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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| WAYNE WILLIAMS,<br><br>Defendant Below,<br>Appellant,<br><br>v.<br><br>STATE OF DELAWARE,<br><br>Plaintiff Below,<br>Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 195, 2015 |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

# APPELLANT'S REPLY BRIEF

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DATED: October 27, 2015

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## I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE STATE TO INTRODUCE UNRELIABLE EVIDENCE AT TRIAL THEN PROHIBITED WILLIAMS FROM FULLY CHALLENGING THE UNRELIABILITY OF THAT EVIDENCE.

### *Argument*

Significantly, the State fails to discuss, or even cite, *State v. Irwin*[1] which provides a road map for the admissibility and relevance of OCME misconduct. That case instructs that where evidence was sent to OCME, there must be "greater scrutiny and review of the evidence" in determining authenticity.[2] *Irwin* explained "[t]his will allow for an individualized review of the circumstances surrounding each case, including an analysis of that case's preservation and custody while at the OCME drug lab and whether that evidence suggests a likelihood the drugs have been tampered with."[3]

While ignoring *Irwin*, the State recites the "lenient burden" of authentication that applies in "normal" cases. This, in turn, improperly narrows the authentication focus solely on an accounting of everyone whom the State believes handled the evidence and it erroneously eschews consideration of the circumstances surrounding the preservation and custody of the evidence. Therefore, "the trial court abused its discretion in finding that it was improbable that the [substances]

[1] 2014 Del. Super. LEXIS 598 (Del. Super. Ct. Nov. 17, 2014).
[2] *Id.* at *32.
[3] *Id* at *36.

originally seized had been exchanged with another, piece of evidence or otherwise tampered with."[4]

Assuming, *arguendo*, the trial court properly admitted the "drug-related" evidence, the OCME investigation was relevant to the jury's decision as to the weight it should give the evidence. As *Irwin* explained, "given the sheer magnitude of the issues that plague the OCME drug lab, it would be[] unfair to allow cases to be tried in a sterile proceeding as if this conduct never occurred."[5] Therefore, the *Irwin* Court created a bright line that, in cases where evidence went to OCME for testing, the defense can question the State's witnesses about or present evidence of OCME misconduct "if there is either evidence of tampering of the packaging submitted by the police ***or a discrepancy in weight***, volume or contents from that described by the seizing officer."[6]

In our case, there were weight discrepancies. The chemist reported that one envelope contained one bag containing six clear bags weighing a total of only 4.10 grams of cocaine, 2.5 grams less than what police claimed was seized from Williams. The other envelope contained one bag containing 5 knotted bags and one additional bag weighing 14.25 grams of marijuana, 3.35 grams less than what

[4] *Loper v. State*, 1994 Del. LEXIS 15, *15 (Del. Jan. 3, 1994).

[5] *Irwin*, 2014 Del. Super. LEXIS 598*33.

[6] *Id.* at 45.

police claimed was seized from Williams.[7] It was "unfair to prohibit the defense from reasonably exploring, with witnesses, the OCME investigation as an explanation for a reduction in weight[.]"[8]

Absent a reasonable exploration into the OCME investigation in this case, the State was permitted to and did "openly capitalize on all aspects of this patently one-sided situation.[9] Williams was unable to counter the expert's explanation regarding the weight discrepancy in our case because he could not fully explore an alternative possibility that the discrepancy was the result of the substance being mishandled or stolen.[10] Additionally, the State made unchallenged statements in closing such as claiming that: it had "presented a witness from each and every day that the drug evidence was touched, packaged, transported, and tested[;]"[11] it had answered any questions regarding chain of custody and established "its careful custody[;]"[12] it had "presented to [the jury] each person who has opened the evidence envelope[;]"[13] and that J. Daneshgar's practice of logging in evidence the day after he retrieved it was "normal practice[.]"[14] Those were all facts which were for the jury to consider in the

[7] A151.
[8] *Irwin*, 2014 Del.Super. LEXIS 598, *42.
[9] *Weber v. State*, 457 A.2d 674, 682-683 (Del. 1983)
[10] A316-317.
[11] A318.
[12] A315.
[13] A315.
[14] A314.

context of the conditions of the lab and with the understanding that J. Daneshgar's practice was contrary to generally accepted forensic standards.

Had the jury been permitted to consider all of the relevant evidence, it would have found a lack of adherence to protocols and controls at OCME which are safeguards to the reliability of scientific evidence. However, it was prevented from hearing this evidence after the trial court withdrew from Williams two of the safeguards essential to a fair trial: cross examination and presentation of contrary evidence.[15] Thus, Williams' convictions must be reversed as he was denied his right to a fair trial.

[15]*United States v. Mitchell*, 365 F.3d 215, 245 (3d Cir. 2004).

## II. THE SUPERIOR COURT ABUSED ITS DISCRETION UNDER *BATSON V. KENTUCKY* BY NOT DECLARING A MISTRIAL WHEN THE STATE IMPROPERLY EXERCISED A PEREMPTORY CHALLENGE AGAINST AN AFRICAN-AMERICAN VENIREPERSON.

In its Answering Brief, the State first points out that its Prosecutrix excluded by peremptory challenge only two of the three African venire persons who were called to the box and allowed the remaining African-American female juror to sit on the jury. Ans. Br. at 23-24. If this is an oblique suggestion that that the guarantee of Equal Protection is diluted when at least one minority is permitted to sit on the jury or that *Batson*[16] should only really be strictly enforced if no African-Americans are permitted to sit on a jury, that's not supported by any decisional authority applying the Equal Protection guarantee.[17]

In this case, the State also makes no attempt on appeal to defend the original, purported factual basis for its Prosecutrix' peremptory challenge of Richard Johnson, a retired African-American correctional officer, on the ground that Richard Johnson, as a retired correctional officer, "may have rehabilitative duties as a correctional officer."[18] The most likely reason is that the contention is implausible on its face. As defense counsel pointed out at

[16] *Batson v. Kentucky*, 476 U.S. 79 (1986).
[17] *United States v. Clemons*, 843 F.2d 741 (3d Cir. 1988) (striking of single juror can constitute discrimination under *Batson*).
[18] A207-208.

trial, correctional officers often sit on juries, probably for the reason that they generally make good prosecution jurors and prosecutors almost never try to exclude them under most circumstances unlike this case.[19] If anything, that a *venire* person is a correctional officer should make that juror more appealing to the Prosecution, not less so.

The State also makes no attempt to defend on appeal the alternative, allegedly non-racial basis for its exclusion of Richard Johnson from the jury – actually the pretextual basis that he had deceived the Court and was biased because he did not disclose, in answer to the Superior Court's *voir dire* question, that he was an employee of the Department of Correction.[20] The problem with this pretextual basis was that, not only did he disclose it on his juror questionnaire, (B12), but more importantly because there was no factual basis for the Prosecutrix's contention: the Superior Court had not asked law enforcement personnel to come forward and the Prosecutrix's proffer of this basis only supported her objective to get Mr. Johnson off the jury although correctional officers generally make good prosecution jurors.

The crux of the State's defense of its peremptory challenge of an African-American venire person is its suggestion that *Batson* requires that a court must essentially accept the 'prosecutor's credibility" as to the

[19] A208.
[20] A208-209.

proffered race neutral basis for the peremptory challenge of a minority juror. Ans. Br. at 26-27. The problem with the State's prosecutorial credibility argument is that it is not supported by the record. It was already evident during jury *voir dire,* before the Prosecution excluded Mr. Johnson, that the only other Department of Correction employees on the *venire*, two white employees, Dana Wagner and Richard Seifert, confirmed that as Department of Correction employees, they were clearly biased for the prosecution.[21] The only other prosecutorial contention at trial supporting the exclusion of Mr. Johnson was that Mr. Johnson did not disclose during jury *voir dire*, as the court requested of the venire, that he was a correctional officer. The Prosecution contended this implied that he was deceitful and biased provided a basis for the State's challenge.[22] The problem with this contention is that he was never, contrary to what the Prosecution asserted at trial, asked to come forward if he was employed by law enforcement. Consequently, neither of the Prosecution's contentions at trial for its purportedly race neutral basis for challenging Mr. Johnson, were true or supported by the record.

The State also tries to save its prosecutorial credibility argument on appeal by contending that its Prosecutrix was legitimately concerned that

[21] A200-203.
[22] A208-209.

two Department of Correction employees had come forward, but that Mr. Johnson had not. That argument is illusory. The two other Department of Correction employees had come forward to report that they were biased against the Defendant as the court below had requested. The record only allows the inference that Mr. Johnson did not come forward because he had no bias to report to the Court. The State doesn't even try to defend its credibility argument based on any reasonable inferences that the record permits. It essentially asks the Court to accept it on appeal.

The State also admits that "the trial judge never specifically stated that she was engaging in the third step of the [*Batson*] analysis…" But the State also admits that "she invited" the parties to respond to the State's proffered race neutral basis for the challenges, which the parties did. Ans. Br. at 26. The problem that the State avoids here is that the Superior Court never reached the third step of the *Batson* analysis, where it "addresses and evaluates all evidence introduced by each side (including all evidence introduced in the first and second steps) that tends to show that race was or was not the real reason and determines whether the defendant has met his burden of persuasion." Ans. Br. at 26[23] The Superior Court merely summarily concluded several days later, after the jury retired to deliberate,

[23] Quoting *Jones v. State*, 938 A.2d 626, 633 (Del. 2005).

that "there was a no-race basis given for the exercise of the peremptory challenges."[24] The Superior Court's ruling was clearly erroneous because it was inadequate on its face. The State may have proffered a race neutral explanation for its peremptory challenge, but that alone is inadequate because it is only the second step in the *Batson* analysis and the Superior Court did not go further. The purported non-race basis for the challenge also must not be pre-textual in light of all of the relevant facts.[25] The Superior Court did not address this. Notwithstanding, the relevant facts in the record contrasted with the State's proffered race-neutral basis not only showed otherwise, but also that the Superior Court's summary conclusion was clearly erroneous.[26]

[24] A319.
[25] *Jones v. State*, 938 A.2d, at 632-33; *see also Riley v. Taylor*, 277 F.3d 261, 283 (3rd Cir. 2001).
[26] *Miller-El v. Dretke*, 545 U.S. 231 (2005) (peremptory challenges were contrary to *Batson* because petitioner presented clear and convincing evidence that state's explanations for its peremptory strikes were pretextual).

## CONCLUSION

For the reasons and upon the authorities cited herein, Williams' convictions should be reversed and remanded for a new trial.

Respectfully submitted,

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