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Case Number 718,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DESIREE A. ARICIDIACONO	:	
BRANDON BARNES	:	
THOMAS G. BARNETT	:	ID# 718, 2014
GERALD D. BOYCE	:	
HOLLY BOYLES	:	
MICHAEL BREWER	:	
MICHAEL CHAMBERS	:	
BRENT CIERKOWSKI	:	
SHAMIKA T. CLARK	:	
DANYELLE CORMIER	:	
VINCENT L. DAVIS	:	
JOSEPH A. DICKERSON	:	
MICHAEL H. DRUMMOND	:	
BRYAN W. EVANS	:	
TYRONE C. FASSETT	:	
CHRISTINE C. FOX	:	
NICHOLE M. FULMER	:	
BRANDON R. GARRISON	:	
MICHAEL R. GRAY	:	
BENJAMIN L. GREENE	:	
CHARLES HAMMOND	:	
MARQUIS HEMBREE	:	
ERIC L. HOWELL	:	
JESSICA HUDSON	:	
MARCUS L. JOHNSON	:	
SAMUEL JONES	:	
EDWIN S. MARTINEZ	:	
JAMES K. MAY	:	
JAMES C. MCNEILL	:	
KARAM M. MOSLEY	:	
SHAQUILL D. NORWOOD	:	
HASAN A. ONEY	:	
LEIGHA R. PARKINSON	:	
COREY J. PFEIFFER	:	
ERIK L. SINGLETARY	:	
STEPHON R. TANKARD	:	
RUSSELL R. THOMAS	:	
ELTORIA L. THOMPSON	:	

RAINY WALLACE	:
JOSHUA A. WARD	:
JOHN W. WHITBY	:
BRANDON WHITE	:
CURTIS WILLIAMS	:
OTIS WILLIAMS	:
CAMERON A. WILSON	:
	:
Defendants Below,	:
Appellants,	:
	:
	:
v.	:
	:
STATE OF DELAWARE,	:
	:
Plaintiff Below,	:
Appellee.	:

APPELLANTS' OPENING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

In early 2014, an investigation led to a discovery that, at least since 2010, drug evidence had been lost, stolen and altered at the Office of the Chief Medical Examiner. Each of the appellants in this case was charged with at least one drug offense during the time of the ongoing OCME misconduct.[1] They each engaged in a plea bargaining process with the State and, after considering various factors, each entered a guilty plea to one or more drug offenses.

Upon learning of the OCME misconduct, the appellants filed post-conviction motions seeking to withdraw their guilty pleas based on a *Brady v. Maryland* violation. Subsequently, the appellants each supplemented their motions arguing that due process also required the guilty pleas be deemed involuntary because the State failed to disclose evidence of government misconduct prior to entry into a plea agreement. On November 14, 2014 the Superior Court issued a rule to show cause and a hearing was conducted on December 2, 2014. The Court subsequently dismissed the motions and the appellants timely appealed the decision.[2] This is their brief in support of their appeals.

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[1] A10, 39, 68, 135, 167, 193, 225, 257, 262, 292, 326, 355, 394, 458, 493, 496, 522, 563, 590, 657, 679, 710, 741, 770, 837, 868, 932, 960, 989, 1017, 1045, 1075, 1103, 1136, 1165, 1199, 1226, 1254, 1286, 1320, 1347, 1376, 1406, 1436, 1466, 1491, 1523, 1551.

[2] *See* December 3, 2014 denial of the appellants' motions, attached as Ex.A.

SUMMARY OF THE ARGUMENT

1. The Fourteenth Amendment of the United States Constitution requires "fundamental fairness" in all criminal prosecutions. This requirement extends to the plea bargaining process. Fairness is considered on a case-by-case basis because the elements of fairness vary with the circumstances of each particular proceeding.[3] Here, however, the Superior Court failed to independently examine all of the circumstances relevant to the fairness of the appellants' plea agreements. Instead, it relied on clearly erroneous and inapplicable findings in *State v. Irwin*.[4]

The failure to independently examine the circumstances led the court to misapprehend the egregiousness of the OCME misconduct and of its effect of that misconduct on the plea bargaining process. Consequently, the court concluded that the resulting guilty pleas were voluntary and that each appellant was bound by the admissions that accompanied their individual guilty plea. The reality, however, is that nondisclosure of the misconduct skewed the plea bargaining process in each appellant's case. Thus, fundamental fairness requires all of the guilty pleas to be deemed involuntary and the Superior Court's decision to be reversed.

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[3] *See California v. Trombetta*, 467 U.S. 479, 485 (1984) ("criminal prosecutions must comport with prevailing notions of fundamental fairness"); *Santobello v. New York*, 404 U.S. 257, 261 (1971) (noting plea cannot be voluntary unless there is fairness in securing the agreement between an accused and the prosecutor).

[4] *State v. Irwin*, 2014 WL 6734821, Carpenter, J. (Del.Super.).

STATEMENT OF THE FACTS

On January 14, 2014, during a Superior Court trial in *State v. Walker*, it was discovered that illegal drugs which had been sealed in an evidence envelope and stored at the crime lab were missing and had been replaced with blood pressure pills. This discovery was made even though "the evidence envelope was presented to the investigating officer who observed that the original seal on the envelope was intact, that the left side of the envelope had a seal indicating that a chemist from the OCME [Office of the Chief Medical Examiner] had opened the package, and that there were no overt signs of tampering to the exterior packaging."[5] After that aborted trial, the evidence envelope was returned to Delaware State Police (DSP) Troop 3. "Upon closer inspection, a small cut was discovered concealed beneath a folded flap of OCME evidence tape. The discrepancy was noted, and the envelope was resealed and placed back into secure storage."[6] At a hearing, Lieutenant Laird admitted that:

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[5] A1663-1664.

[6] *Id.* A1773-1775, 1783-1784. In the supplements to their motions, and again at the summary hearing, the appellants asked the Superior Court to take judicial notice of the record from the hearing conducted on August 19, 2014-August 21, 2014 in *State v. Nesbitt*, 1310018849. The evidence of misconduct presented at that hearing was at issue in *State v. Irwin*, 2014 WL 6734821, Carpenter, J. (Del.Super.), the case upon which the Superior Court heavily relied. Because the request conformed to *D.R.E.* 201 and the State did not object, the court was required to honor that request. A1895, 1956.

> No officer on the stand viewing th[e evidence] envelope [in that case] would observe any type of tampering by the way it is concealed with Medical Examiner's tape.[7]

On February 20, 2014, DSP shut down the crime lab, confiscated the drugs at the lab and launched a criminal investigation into the crime lab's operation.[8] The investigation led to a discovery that the environment at OCME was one "in which drug evidence could be lost, stolen and altered, thereby negatively impacting the integrity of many prosecutions."[9]

The Crime Lab At OCME Was Unsecure And Disorganized

The security in the lab and drug evidence vault was found by DSP to be severely lacking. There was "no consistent, established criteria for the distribution of the alarm code to OCME personnel."[10] Access to the vault was not revoked when an employee either transferred from the lab or left the OCME.[11] The door to the drug evidence vault was propped open on many occasions over the years.[12] Forensic investigators retained "free access to the OCME building as the

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[7] A1784.
[8] A1710,1754, 1761-1762, 1785.
[9] A1661.
[10] A1672.
[11] A1675.
[12] A1676.

investigators occasionally slept in the OCME annex during their 'on call' shifts."[13] Additionally, everyone in the lab had access to the combinations of the lock boxes used by the OCME drug custodian to transport evidence from law enforcement agencies in Kent and Sussex Counties to OCME.[14]

Digital media to which internal and external cameras record was kept unsecure. Additionally, the "digital media [wa]s 'rewritten,' that is, overwritten by new video footage, at approximately 7-day intervals."[15] As such, there was no long-term storage of video footage. Employees were aware of "the capabilities and limitations of the video surveillance equipment[.]"[16]

There was also an inadequate software program being used at OCME. The Forensic Advantage or "FLIMS" program was used in an effort to track the chain of custody of suspected drug evidence while it was at OCME. However, that program generated unreliable reports. There were many occasions where there was not even a single entry in a chain of custody report that was completely

[13] A1673.
[14] A1739, 1776-1777.
[15] A1675.
[16] A1675.

accurate.[17] Adding to the unreliability of these reports was that employees were not logging evidence in to the computer tracking system when it was received.[18]

For several years, Caroline Honse (Honse) was the manager of the crime lab at OCME.[19] She did not maintain any policies or procedures for the lab.[20] In fact, Laura Nichols, (Nichols) who was a Forensic Evidence Specialist (FES) in the lab,[21] testified at a hearing that Honse repeatedly changed the way Honse wanted things done in the lab.[22] According to Robin Quinn (Quinn), a supervisor who later took over Honse's position, Honse's office was like a scene from the television show "Hoarders."[23] Among other non-professional practices, Honse kept boxes containing drug evidence in her non-secured office.[24] Lt. Laird testified that evidence in those boxes was related to cases that were "very old."[25] In fact, Nichols testified that she believed some of this evidence dated as far back as

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[17] A1707-1709, 1730-1731,1736-1737, 1744-1749, 1752-1753.
[18] A1728-1729,1742-1743, 1750-1751.
[19] A1679. It appears Honse was the manager from, at the latest, 2008.
[20] A1679.
[21] A1798.
[22] A1799-1780.
[23] 8/19 84-85.
[24] A1733-1734, 1780-1781,1797-1798.
[25] A1780-1781.

2004.[26] Nichols was also aware that, on occasion, Honse went into the vault and pulled evidence purportedly to use for proficiency testing of chemists.[27]

Employees Of Questionable Credibility

Farnam Daneshgar (Daneshgar) was a chemist at the crime lab whose initial employment ended in 1990 after allegations were made that he was "drylabbing," a process where a chemist declares the composition of a substance "without performing the analytical testing to produce th[at] result."[28] However, Daneshgar was rehired by the lab several years later. Not surprisingly, witnesses told police that Daneshgar again engaged in the fraudulent practice of drylabbing.[29] While the State claims he was rehired in 2006, Daneshgar performed tests and testified in criminal cases during the period between 1990 and 2006. For example, he testified in one case about a test he conducted in 2005 where he was untruthful with the court.[30]

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[26] A1798.
[27] A1796-1797.
[28] A1690.
[29] *Id.*
[30] "Frustrated because he had to wait all day to testify, Daneshgar used profane language in front of the prosecutor and the court bailiff. When first questioned about his inappropriate behavior by the trial judge, Daneshgar denied using the "F" word, but later admitted that he had said, "I got to pick up my 'f' ing kids." *Hicks v. State*, 913 A.2d 1189, 1192-93 (Del. 2006).

In 2008, Aretha Bailey (Bailey) was hired by OCME as an administrative assistant.[31] While it may have only been conjecture at the time she was hired, it was later confirmed that she left her former employment after she was confronted with allegations of theft.[32] Even though her position as an administrative assistant did not require it, Bailey was "quickly granted security access" to the vault after she was hired.[33] She was also given the building alarm code so that she could work in the vault alone on the weekends and early in the morning on weekdays.[34] Honse assigned Bailey duties that should have been reserved for FES. These duties included: accepting evidence from and returning evidence to law enforcement agencies; transferring evidence from the drug vault to chemists; assigning cases to chemists; and serving as liaison with the Department of Justice (DOJ).[35]

In her role as a liaison, Bailey communicated with DOJ on drug testing issues. For example, the lab tried to test evidence on a first come first serve basis. However, most cases associated with the evidence submitted to the lab resolved short of trial, thus eliminating the need for the evidence to be tested in those cases. So, when it appeared that a case was actually going to trial, DOJ contacted Bailey

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[31] A1777-1778, 1798-1799.
[32] A1690
[33] *Id.*
[34] A1703-1704,1718-1719, 1726-1727, 1778, 1800.
[35] A1703, 1719, 1738, 1778-1779, 1806.

or Honse and requested the evidence in that particular case be moved to the front of the line for testing.[36] Because she was erroneously given the authority to do so, Bailey was in a position to personally assign the testing of evidence to a chemist.

At a hearing, Nichols testified to some of Bailey's curious activities. One thing Nichols relayed was that Bailey kept her own box in the vault and instructed others not to touch it.[37] Nichols was never completely sure what was in the box.[38] She also found it odd how quickly Bailey could find "missing" evidence. There were times when Nichols could not find a piece of drug evidence that she needed even though she had thoroughly searched the vault. However, once Bailey learned about the "missing" evidence, she went right into the vault and found it unusually fast.[39]

In 2010, James Woodson (Woodson) was hired to work at the lab as a FES.[40] During his hiring process, OCME learned that he left his previous position as a police officer at New Castle City Police Department amidst allegations that he stole money that had been seized in an investigation. In fact, OCME was provided

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[36] A1778, 1807-1808.
[37] A1802-1804.
[38] A1809.
[39] A1804-1805.
[40] A1690.

this information by the Chief of that department.[41] Despite this cloud of suspicion, Woodson was hired to work as the "usual custodian" of drug evidence at the crime lab.[42] On at least one occasion, Woodson discussed with Bailey that, given the systemic failures in the lab, it would be easy to steal drugs from the lab without being discovered.[43]

At some point in November, 2013, Honse retired[44] and Bailey began to look for other employment. Quinn, who was successfully managing the DNA unit at OCME,[45] replaced Honse as manager of the crime lab.[46] Quinn immediately recognized the many failings of the crime lab[47] and began to make changes in late November or early December.[48] In particular, she discovered that Bailey was an administrative assistant and not a FES. Therefore, she realized, Bailey was not qualified to perform the various functions to which she had been assigned.[49] More importantly, Bailey should not have been given access to the vault. Quinn stripped

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[41] A1645.
[42] A1649.
[43] A1782.
[44] A1704.
[45] A1701, 1713-1715.
[46] A1703-1704.
[47] A1702, 1705, 1711-1712, 1714-1715, 1716-1717, 1727-1728.
[48] A1703-1704, 1718.
[49] A1706.

Bailey of the FES duties and revoked her access to the vault.[50] Bailey quit the OCME soon thereafter.[51]

DSP Discovery Of A Variety Of Evidence Tape And 705 Unaccounted-For Pieces Of Evidence In The OCME Drug Evidence Vault

After DSP launched its investigation, Sgt. McCarthy entered the evidence vault and found, among other things, a variety of evidence tape. He found "red tape, white tape, every type of tape, clear …tape."[52] Nichols informed police that there was "all kinds of colors" of tape; "we had blue, we had red, we had white." On one occasion, she saw blue tape that later went missing.[53] The color of the tape was used to assist in tracking the number of times an envelope was legitimately opened and resealed.

Each agency has its own color tape.[54] For example, blue evidence tape is used by the DSP and white evidence tape is used by OCME.[55] When an individual in the chain of custody legitimately reopens an evidence envelope he must do so at a different spot than where it had previously been opened and reseal it with evidence tape. He must use tape the color of which corresponds with his State

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[50] A1703.
[51] A1779, 1801.
[52] A1789.
[53] A1803-1804.
[54] A1788-1790, 1804.
[55] A1722, 1788.

agency. Reopening the envelope in the same spot renders it difficult, if not impossible, to know whether there had been tampering in that spot.[56] As Quinn pointed out, none of this evidence tape should have been in the vault.[57]

Also in the vault, police found 705 unaccounted-for pieces of drug evidence.[58] Quinn testified that from the lack of documentation, it appeared to her that no inventory of the evidence in the vault had ever been done.[59] To date, it does not appear that DSP ever determined from whence this evidence came.

DOJ Preliminary Findings From The Criminal Investigation

Shortly after the discovery of misconduct at OCME, Chief Medical Examiner Richard T. Callery was suspended and became the target of a separate criminal investigation.[60] Woodson and Daneshgar were each suspended and each were indicted on charges related to misconduct at OCME.[61] While Bailey was interrogated by police, she was not charged with any crimes.

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[56] A1720-1721, 1725, 1755-1757.
[57] A1726. The only possible use for evidence tape in the office was for police to use red tape if needed to ensure a container was properly sealed. A1723-1724.
[58] A1682, 1786-1787.
[59] A1735, 1740-1741.
[60] A1647.
[61] A1648.

I. THE SUPERIOR COURT ERRED WHEN IT FORECLOSED THE APPELLENTS FROM POST-CONVICTION RELIEF BY FINDING THEY ENTERED THEIR GUILTY PLEAS VOLUNTARILY

Standard and Scope of Review

"In a post-conviction proceeding, the decision whether to hold an evidentiary hearing is a determination made by the trial court. Thus, [this Court] typically review[s] the Superior Court's denial of post-conviction relief for abuse of discretion."[62] Further, "questions of law and constitutional claims, such as claims that the State failed to disclose exculpatory evidence, are reviewed *de novo*."[63]

Question Presented

Whether the Superior Court erred when it found the appellants were bound by admissions made during the entry of their guilty plea and when it summarily dismissed their post-conviction motions even though: the motions contained specific claims; the State never responded to any of the motions; and the court failed to make independent findings of fact regarding the OCME misconduct.[64]

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[62] *Weedon v. State*, 750 A.2d 521, 527 (Del. 2000).
[63] *Wright v. State,* 91 A.3d 972, 982-83 (Del. 2014).
[64] A13, 43, 74, 140, 173, 199, 232, 269, 298, 334, 361, 400, 464, 503, 526, 569, 596, 622, 688, 716, 747, 778, 844, 873, 938, 965, 995, 1022, 1051, 1080, 1108, 1142, 1171, 1206, 1231, 1260, 1292, 1325, 1353, 1384, 1412, 1442, 1468, 1497, 1527, 1558, 1956.

Argument

The Fourteenth Amendment of the United States Constitution requires "fundamental fairness" in all criminal prosecutions. This requirement extends to the plea bargaining process. Fairness is considered on a case-by-case basis because the elements of fairness vary with the circumstances of each particular proceeding.[65] Here, however, the Superior Court failed to independently examine all of the circumstances relevant to the fairness of the appellants' plea agreements. Instead, it relied on clearly erroneous and inapplicable findings in *State v. Irwin*.[66]

The failure to independently examine the circumstances led the court to misapprehend the egregiousness of the OCME misconduct and of its effect of that misconduct on the plea bargaining process. Consequently, the court concluded that the resulting guilty pleas were voluntary and that each appellant was bound by the admissions that accompanied their individual guilty plea. The reality, however, is that nondisclosure of the misconduct skewed the plea bargaining process in each appellant's case. Thus, fundamental fairness requires all of the guilty pleas to be deemed involuntary and the Superior Court's decision to be reversed.

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[65] *See California v. Trombetta*, 467 U.S. 479, 485 (1984) ("criminal prosecutions must comport with prevailing notions of fundamental fairness"); *Santobello v. New York*, 404 U.S. 257, 261 (1971) (noting plea cannot be voluntary unless there is fairness in securing the agreement between an accused and the prosecutor).

[66] *State v. Irwin*, 2014 WL 6734821, Carpenter, J. (Del.Super.)

The Superior Court Abused Its Discretion When It Summarily Dismissed The Appellants' Motions

Delaware Superior Court Rule of Criminal Procedure 61(d) (5) allows for summary dismissal of post-conviction claims only if it "plainly appears" from the motion and the record in the case that the movant is not entitled to relief[.]"[67] On the other hand, it is an abuse of discretion for a court to dismiss a post-conviction motion when "material and substantial questions of fact" are raised.[68]

A dismissal remains summary in nature even if the court adds a hearing to show cause into the mix. A rule to show cause is an order that remains absolute unless cause is shown after the fact warranting the order to be discharged.[69] Thus, a hearing to show cause is a summary proceeding and is only appropriate where there is "no substantial issue of fact involved and undisputed and incontrovertible facts [] afford an insufficient basis for the legal relief sought."[70]

Here, the post-conviction motions were neither conclusory nor unsubstantiated.[71] The motions raised specific claims supported by specific and detailed facts and a plethora of legal authority. Despite the specificity of the

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[67] *Harris v. State*, 410 A.2d 500, 502 (Del. 1979).
[68] *Id.*
[69] *See Lane v. Bd. of Parole*, 2012 WL 1413987, at *1 (Witham, J.) (Del. Super.).
[70] *U. S. ex rel. Darcy v. Handy*, 203 F.2d 407, 411 (3d Cir. 1953) (*citing Walker v. Johnston*, 312 U.S. 275, 284 (1941)).
[71] *State v. Small*, 2010 WL 2162898, at *1 (Cooch, J.) (Del. Super.) (denying motion to suppress because it was "devoid of legal authorities and facts").

claims, the Superior Court refused to require the State to file any written response to the motions. Instead, it issued a rule to show cause without providing notice of the basis for that order.[72]

At the hearing to show cause, the court pointed to the appellants' inability to present clear and convincing evidence that the guilty pleas were involuntary because they could not explain what happened apart from the actual entry of the plea.[73] It made no inquiry of the State as to the existence of discovery materials. Instead, it presumed an absence of evidence of value to the appellants.[74]

The court's approach allowed the State to shirk its duty to not only investigate the misconduct in general but to conduct a thorough investigation into the misconduct's effect "on cases in which defendants already had been convicted of crimes involving controlled substances[.]"[75] While there was an investigation, the State was unable to identify the scope of the misconduct. By failing to explore with the State the availability of discovery and not ordering an evidentiary hearing, the court allowed the State to take advantage of its own failure to conduct a proper

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[72] A1810,1816.
[73] A1873.
[74] A1836, 1882. *Ex Parte Turner*, 394 S.W.3d 513, 514 (Tex. Crim. App. 2013) (finding appellant entitled to relief because the chemist in his case was one involved in misconduct and evidence could not be retested because it was destroyed); *Ex Parte Sellers*, 2013 WL 831142, at *1 (Tex. Crim. App.) (same).
[75] A1836.

investigation and/or of the fact that the misconduct was so rampant at OCME that the State was unable to link a specific misconduct to specific cases.

Not only were the summary proceedings an abuse of discretion, the use of these proceedings in our cases is contrary to the court's constitutional duty to use its "inherent powers to undertake whatever action is reasonably necessary to ensure the proper administration of justice."[76] The OCME misconduct "raised significant concerns about the administration of justice in criminal cases where a defendant was convicted of a drug offense[.]"[77] It "present[ed] exceptional circumstances warranting th[e] court's immediate attention."[78]

The United States Supreme Court explained that the court's inherent powers are implicated whenever there is "tampering with the administration of justice" because it involves

> far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society[.][79]

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[76] *State v. Sloman*, 886 A.2d 1257, 1265 (Del. 2005). *See State v. Guthman*, 619 A.2d 1175, 1179 (Del. 1993); Del. Const. § , art. 4, § 13 (West).
[77] *Com. v. Ware*, 2014 WL 8481090, at *5 (Mass. Apr. 8, 2015).
[78] *Id.*
[79] *Smith v. Williams*, 2007 WL 2193748 (Del.Super.) (*quoting Hazel–Atlas Glass v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944) (holding that "after-discovered fraud" allowed the court to set aside a final judgment).

Here, the State conceded the environment at OCME was one "in which drug evidence could be lost, stolen and altered, thereby negatively impacting the integrity of many prosecutions."[80] It also recognized the vast impact the misconduct had on Delaware's criminal justice system as a whole.[81] The *Irwin* Court found the OCME misconduct to "be outrageous, unacceptable and a violation of a public trust[.]" It also found that "[t]he reliability and confidence in the State's ability to perform this critical function has been severely damaged and the citizens of this State deserve nothing less than a lab that will meet or exceed the best practices for this industry."[82] Finally, this Court found the misconduct to be "disturbing and regrettable."[83]

There can be no doubt that the OCME misconduct described by the State, the Superior Court and this Court was a wrong against an institution "set up to protect and safeguard the public[.]" Thus, the short shrift given to the motions by the Superior Court fostered the toleration of the tampering with the administration of justice. Therefore, the court's dismissal of the appellants' motions for post-conviction relief must be reversed.

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[80] A1661.
[81] A1577.
[82] *Id.*
[83] *Brown v. State*, 108 A.3d 1201, 1202 (Del. 2015).

The Superior Court Clearly Erred When It Found The Appellants Voluntarily Entered Their Guilty Pleas[84]

A defendant who enters a guilty plea "waives several constitutional rights[.]"[85] The guilty plea "is an admission of all the elements of a formal criminal charge[.]"[86] But, to be a constitutionally valid predicate for a conviction, the guilty plea must be voluntary, knowing and intelligent.[87] Thus, it must be entered into "with sufficient awareness of the relevant circumstances and likely consequences[.]"[88]

A guilty plea is involuntary if it is "induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)."[89]

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[84] In *Brown*, this Court addressed a denial of a motion to withdraw a guilty plea based on a *Brady v. Maryland* claim. This Court relied on *United States v. Ruiz*, 536 U.S. 622 (2002), and found the OCME evidence was only impeachment in nature and concluded that the petitioner was not entitled to its disclosure prior to entering his plea agreement.[84] The Court did not address our current issue which an argument under *Brady v. United States,* 397 U.S. 742, 748 (1970) that due process requires a defendant's guilty plea to be deemed involuntary when government misconduct is not disclosed to him prior to its entry.

[85] *McCarthy v. United States*, 394 U.S. 459, 466, (1969).

[86] *Id.*

[87] *Brady v. United States,* 397 U.S. 742, 748 (1970).

[88] *Id.*

[89] *Id.* at 755 (1970) (internal quotation marks and citation omitted). In fact, there may be occasions where government misconduct "is so outrageous that due

Additionally, the State's failure to disclose government misconduct can render an otherwise voluntary plea invalid.[90] To determine whether a defendant's plea is involuntary due to the State's failure to disclose government misconduct, the Court must assess whether:

> 1) some egregiously impermissible conduct (say, threats, blatant misrepresentations, or untoward blandishments by government agents) antedated the entry of his plea; and
> 2) the misconduct influenced his decision to plead guilty or, put another way, that it was material to that choice.[91]

When assessing the effect of government misconduct on the voluntariness of a guilty plea, the court must look at more than just the plea colloquy and plea agreement forms. It must look to "all the relevant circumstances surrounding the

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process principles would absolutely bar the government from invoking judicial process to obtain a conviction." *United States v. Russell,* 411 U.S. 423, 430 (1973).

[90] *See Matthew v. Johnson,* 201 F.3d 353, 364 n. 15 (5th Cir. 2000) (noting there may be situations where the prosecution's failure to disclose makes it "impossible for [a defendant] to enter a knowing and intelligent plea"); *United States v. Jones*, 2013 WL 4736379 at *2 (D.S.C. Sept. 3, 2013) (denying relief because defendant was aware of government misconduct at time of plea, thereby implying relief would be available had he been unaware of misconduct); *United States v. Fisher,* 711 F.3d 460, 462 (4th Cir. 2013) (holding belated disclosure of officer's false representation on a search warrant affidavit "tinged the entire proceeding" and "rendered the defendant's plea involuntary").

[91] *Ferrara v. United States*, 456 F.3d 278, 290 (1st Cir. 2006) (internal citations omitted) (finding that absent prosecutor's misconduct there was a reasonable probability that the petitioner would not have pled).

plea[.]"[92] These circumstances include those relevant to the fairness with which the plea agreement was secured by the State.[93]

Accordingly, no one circumstance is dispositive of the voluntariness of a guilty plea. Thus, even if a defendant made "an early admission of guilt and acceptance of responsibility" or would have been subject to a higher penalty had he not pled, the plea can still be deemed involuntary due to government misconduct.[94] Otherwise, "defendants might never be permitted to withdraw their guilty pleas."[95]

The Superior Court agreed with cases that presumed a plea was involuntary due to egregious government misconduct that antedated and affected a defendant's

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[92] *Santobello*, 404 U.S. at 261. *See Ferrara*, 456 F.3d at 290 ("The ultimate aim, common to every case, is to ascertain whether the totality of the circumstances discloses a reasonable probability that the defendant would not have pleaded guilty absent the misconduct"); *Fisher*, 711 F.3d at 467 (the court must consider "all of the relevant circumstances" surrounding the plea). *See also Scarborough v. State*, 945 A.2d 1103, 1116 (Del. 2008) (addressing effect of oral side agreement on a guilty plea when the court had not been informed of the agreement).

[93] *Santobello*, 404 U.S. at 261 (noting circumstances must be reviewed because a voluntary guilty plea "presuppose fairness in securing agreement between an accused and a prosecutor").

[94] *Id.* (noting impact of misconduct is the same whether prosecutor acted in good faith or not).

[95] *United States v. Nelson*, 2014 WL 535461, at *7 (D.D.C. Feb. 11, 2014) (finding, upon review of all circumstances, early guilty plea to be involuntary). *See also United States v. Garcia*, 401, F.3d 1008, 1013 (9th Cir. 2003) (recognizing defendant may have valid reasons to withdraw a plea "that have nothing to do with innocence").

decision.[96] However, the court then made the clearly erroneous finding that there was no such misconduct in our case.[97] The court reached this conclusion without making any individual findings of the facts underlying the OCME misconduct. Instead, it deferred to the findings in *State v. Irwin*.

OCME Misconduct Involved More Than Pilfering Or Stealing Of Some Drugs

The Superior Court blindly adopted three findings in *Irwin*: 1) that the misconduct involved "pilfering or stealing of some drugs that passed through the M.E.O. by an unknown individual[;]" 2) that drugs were not improperly tested; and 3) that no chemists created false reports.[98] These findings were based, in large part, on the evidence presented at a pre-trial hearing in *State v. Nesbitt*.[99]

The court was not bound in our case to the *Irwin* findings.[100] In fact, it was required to take judicial notice of the evidence presented at the hearing.[101] Thus,

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[96] Ex.A at *1.
[97] Ex.A at *2.
[98] Ex.A at *3.
[99] *State v. Nesbitt*, ID# 1310018849.
[100] *Threadgill v. Armstrong World Industries, Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991) (finding that even when the facts found in a previous case were "for all practical purposes the same" a judge is not barred from reconsidering similar contentions). *See Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557, 1571 (Fed. Cir. 1993) ("No precedent eliminates the need for independent factfinding in the second trial before *stare decisis* applies.").
[101] A1895, 1956. *D.R.E.*201. "[P]leadings and transcripts are part of the official court record and are subject to judicial notice." *Lagrone v. Am. Mortell Corp.*, 2008 WL 4152677, at *4 (Del. Super. Sept. 4, 2008).

the court was required to independently reach its own findings of the facts underlying the government misconduct. Had it done so, it would have recognized that a finding that there was simply "pilfering or stealing of some drugs" at the OCME is clearly erroneous.[102] Rather, the facts reveal that OCME was a den of chaos and impropriety at the time the appellants entered their plea agreements.

While the State has probable cause to believe that suspected drug evidence was pilfered and/or stolen by James Woodson, the record supports a reasonable conclusion that at least 2 others, Daneshgar and Bailey, either participated with him in an extensive drug-theft enterprise or independently engaged in misconduct.

The misconduct thrived for years due to: an unfettered and unsupervised access to the drug evidence vault; a meaningless chain of custody tracking program; an improper grant of authority; the presence of several hundred pieces of unaccounted for evidence; and the presence of evidence tape. Further, those engaged in the misconduct took advantage of a critical stage in the criminal process – plea bargaining between the prosecutor and a defendant.

The *Walker* case revealed that, despite a process designed to expose tampering of evidence packages, evidence was being tampered without discovery. The officer in the *Walker* case observed what he believed to be the original seal on

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[102] This Court reached the same conclusion in *Brown v. State*. However, in that case, the record presented was not as extensive as presented in this case.

the evidence envelope to be intact.[103] Thus, someone had been able to carefully open the package, swap evidence then reseal the package with clean tape matching the color of that which was removed.

An audit of evidence seized from the lab revealed that the same illicit opening and resealing of evidence packages were used in other cases. Among the many cases DSP identified cases where the evidence had been compromised, there were those where no point of entry was discovered.[104] Significantly, in examining those packages, the officers never looked under any evidence tape.

It is no secret that most of the cases associated with the evidence sent to the lab resulted in plea agreements. If a case did result in a plea agreement, no one would ever inspect the evidence package or its contents. Thus, any theft of that evidence would never be discovered. If, on the other hand, a case was going to trial, DOJ contacted either Bailey or Honse so make sure the evidence was tested. In the event evidence had been stolen from a case, it could be "replaced" by one of the 700 pieces of unaccounted for evidence then the package could be resealed with tape of the same color of that which had been opened.[105] The testing of the evidence that evidence would then be assigned to a chemist by Bailey or Honse.

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[103] A1762-1772.
[104] A1762-1772.
[105] *Irwin*, 2014 WL 6734821, at *15.

At that point, if the chemist were so inclined, he could fraudulently declare results without testing the evidence.

Thus, finding the misconduct to be "pilfering or stealing of some drugs" is clearly erroneous as it fails to grasp the complexities of the comprehensive drug-theft enterprise with which the OCME conditions were conducive.

There Is Evidence That Drugs Were Improperly Tested And False Reports At The Time Appellants Entered Their Pleas

Contrary to the Superior Court's conclusion, there is "evidence that the drugs were improperly tested" and there is "evidence that the chemists were creating false reports." The suspected drug evidence in *Irwin*, like that in our cases, had been at the OCME. However, the suspected drug evidence in *Irwin*, unlike that in our cases, were seized by DSP shortly after the *Walker* trial and tested at an independent lab. None of the chemists from the OCME were involved in testing that evidence. There were no allegations in those cases that the chemists at the independent lab engaged in any misconduct. Thus, *Irwin*'s finding was correct as applied to those cases.

In our cases, unlike those in *Irwin*, the responsibility for testing evidence was on the chemists at OCME. The record reveals that there were suspicions in 1990, and possibly earlier, that Daneshgar falsely declared test results used by the State to obtain convictions. He left his employment at OCME amidst those

suspicions. However, despite knowledge of these suspicions, the OCME rehired Daneshgar. Not surprisingly, there were suspicions that Daneshgar falsely declared test results after he was rehired. Apparently the suspicions rose to the level that supported probable cause to charge him with 2 counts of fraud.

There are also unanswered questions about the actual time in which Daneshgar was employed at OCME. The State claimed he did not work there between 1990 and 2006. However, records reveal that he testified and/or tested drugs for OCME during that time.

That the State recently dropped the charges against Daneshgar in no way diminishes the evidence of his suspected drylabbing. In fact, it supports a conclusion that many of the chemists and FES who routinely handled and/or tested drug evidence and/or testified in criminal cases had credibility issues. The State did not drop the charges due to lack of merit. Rather, the prosecutor believed there was an "unlikelihood of conviction" due to credibility concerns involving several witnesses who would testify in a manner to indemnify themselves. Among the witnesses the prosecutor subpoenaed were other chemists and staff at OCME. [106]

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[106] The prosecutor believed there was an "unlikelihood of conviction" because she due to the lack of written policies at OCME and credibility concerns with those from the lab who she would call to testify about the policies. *See generally*, A1908-1919.

Recently, credibility of the chemists at the lab was further compounded when, during post-conviction proceedings, an independent lab retested a substance that Irshad Bajwa testified was 2 kilograms of cocaine. The retest revealed the presence of no illicit drugs and the defendant's convictions were vacated.[107]

The entirety of the evidence reveals the numerous possibilities as to which and how many employees of OCME engaged in misconduct and which methods of misconduct were used. This, in turn, increases the number of cases which were likely to have been affected by misconduct at the crime lab. Thus, at the very least, further investigation and discovery was necessary.

The Government Misconduct Was Egregious

Despite its otherwise heavy reliance on the findings in *Irwin*, the Superior Court, without any independent assessment of the facts, ignored the finding in *Irwin* that the government misconduct was, among other things, "outrageous."[108] Instead, it concluded the misconduct was not egregious. However, the terms "egregious" and "outrageous" are synonymous. "Outrageous" is defined as "very

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[107] *See generally* A1920-1949.

[108] 2014 WL 6734821 *9. *See Pekala v. E.I. duPont de Nemours & Co.*, 2006 WL 1067275, at *4 (Del. Super. Mar. 31, 2006) (defining outrageous conduct as that "which 'exceeds bounds of decency and is regarded as intolerable in a civilized community.'"); *Procter & Gamble Pharm., Inc. v. Hoffmann-LaRoche Inc.*, 2006 WL 2588002, at *29 (S.D.N.Y.) (citing Webster's New Universal Unabridged Dictionary 624 (1996)).

bad or wrong in a way that causes anger: too bad to be accepted or allowed[.]"[109] And, "egregious" is defined as "very bad and easily noticed[.]"[110]

To support its conclusion, the Superior Court attempted to distinguish our case from those where government misconduct created a presumption of an involuntary guilty plea.[111] It claimed that, unlike our case, there was specific evidence of egregious conduct linked to the defendant in those cases. There is no such distinction. The cases addressed by the Superior Court set forth analyses to determine whether to presume government misconduct precisely because no specific nexus between the misconduct and the defendant's case could be drawn.[112]

In *Commonwealth v. Scott*, the Massachusetts Supreme Court found that a chemist's misconduct of "drylabbing" is "the sort of egregious misconduct that could render a defendant's guilty plea involuntary," and that her conduct "may be attributed to the government[.]"[113] The *Scott* Court then concluded that a defendant could withdraw his guilty plea due to egregious government misconduct even

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[109] http://www.merriam-webster.com (last visited April 16, 2015).
[110] *Id.*
[111] *See also Fisher*, 711 F.3d at 466-67 (finding guilty plea involuntary due to later discovered evidence that law enforcement officer lied to get a search warrant and attributed that misconduct to the prosecution "even though the prosecutor, in fact, disclosed the officer's behavior as soon as it became known").
[112] *Com. v. Scott*, 5 N.E.3d 530, 544 (Mass. 2014).
[113] *Id.* at 545.

though there was no "defect in the plea procedures"[114] as long as there was "egregiously impermissible conduct ... by government agents" that took place prior to the entry of the plea and the misconduct influenced his decision to plead guilty or, put another way, that it was material to that choice."[115]

After noting the reality that it would be near impossible for a defendant to establish a nexus between misconduct and his case, the court stated that what was "reasonably certain," was that the chemist's "misconduct touched a great number of cases."[116] Thus, the court held that where that particular chemist had "signed the certificate of drug analysis" the defendant was "entitled to a conclusive presumption that misconduct occurred in his case, that it was egregious, and that it is attributable to the Commonwealth."[117]

In another case addressed by the Superior Court, *Ex Parte Coty*,[118] a holding similar to that in Scott was reached.[119] That court ruled that it would infer that suspected drug evidence is false when the defendant shows that: "(1) the technician in question is a state actor, (2) the technician has committed multiple instances of intentional misconduct in another case or cases, (3) the technician is the same

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[114] *Id.*
[115] *Id.*
[116] *Id.* at 544.
[117] *Id.* at 535.
[118] *Ex Parte Coty*, 418 S.W.3d 597, 605 (Tex. Crim. App. 2014).
[119] 2014 WL 7010788 at *2

technician that worked on the applicant's case, (4) the misconduct is the type of misconduct that would have affected the evidence in the applicant's case, and (5) the technician handled and processed the evidence in the applicant's case within roughly the same period of time as the other misconduct."

These analyses recognize that which the *Irwin* Court and the court in our case did not - it defies logic to require the petitioner to show actual misconduct in his case where the misconduct was rampant and could not be isolated. To place such a burden on the petitioner allows the State to benefit from its own failure to conduct a proper investigation and/or of the fact that the misconduct was so rampant that the State was unable to link a specific "bad actor" to a specific case.

In our case, there was rampant misconduct, not just one rogue chemist. The evidence supports the conclusion of an existence of an on-going drug theft enterprise in a lab staffed by chemists, forensic evidence specialists and managers whom the State has found to be unreliable for purposes of testifying under oath. Surely this must be considered egregious misconduct[120]

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[120] Some jurisdictions that dismiss cases due to government misconduct require no more than "simple mismanagement" with respect to a crime lab. *See State v. Granacki,* 90 Wn. App. 598 (1998) (finding that dismissal of criminal charges due to government misconduct not limited to actions by prosecutor but may include law enforcement, the Court and state crime labs); *Washington, v. Wilson*, 2005 WL 6564211 (Wash.Super.) (finding government misconduct even though the crime

The Egregious Government Misconduct Affected The Decision Of The Appellants To Enter A Guilty Plea

To determine whether the egregious OCME misconduct rendered the guilty pleas in our case involuntary, the Court must decide "whether a reasonable defendant standing in the [appellants]' shoes would likely have altered his decision to plead guilty" had he been aware of the misconduct.[121] This is an objective assessment that requires the Court to consider a "multiplicity of factors [that] may influence a defendant's decision to enter a guilty plea[.]"[122]

There is no list of dispositive factors bearing on the reasonable probability that a defendant would have elected to go to trial.[123] That is because "each defendant's decision whether to enter a guilty plea is 'personal and, thus,

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lab not part of prosecutor's office because "the state had an on-going duty to make diligent efforts to keep abreast of the status of the testing and failed to do so…").

[121] *Ferrara*, 456 F.3d at 294-97.

[122] *Id. See also Miller v. Angliker,* 848 F.2d 1312, 1322(2nd Cir. 1988) ("even where counsel would likely adhere to his recommendation of a plea of guilty or not guilty ..., if there is a reasonable probability that but for the withholding of the information the accused would not have entered the recommended plea but would have insisted on going to a full trial, the withheld information is material under *Brady v. Maryland*).

[123] *United States v. Smith*, 2013 WL 10257816 (D.Mass.) (citing *Ferrara*, 456 F.3d at 294).

unique[.]'"[124] Thus, the assessment of the voluntariness requires consideration of facts that are found well outside the plea form and plea colloquy.[125]

The Superior Court correctly noted that deciding whether to enter a plea agreement involves a cost/benefit analysis. However, the ultimate decision is only voluntary if it is conducted with "sufficient awareness of the relevant circumstances and likely consequences."[126] While the defendant normally risks his own misapprehension of the strength of the State's case, he does not bear the risk of any misapprehension created by the State's impermissible conduct.[127] This Court has recognized that the application of the implied covenant of good faith is important in the context of a plea agreement because the State has a "superior ability to control implementation of the agreement's terms."[128]

"[T]he point of the question is not to second-guess a defendant's actual decision; if it is reasonably probable he would have gone to trial absent the error, *it is no matter that the choice may have been foolish.*"[129]

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[124] *Smith*, 2013 WL 10257816 (citing *Ferrara*, 456 F.3d at 294).
[125] *Id. See Scott*, 5 N.E.3d at 547 ("judge may not consider any assertion by the Commonwealth that it would have offered to retest the substances at issue in the defendant's case if the defendant had known of [the chemist]'s misconduct.").
[126] *Brady v. United States*, 397 U.S. 742, 748 (1970).
[127] *Ferrara,* 456 F.3d at 291.
[128] *Cole v. State*, 922 A.2d 354, 359-60 (Del. 2005).
[129] *United States v. Monzon*, 429 F.3d 1268, 1272 (9th Cir. 2005). Early admission of guilt and acceptance of responsibility not dispositive. If so, "defendants might

The misconduct at the crime lab was a relevant circumstance that existed at the time each appellant entered his/her individual guilty plea. Thus, the appellants were entitled to consider that circumstance during the decision-making process. The nondisclosure of this powerful evidence was "apt to skew the decision-making of a defendant who is pondering whether to accept a plea agreement."[130] With knowledge of the misconduct at the crime lab, "a reasonable defendant in the petitioner's shoes would have viewed the odds as greatly improved."[131]

"If [the petitioners] and [their] counsel had known prior to the plea that counsel would have been able to discredit the government's drug analyst and cast doubt upon the chemical composition of the drugs, there is a reasonable probability that, [the petitioners] would not have pleaded guilty and would have insisted on going to trial."[132] The petitioner may have opted to go to trial or, given the plea

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never be permitted to withdraw their guilty pleas." fact that he was subject to a higher penalty had he not pled. *United States v. Nelson*, 2014 WL 535461, at *7.

[130] *Ferrara*, 456 F.3d at 296. *See also Miller,* 848 F.2d at 1322 ("even where counsel would likely adhere to his recommendation of a plea of guilty or not guilty ..., if there is a reasonable probability that but for the withholding of the information the accused would not have entered the recommended plea but would have insisted on going to a full trial, the withheld information is material within the meaning of the *Brady v. Maryland* line of cases").

[131] *Id.* at 297.

[132] *Smith*, 2013 WL 10257816 (D.Mass.). *Commonwealth v. Rodriguez*, 5 N.E.3d 519 (Mass. 2014) (pointing out that the credibility issues had the potential to thwart prosecutor's ability to prove beyond reasonable doubt that the substance was a particular drug).

offers made in pending cases at the time the misconduct was discovered, the petitioner would have sought and received "a substantial reduction in the plea-bargained sentence as a condition of forgoing a trial."[133]

Because knowledge of the egregious misconduct at OCME would likely have altered the appellants' decision to plead guilty the appellants must be allowed to withdraw their guilty pleas.

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[133] *Id.*at 296. *Smith*, 2013 WL 10257816 (D.Mass.) (concluding a reasonable probability that defendant would have sought a better plea agreement had he been aware of misconduct); *Rodriguez*, 5 N.E.3d 519 ("defendant and his counsel should have had the information about [the chemist]'s misconduct to inform them as to what kind of plea bargain to seek and/or accept or whether to reject a plea bargain and go to trial").

CONCLUSION

For the foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that the Superior Court's decision be reversed.

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