At the pretrial hearing, the victim stated that he did not recall the shooting or the statement he gave to police. Defendant cross-examined the victim at the pretrial hearing about the identification procedures used by the police when speaking with him at the hospital but could not substantively cross-examine him as to the statement the victim gave to police because he could not recall giving the statement. Moreover, even if he did recall giving the statement at the hospital, any questions unrelated to the victim's identification of defendant would have been outside the scope of permissible cross-examination under Rule 611.

The trial court found that the victim had feigned memory loss at the Wade/Henderson hearing and determined that his statement to the detectives while hospitalized could be admitted under Rule 803(a)(1) as a prior inconsistent statement if the victim testified he could not remember the shooting at trial. The court also recognized that whether the victim had in fact feigned memory loss was a matter for the jury to resolve.

Before the start of trial, the prosecutor notified the court that the victim was not cooperating and would likely invoke the Fifth Amendment and refuse to testify. The court said that if this occurred, it would find the victim "unavailable" under Rule 804(a)(1) and would admit his pretrial hearing testimony pursuant to Rule 804(b)(1)(A). Defendant argued that this would result in a Confrontation Clause violation, but the court rejected the argument finding Rule 804(b)(1)(A) directly applicable.

During trial, but outside the presence of the jury, the court questioned the victim on whether he would testify. The victim invoked his Fifth Amendment privilege against self-incrimination based on the charges he faced for the murder of R.P. The State offered him immunity, and the court ordered him to testify, but he still refused. The State claimed that because he was already in custody and facing charges for murder, they saw no point in pursuing a contempt charge.

Instead, it requested that the court declare the victim unavailable and allow the State to present his Wade/Henderson testimony through Weisbrot. Relying on Rule 804(b)(1)(A), the court granted that request.

At the start of Weisbrot's second day of testimony, the court instructed the jury that the victim was alive but unavailable as a witness and that it should not draw any negative inference from his unavailability. The State then presented the victim's Wade/Henderson hearing testimony by way of the prosecutor reading the questions put to the victim and Weisbrot reading the victim's answers. That hearing testimony contained the victim's statement to the police that he gave at the hospital.

Specifically, Weisbrot read from the transcript of the victim's testimony from the Wade/Henderson hearing at which the questions asked of the victim in the hospital, as well as his answers to those questions, were read to the victim from the statement he gave to the police. Weisbrot also read each response the victim gave to the questions at the hearing about whether he recalled giving the recorded answers to the police's questions in the hospital. Weisbrot's reading of the victim's testimony included the victim's statements on cross-examination during which defense counsel asked questions about his inability to recall being interviewed by the detectives in the hospital and the procedure by which they

had the victim identify a photograph of defendant. In addition, the cross-examination also addressed the victim's criminal history. Through that process, the State was able to introduce into evidence at trial the victim's entire statement to police.

B.

We review an evidentiary hearsay ruling under the abuse of discretion standard but afford no deference to questions of law, such as those interpreting constitutional rights. State v. McInerney, 450 N.J. Super. 509, 512 (App. Div. 2017).

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution afford an accused in a criminal case the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. These "provisions express a clear preference for the taking of testimony subject to cross-examination." State v. Cabbell, 207 N.J. 311, 328 (2011).

> "One of the essential purposes of cross-examination is to test the reliability of testimony given on direct-examination." State v. Feaster, 184 N.J. 235, 248 (2005) (citations omitted). Indeed, "[w]hen a witness's direct testimony concerns a matter at the heart of a defendant's case, the court should strike that testimony if the witness" is unavailable for cross-examination

> before the same factfinder. See ibid. (citations omitted).
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> [Id. at 328–29 (alteration in original).]

"The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Maryland v. Craig, 497 U.S. 836, 845 (1990). "In Craig, the United States Supreme Court outlined four key elements of a defendant's right of confrontation: physical presence; the oath; cross-examination; and observation of demeanor by the trier of fact." State v. Castagna, 187 N.J. 293, 309 (2006).

While the Confrontation Clause expresses a preference for in-court testimony, it does not preclude all forms of hearsay. State ex rel. J.A., 195 N.J. 324, 342 (2008). "Hearsay is 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" State v. Branch, 182 N.J. 338, 357 (2005) (quoting Rule 801(c)). "Hearsay is not admissible except as provided by [the Rules of Evidence] or by other law." N.J.R.E. 802.

The Confrontation Clause prohibits the use of out-of-court testimonial statements when the defendant did not have the opportunity to cross-examine the witness on the statement. J.A., 195 N.J. at 342, 351 (discussing Crawford v.

Washington, 541 U.S. 36, 51–52 (2004)). Police statements obtained in furtherance of a criminal investigation are testimonial for purposes of the Confrontation Clause. Id. at 345 (discussing Davis v. Washington, 547 U.S. 813, 822 (2006)).

"The government bears the burden of proving the constitutional admissibility of a statement in response to a Confrontation Clause challenge." State v. Basil, 202 N.J. 570, 596 (2010). Where admission of evidence under a hearsay rule exception results in a Confrontation Clause violation, the evidence must be excluded. See Branch, 182 N.J. at 369–70 ("Crawford . . . is a reminder that even firmly established exceptions to the hearsay rule must bow to the right of confrontation.").

"As Crawford explains, the Confrontation Clause of the United States Constitution bars the 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" State v. Slaughter, 219 N.J. 104, 116–17 (2014) (quoting Crawford, 541 U.S. at 53–54). Where an out-of-court statement is testimonial for purposes of the Confrontation Clause, the statement may be admissible in evidence "so long as the [witness] is present at trial to defend or explain it." Cabbell, 207 N.J. at 329 (alteration in original)

(quoting Crawford, 541 U.S. at 59 n.9). The Court underscored: "One of the key objectives of the Confrontation Clause is to give the 'jury' the opportunity 'to observe the witness's demeanor,'" as it is the jury who decides the defendant's fate. Id. at 330 (quoting United States v. Owens, 484 U.S. 554, 560 (1988)).

Under Rule 804(a)(1), a declarant is "unavailable" if the declarant "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the statement." N.J.R.E. 804(a)(1). Rule 804(b)(1)(A) provides an exception to the hearsay rule where the witness is unavailable and gave testimony "at a prior trial of the same or a different matter, or in a hearing or deposition taken in compliance with law in the same or another proceeding" and that testimony is "offered against a party who had an opportunity and similar motive in the prior trial, hearing or deposition to develop the testimony by examination or cross-examination." N.J.R.E. 804(b)(1)(A).

The bar against permitting hearsay when there has been no opportunity to cross-examine has been applied by our courts when witnesses are deemed "unavailable" because they refuse to testify. For example, in State v. Williams, the State called as a witness Kevin Madison, who had been charged in a separate indictment with the same crimes as Williams. 182 N.J. Super. 427, 430–32 (App. Div. 1982). Madison had given police a statement describing his and

Williams's involvement in the crimes. Id. at 430. At the time of Williams's trial, Madison had already been convicted and his case was pending appeal. Ibid.

At a pretrial hearing, Madison invoked the Fifth Amendment and refused to testify at Williams's trial, which prompted the State to grant him immunity. Id. at 430–31. However, Madison continued to assert the Fifth Amendment and refused to answer any questions. Id. at 431.

The State sought to admit Madison's statement to police as a prior inconsistent statement. Ibid. The trial court denied that request, finding the statement hearsay that did not fall within any exception. Ibid. Madison had offered no testimony; thus, his police statement was not a statement inconsistent with trial testimony. Ibid. Moreover, admission of Madison's police statement would deny Williams the constitutional right to cross-examine Madison before the jury. Ibid.

On appeal, we stated the following:

> The statement was not subject to cross-examination when given by Madison. Moreover, defendant will not have an opportunity to cross-examine Madison at trial about the statement because Madison has refused, albeit without legal justification, to answer any questions put to him. Thus, the Confrontation Clause bars the admission of Madison's statement into evidence at defendant's trial.
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> [Id. at 438.]

In Cabbell, two defendants were charged in the shooting death of a man who was riding in a car that had collided with the defendants' vehicle. 207 N.J. at 317–19. After the shooting, eyewitness Karine Martin described the accident and shooting to police and identified the defendants as the shooters. Id. at 322.

At trial, the prosecutor called Martin as a witness. Id. at 319. While on the witness stand, she repeatedly said that she did not wish to testify. Ibid. The prosecutor persisted and got her to admit that she was currently in custody for a drug offense and that she had given a truthful statement to police. Ibid. The court then interrupted trial to hold a Rule 104 hearing outside the presence of the jury to determine whether her police statement was reliable and admissible. Ibid.

At the hearing, Martin refused to answer questions until the court informed her of the contempt and jail consequences. Id. at 320. Then, she answered by claiming a lack of memory. Ibid. She admitted, however, that she was on the road of the shooting when the shooting occurred and that her statement to police was truthful. Ibid. On direct examination, Martin claimed that she was under the influence of crack cocaine at the time of the shooting and when she spoke with police, but on cross-examination she stated that she did not remember whether she had been under the influence at the time of the shooting

or subsequent questioning. Ibid. The court determined that Martin's statement to police would be admissible under Rule 803(c)(5) as a past recollection recorded and that she would not be called to testify any further before the jury. Id. at 321 (citing N.J.R.E. 803(c)(5)).

In finding that admission of Martin's statement to police violated Cabbell's right to confront her, the Court explained:

> The Confrontation Clause prohibits the use of a witness's out-of-court testimonial hearsay statement as a substitute for in-court testimony when a defendant has never been given the opportunity to cross-examine the witness. . . . For [C]onfrontation-[C]lause purposes, testimonial statements are those in which witnesses bear testimony against the accused . . . and include certain statements that are the product of police interrogation . . . . More precisely, a statement made to the police is testimonial when it is given in circumstances objectively indicat[ing] that . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.
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> [Id. at 329 (third alteration in original) (citations and internal quotation marks omitted).]

In Nyhammer, the Supreme Court approved the admission of a child's videotaped interview in a sexual assault case. 197 N.J. at 389. In approving the tape's admission even though it "constitute[ed] testimonial hearsay for Sixth Amendment purposes," id. at 412, the Court determined that the defendant had

not been deprived of his rights under the Confrontation Clause as defense counsel had the opportunity to cross-examine the child at trial but chose not to do so based upon a tactical decision. Id. at 412–14. Here, however, as in Cabbell, the witness, who was the victim, was never presented for cross-examination before the jury. See Cabbell, 207 N.J. at 333.

Here, the State concedes on appeal that the victim's signed statement could not have been admitted at trial as a prior inconsistent statement. But it argues that his testimony was admissible under Rule 804, because the victim was unavailable at trial, and defendant had an opportunity to cross-examine the victim at the Wade/Henderson hearing. Thus, the State contends the victim's statement was admissible under Rule 804 through the prosecutor and Weisbrot's reading of the victim's testimony from the Wade/Henderson hearing. We disagree.

We reject the trial court's reliance on Rule 804(b)(1)(A), because defendant did not have "an opportunity and similar motive in the prior . . . hearing . . . to develop the testimony by . . . cross-examination." N.J.R.E. 804(b)(1)(A). Due to the victim's claimed lack of memory, defendant did not have an "opportunity" to develop the victim's testimony by cross-examination. See State v. Coder, 198 N.J. 451, 467 (2009) (finding witness "unavailable" at a Rule 104 hearing pursuant to Rule 804(a)(3) where witness claimed lack of

memory). Moreover, the purpose of the hearing was limited to the victim's out-of-court identification of defendant. Defendant's purpose in developing the victim's testimony at trial would have been to attack the victim's credibility in the eyes of the factfinder, specifically the veracity of his identification of defendant as the shooter. Defendant did not have the opportunity to do that at the hearing because the victim denied any recollection of the shooting and the police statement. Therefore, admission of the victim's statement under Rule 804(b)(1)(A) was in error.

Independent of this Rule 804 issue, the admission of the victim's statement also ran afoul of defendant's rights under the Confrontation Clause. Defendant did not have the opportunity to cross-examine the victim about his statement to police—either at the pretrial hearing or in front of the jury—which had been admitted because the victim was unavailable by virtue of his feigned memory loss at the hearing and refusal to testify at trial. In so concluding, we find defendant was deprived of both the opportunity to cross-examine the victim and the opportunity to have the trier of fact observe the victim's demeanor on cross-examination. Castagna, 187 N.J. at 309.

To begin with, defendant "did not have 'a prior opportunity to cross-examine' in any real sense," Cabbell, 207 N.J. at 332, at the pretrial hearing

because the victim denied any memory of the shooting or of giving his statement identifying defendant. Cf. Coder, 198 N.J. at 466–67. Without any memory as to the statement, there was nothing to cross-examine the victim about at the Rule 104 hearing, and therefore defendant never had a meaningful opportunity to cross-examine the victim.

Moreover, by allowing the statement to be admitted through Weisbrot's testimony, defendant was deprived of the jury being able to assess the victim's demeanor. Contrary to the trial court's acknowledgment that the jury was to determine if the victim's memory loss was feigned, the jury was never given that opportunity. Craig, 497 U.S. at 845 ("[T]he right guaranteed by the Confrontation Clause . . . permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility."). "[C]ross-examination would have allowed counsel not only to explore [the victim's] state of mind at the time but also to probe for bias. Of great import as well, the jury was deprived of a chance to assess [the victim's] demeanor and credibility." Slaughter, 219 N.J. at 121. Because defendant never had the opportunity to cross-examine the victim before the factfinder that was to decide his fate, admission of the victim's statement violated his confrontation rights.

In sum, admission of the victim's hearing testimony, which contained his police statement verbatim, violated defendant's right to cross-examine the victim before the jury and should not be admitted again at defendant's new trial.

IV.

Because we have remanded this matter for a new trial, we need not address defendant's remaining arguments relating to the prosecutor's comment during summation or the excessiveness of his sentence.

Reversed and remanded for a new trial. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

SUSSWEIN, J.A.D., concurring in part and dissenting in part.

In section II of the majority opinion, my colleagues announce a new rule that when police make an arrest following an investigation, they must at the outset of a custodial interrogation advise the interrogee of the offense(s) for which he or she was arrested regardless whether a complaint-warrant or arrest warrant has been issued. I respectfully dissent from this portion of the majority opinion because I believe this new rule has the potential to introduce uncertainty to the administration of Miranda[1] warnings.

The majority opinion builds upon the foundation laid by our Supreme Court's recent decision in State v. Vincenty, 237 N.J. 122 (2019). The Court in that case ruled that law enforcement officers must "make a simple declaratory statement at the outset of [a custodial] interrogation that informs [the arrestee] of the essence of the charges filed against him." Id. at 134 (emphasis added). The majority today extends the notification rule announced in Vincenty, holding that it can apply even when charges have not been filed against the interrogee and no arrest warrant has been issued.

In doing so, the majority opinion acknowledges that it is resolving a question of first impression. Sims, __ N.J. Super. at __ (slip op. at 2). The per se rule announced today will change current law and longstanding police interrogation

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

practices. Until now, police have not been required to inform a custodial interrogee as to the offense(s) for which he was arrested unless a complaint-warrant or arrest warrant had been issued. To fully appreciate how the majority opinion alters current law, it is helpful to retrace the incremental steps leading to today's decision.

In State v. A.G.D., our Supreme Court expanded the list of familiar Miranda warnings, holding that a waiver of Miranda rights is invalid when police fail to inform the defendant that a criminal complaint has been filed or an arrest warrant has been issued. 178 N.J. 56, 58–59 (2003). In establishing this bright-line rule, the Court explicitly recognized the critical significance of formal charging, explaining that

> a criminal complaint and arrest warrant signify that a veil of suspicion is about to be draped on the person, heightening his risk of criminal liability. Without advising the suspect of his true status when he does not otherwise know it, the State cannot sustain its burden to the Court's satisfaction that the suspect has exercised an informed waiver of rights, regardless of other factors that might support his confession's admission.
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> [Id. at 68.]

In State v. Nyhammer, the Court further acknowledged the significance of formal charging, explaining, "[t]he issuance of a criminal complaint and arrest warrant by a judge is an objectively verifiable and distinctive step, a bright line, when the forces of the state stand arrayed against the individual." 197 N.J. 383, 404

(2009). The Supreme Court in Nyhammer took pains to explain the limited scope of its earlier ruling in A.G.D.:

> Moreover, we emphasized that "[o]ur holding [in A.G.D.] is not to be construed as altering existing case law . . . other than imposing the basic requirement to inform an interrogatee that a criminal complaint or arrest warrant has been filed or issued."
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> [Id. at 405 (alterations in original) (emphasis added) (quoting A.G.D., 178 N.J. at 68–69).]

In Vincenty, the Court expounded upon A.G.D., explicitly requiring police to not only advise the arrestee of the fact that a criminal complaint or arrest warrant has been issued but also to provide a "simple declaratory statement" as to the charges filed against him. 237 N.J. at 134. Under the A.G.D./Vincenty rule, police interrogators know with objective certainty not only when this notification requirement is triggered—a complaint-warrant or arrest warrant has been issued—but also know with objective certainty what they are required to disclose, namely, the offense(s) that are specified in the complaint-warrant.

We should be careful not to transform this simple prophylactic rule into an unnecessarily complex one. The Supreme Court's repeated references in A.G.D., Nyhammer, and Vincenty to charges that have been filed and warrants that have been issued are not superfluous dicta. Rather, in my view, the "objectively verifiable" nature of judge-issued complaint-warrants and arrest warrants,

Nyhammer, 197 N.J. at 404, is an important consideration that supports the rationale for the Supreme Court's holdings in A.G.D and Vincenty.

The underlying premise is that arrestees should be advised of their "true status" before being asked to waive Miranda rights. A.G.D., 178 N.J. at 68. When a complaint-warrant or arrest warrant is issued by a judge, there is no ambiguity as to the essential nature and gradation of the charge(s) the defendant is facing because the specific offense(s) for which a judge found probable cause are set forth in the charging document. See R. 3:2-1(a)(1) ("The complaint shall be a written statement of the essential facts constituting the offense charged . . . ."). The specificity of a complaint-warrant thus makes it possible for police to provide a "simple declaratory statement" to inform an interrogee accurately and definitively as to the nature and seriousness of the charges that have been filed as of the time of a custodial interrogation.[2]

The assessment of an arrestee's "true status" can become more complicated when charges have not been approved by a judge. To be sure, arresting officers must have probable cause to believe an offense has been or is being committed before

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[2] The arrestee's "true status" refers to the status at the time of the custodial interrogation. See A.G.D., 178 N.J. at 68. Obviously, initial charges set forth in a complaint-warrant can be amended. A grand jury, for example, may add to or delete charges that were initially filed by complaint-warrant.

making an arrest, or else the arrest is unlawful. It is possible, however, for an officer to have a lawful basis for an arrest but insufficient information, pending further investigation, to determine which exact offense(s) have been committed. Even when probable cause was developed in the course of an investigation, as contemplated in the majority opinion, there still may be reasonable disagreement as to what specific offenses were committed and thus which ones should be included in an application for a complaint-warrant. The number and gradation of offenses has a significant impact on a defendant's sentencing exposure, and thus directly impacts his "true status" within the meaning of A.G.D.

Consider, by way of example, that when a defendant is arrested for unlawful possession of controlled dangerous substances, police at the outset of an interrogation may not have sufficient information to determine whether the defendant committed the offense of simple possession, N.J.S.A. 2C:35-10, or the more serious offense of possession with intent to distribute, N.J.S.A. 2C:35-5(a). Even in the case of a planned arrest pursuant to an investigation of drug trafficking, detectives conducting a custodial interrogation may not be in a position to know whether the defendant committed a first, second, or third-degree drug distribution/possession with intent crime, which depends on the aggregate amount of drugs involved, N.J.S.A. 2C:35-5(c). Nor may they be able to determine whether

the defendant committed conspiracy, N.J.S.A. 2C:5-2, or even—in rare cases—the crime of leading a narcotics trafficking network, N.J.S.A. 2C:35-3.

Likewise, when an arrest is made for assault, the interrogating officer may lack sufficient medical information to determine whether the victim suffered bodily injury, significant bodily injury, or serious bodily injury, N.J.S.A. 2C:11-1(a), (d), (b), which can determine whether the arrestee committed simple assault or the far more serious crime of aggravated assault. In the same vein, an interrogating officer may not have sufficient information concerning the arrestee's culpable mental state to decide at the outset of the interrogation whether the defendant committed the specific-intent crime of attempted murder, which is a far more serious crime than aggravated assault.[3]

I list only a few examples of the myriad situations where an arrest and ensuing custodial interrogation may be initiated before police have sufficient information to determine the seriousness and statutory gradation of the suspected offense conduct. In these situations, extending the bright-line rule established in Vincenty could put the proverbial cart before the horse by requiring a police officer to advise the

[3] There is no such ambiguity in this case given the execution-style nature of the shooting and the life-threatening injuries that were inflicted. Furthermore, the arresting detectives had already determined the retaliatory motivation for the shooting.

custodial interrogee as to the specific charges he is facing before an informed charging decision can be made. When that happens, the officer may not be able to accurately advise the arrestee as to his "true status" within the meaning of the A.G.D./Vincenty rule because that status may be in flux.

It bears noting, moreover, that the officer who conducts the custodial interrogation may not be the law enforcement official who decides which offense(s) will be included in the ensuing complaint-warrant application that must be made before the arrestee is released or is held pending a pretrial detention hearing.[4] The complaint review and approval process prescribed in the Attorney General's CJRA Directive may reduce or expand the number of charges contemplated by the interrogating officer, or may upgrade or downgrade those charges.

Consequently, requiring an interrogating officer to advise an arrestee as to specific charges that have not yet been approved may, in some cases, misinform the arrestee as to his predicament. Moreover, because we are treading on new and

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[4] To ensure the uniform implementation of the Criminal Justice Reform Act, N.J.S.A. 2A:162-15 to -26, in October 2016, the Attorney General issued a directive to law enforcement that generally provides that applications for complaint-warrants involving indictable crimes must be reviewed and approved by an assistant prosecutor or deputy attorney general before being submitted to a judge. See Attorney General, Law Enforcement Directive No. 2016-1, §§ 3.1 to 3.6 (CJRA Directive).

untested ground,[5] our opinion today can offer no guidance on how a reviewing court should address variance between the unfiled charges now required to be announced to the interrogee and the charges set forth in a complaint-warrant issued shortly after the custodial interrogation. Such variance might inject new fact-sensitive issues to be litigated at suppression hearings when defendants challenge the accuracy of the charge-related information that police disclosed during the Miranda waiver colloquy pursuant to the new rule announced today.

A per se rule requiring notification of charges not yet filed may create additional uncertainties when, for example, a defendant is arrested for one criminal incident but also is suspected of committing other uncharged crimes. Consider a situation where a burglar is caught red-handed in a home and also is suspected of committing a rash of other residential burglaries for which the proofs are less compelling. It is not clear under the rule announced today whether an interrogating detective must tell the arrestee he is suspected of—and likely to be charged with—committing those other burglaries. New questions will arise under this new paradigm. For example, must the interrogating officer decide whether, in view of

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[5] As previously noted, the majority opinion addresses an issue of first impression under New Jersey law. Neither the briefs submitted by the parties nor the majority opinion cite to federal or other state precedents that require the advisement mandated by the new rule announced today.

the latest episode, there is now probable cause to believe that the defendant committed some or all of those other burglaries? If probable cause for those other criminal events has, in the officer's opinion, ripened as a result of the suspect's latest offense, must the officer so advise the arrestee before conducting the custodial interrogation?

The A.G.D./Vincenty rule, as it presently stands, avoids the need to answer such subjective questions by relying on what the Supreme Court in Nyhammer described as an "objectively verifiable and discrete fact," that is, the issuance of a complaint-warrant or arrest warrant. 197 N.J. at 405. I believe that as a general proposition, any per se rule that expands the list of Miranda warnings/advisements should be unambiguous, relying on objectively verifiable and discrete facts so that police know precisely what they are required to disclose to the interrogee.[6] Indeed, the whole point of a "bright line" rule is to draw clear, unambiguous lines of demarcation. Under the new rule we announce today, the declaratory statement

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[6] Our Supreme Court also expanded the list of Miranda advisements in State v. Reed, 133 N.J. 237 (1993). The Court held that, "[w]hen, to the knowledge of the police, . . . an attorney is present or available, and the attorney has communicated a desire to confer with the suspect, the police must make that information known to the suspect before custodial interrogation can proceed or continue." Id. at 261–62. The fact that an attorney is present at the police station or is available and has asked to confer with an arrestee is an objectively verifiable and discrete circumstance that can be relayed accurately to the arrestee through a simple declaratory statement.

that police will be required to make at the outset of a custodial interrogation may not be as simple as the one contemplated in Vincenty. 237 N.J. at 134. Rather, the determination of a defendant's "true status," that is, a determination as to what charges he is facing, may well be, to borrow phraseology from Nyhammer, a more "elusive concept that will vary depending on subjective considerations of different police officers." 197 N.J. at 405 (explaining that police are not required to inform persons of their "suspect status" because "suspect status is not an objectively verifiable and discrete fact."). It bears noting in this regard that the provisions in the Attorney General's CJRA Directive that require prosecutorial review and oversight of the complaint-warrant application process presuppose that law enforcement officials can disagree as to the appropriate charges.

One of the hallmarks of Miranda and its progeny is that the familiar five-fold[7] warnings/advisements are essentially scripted. They are not tailored based on

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[7] As explained in State v. Tillery:

> In Miranda, the United States Supreme Court held that before law enforcement subjects a suspect to custodial interrogation, the suspect must be advised: (1) "that he has the right to remain silent"; (2) "that anything he says can be used against him in a court of law"; (3) "that he has the right to the presence of an attorney"; and (4)

subjective determinations made by interrogating officers. For the foregoing reasons, the majority's extension of the A.G.D./Vincenty rule might introduce subjectivity, ambiguity, and uncertainty as to what police are required to tell arrestees before conducting custodial interrogations.

Finally, I would note that it is not clear that the Court in Vincenty intended to lay the groundwork for the significant change to our custodial interrogation jurisprudence that will result from today's opinion. Our Supreme Court knows best whether and to what extent formal charging was essential to its holdings in A.G.D. and Vincenty. Those cases amply demonstrate our Supreme Court's willingness to adopt new rules, practices, and procedures to safeguard the constitutional rights of persons who are subjected to custodial interrogation. See also R. 3:17 (generally requiring electronic recordation of stationhouse interrogations). Without question, a custodial interrogee is better able to make an informed decision whether to waive Miranda rights when he is alerted to the offense(s) for which he was arrested. The challenge is how best to effectuate

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> "that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Miranda imposes a fifth requirement: "that a person must be told that he can exercise his rights at any time during the interrogation."
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> [238 N.J. 293, 315 (2019) (internal citations omitted).]

that basic principle. Given the important ramifications of such a significant change to the Miranda rule, I would leave it to our Supreme Court to consider the costs and benefits and decide whether to dispense with the explicit prerequisite in Vincenty that formal charges have been filed.

SUPREME COURT OF NEW JERSEY
M-1014 September Term 2021
085369

State of New Jersey,

Plaintiff,

v. ORDER

Anthony Sims, Jr.,

Defendant-Movant.

It is ORDERED that the motion for reconsideration of the Court's opinion filed on March 16, 2022, is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 3rd day of May, 2022.

Heather J. Baker
CLERK OF THE SUPREME COURT