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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On December 18, 2013, Williams was charged by information with two counts of drug dealing; one count each of tampering with physical evidence and resisting arrest; and two counts of possession of drug paraphernalia. On June 25, 2014, he filed a Motion to Exclude challenging the reliability of the "drug evidence" the State sought to introduce.[1] On July 2, 2014, Williams filed a Motion in *Limine* requesting that he be permitted to cross examine witnesses about the conditions/investigation at OCME.[2] On January 13, 2015, the first day of trial, the court denied both of the motions.[3]

Later, the trial court dismissed the drug paraphernalia counts after the State rested. At the conclusion of trial, the court denied a *Batson* motion Williams had made during jury selection.[4] Subsequently a jury found him guilty of drug dealing (marijuana), possession of cocaine, and tampering with physical evidence. He was found not guilty of resisting arrest.

In March 2015, Williams was sentenced to 12 years plus probation.[5] This is Williams' Opening Brief in support of his timely-filed appeal.

[1] A54.
[2] A65.
[3] *See* Trial Court's Oral Rulings Denying Motion in Limine and Motion to Exclude, Ex.A.
[4] *See* Trial Court's Oral Ruling Denying *Batson* Motion, Ex.B.
[5] *See* Sentence Order, Ex.C.

SUMMARY OF THE ARGUMENTS

1. The trial court abused its discretion and violated Williams' constitutional rights to a fair trial when it permitted the State to present unreliable evidence at trial to support a claim that the substances seized from Williams were unlawful. This evidence included: the substances the State claimed were seized from Williams; the OCME chemist's lab report asserting that the substances were unlawful; and the chemist's testimony about the lab report. Neither the expert testimony nor the lab results met the standard of scientific reliability set forth in *Daubert v. Merrell Dow Pharms.* and there was insufficient evidence to reasonably establish, as required under *D.R.E.* 901 (a), that the substances the State introduced were those which were seized from Williams. Thus, none of this evidence should have been admitted. Assuming, *arguendo*, the evidence was admissible, the trial court abused its discretion when it prevented Williams from fully challenging the reliability of the evidence at trial. Therefore, this Court must reverse Williams' convictions.

2. The trial 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.

3. Williams' conviction of tampering with physical evidence must be reversed because the State's proof at trial did not support that conviction.

STATEMENT OF FACTS

Sergeant Jason Stephenson of the Delaware State Police, also a member of the Governor's Task Force,[6] testified that he and Probation Officer William Wallace were patrolling in an unmarked vehicle in the Blades area when they became suspicious of a vehicle and followed it. When the operator of the vehicle failed to signal a left turn, he signaled for the operator to pull over. He asked the driver and front seat passenger, Wayne Williams, for identification and obtained consent from the driver to search the car. He noticed that Williams was fidgety and asked both occupants to step from the vehicle in order to search it. Williams delayed exiting and other troopers struggled with him as he exited because he would not take one of his hands out of his pocket. Williams admitted he had marijuana in his pocket. The assisting officers struggled with him and wrestled him to the ground. Williams attempted to swallow a plastic bag but the officers forced him to spit it out. After officers subdued him, they found several other bags containing suspected cocaine and marijuana where Williams had been prone on the ground. Another small bag of suspected cocaine was found between the passenger seat and center console.[7] Police seized this evidence. They then processed and packaged it be sent to the Office of the Chief Medical Examiner (OCME) to be tested.

[6] The Governor's Task Force is an enforcement team of police and probation officers primarily assigned to pro-actively monitor the behavior or probationers and other suspected offenders in the community. A212-213.
[7] A212-231, 236-244.

There is little, if any, doubt that the OCME was a den of chaos and impropriety at the time the evidence in this case was housed there. In a report dated June 19, 2014, the Department of Justice (DOJ) set forth "investigative findings that directly impact the integrity of the forensic services offered by the OCME-CSU [controlled substances unit]."[8] The DOJ investigation findings revealed:

1. Systemic operation failings of the OCME resulted in an environment in which drug evidence could be lost, stolen and altered, thereby negatively impacting the integrity of many prosecutions. These systemic failings include:
    a. Lack of management;
    b. Lack of oversight;
    c. Lack of security;
    d. Lack of effective policies and procedures.
2. As a result of the systemic failures, evidence in several cases has been lost or stolen.
3. The loss of this evidence is not always traceable to any one individual.[9]

The Unsecure And Disorganized Environment At The Crime Lab[10]

The security in the Controlled Substance Unit (crime lab) and drug evidence

[8] A78.

[9] A77-78.

[10] Counsel asks this Court to take judicial notice of the record from the hearing conducted on August 19, 2014-August 21, 2014 in *State v. Nesbitt*, 1310018849. This is one of the hearings which the Superior Court addressed in *State v. Irwin*, 2014 Del.Super. LEXIS 598, Carpenter, J. See Langrone v. Am.Mortell Corp., 2008 WL 4152644 (Del.Super.) (citing Frank v. Wilson, 32 A.2d 277, 280 (Del. 1943) (taking judicial notice of court record in companion litigation on a motion to dismiss related complaint) and *Orloff v. Shulman*, 2005 WL 3272355, at *12 (Del.Ch.) (court considered pleadings in companion bankruptcy litigation which contradicted pleading filed in the Chancery litigation). The transcripts from that hearing are docketed as follows: Docket Item #58 is the transcript from August 21, 2014; Docket Item #59 is the transcript of Officer Pfaff's testimony on August 19, 2014; Docket Item #60 is the remaining transcript of August 19, 2014; and Docket Item #61 is the transcript from August 20, 2014. The portions of the transcript cited herein are included in Appendix to Appellant's Opening Brief. If the Court desires the entirety of the transcripts, Counsel will provide it.

vault at OCME was severely lacking for several years,[11] including the time the substances in our case were housed there. There was "no consistent, established criteria for the distribution of the alarm code to OCME personnel."[12] Access to the vault was not revoked when an employee either transferred from the lab or left the OCME.[13] The door to the drug evidence vault was propped open on many occasions over the years. 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. In fact, the combination was kept in an unsecure folder in the lab.[14]

Digital media to which internal and external cameras record was kept unsecure. This media was "overwritten by new video footage, at approximately 7-day intervals."[15] As such, there was no long-term storage of video footage. Significantly, 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 the evidence while at OCME. That program generated unreliable

[11] A95. State has consistently used the year 2010. It appears that year was selected only because that is when James Woodson was hired.
[12] A88.
[13] A91.
[14] A363, 400-401.
[15] A91.
[16] A91.

reports. There were many cases, including ours, where there was not a single entry in the OCME chain of custody report that was accurate.[17] Additionally, employees did not log evidence in to the computer tracking system when it was received.[18] Thus, evidence submitted to OCME was unaccounted for until someone got around to logging evidence in to the system.

No effective policies or procedures were maintained for the lab.[19] In fact, Laura Nichols, (Nichols) a Forensic Evidence Specialist (FES) in the lab,[20] testified at a hearing that Caroline Honse, manager of the lab, seemingly on a whim, repeatedly changed the way Honse wanted things done in the lab.[21] On occasion, Honse went into the vault and pulled evidence purportedly to use for proficiency testing of chemists.[22] Among other non-professional practices, she kept boxes containing drug evidence in her non-secured office.[23] The evidence in those boxes was related to cases that were "very old."[24] Nichols believed some of this evidence dated as far back as 2004.[25] According to Robin Quinn (Quinn), a

[17] A331-333, 354-355, 360-361, 368-373, 376-377.
[18] A352-353, 366-367, 374-375.
[19] A95.
[20] A422.
[21] A423-424.
[22] A419-421
[23] A357-358, 421-422.
[24] A404-405.
[25] A422.

supervisor who later took over Honse's position, Honse's office was like a scene from the television show "Hoarders."[26]

Employees Of Questionable Credibility

In 2008, Aretha Bailey (Bailey) was hired by OCME as an administrative assistant.[27] She had left her former employment after she was confronted with allegations of theft.[28] 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 DOJ.[29] In her role as a liaison, Bailey received requests from DOJ regarding drug testing.[30]

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.[31] 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.[32] Curiously, Bailey kept her own box in the vault and instructed others not to touch it.[33] And, there were times when Bailey could quickly locate "missing" evidence after another employee had

[26] A356-357.
[27] A401-402, 422-423.
[28] A93.
[29] A327, 343, 402-403, 430.
[30] A403, 431-432.
[31] A93.
[32] A327-328, 342-343,350-351, 402, 424.
[33] A426-428.

thoroughly searched the vault.[34]

In 2010, James Woodson was hired to work at the lab as a FES.[35] 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 this information by the Chief of that department.[36] On at least one occasion, Bailey and Woodson discussed that, given the systemic failures in the lab, it would be easy to steal drugs from the lab without being discovered.[37] In fact, Woodson was later indicted on charges related to the theft of evidence.

In September, 2013, Woodson was transferred out of the crime lab to become a forensic investigator for OCME.[38] James Daneshgar, (J. Daneshgar)[39] a lab technician, was reassigned to replace Woodson as the usual custodian of the evidence brought in to the crime lab and as the courier of evidence from lower counties to the lab. In Woodson's new position, he retained "free access to the OCME building."[40] In fact, it appears from the DOJ report that Woodson

[34] A428-429.
[35] A106.
[36] A156.
[37] A406.
[38] A106.
[39] James Daneshgar, who recently left his employment at OCME after he tested positive for marijuana, is referred to as "J. Daneshgar" in order to distinguish him from his father, Farnam Daneshgar, who was a chemist at OCME suspected of engaging in "drylabbing," a process where a chemist declares the composition of a substance "without performing the analytical testing to produce th[at] result." A106, 155.
[40] A89.

erroneously retained access to the drug evidence vault until February 14, 2014.

Around the first week of November, 2013, Honse retired[41] and Bailey began to look for other employment. Quinn, who was successfully managing the DNA unit at OCME,[42] replaced Honse as manager of the crime lab.[43] Quinn immediately recognized the many failings of the crime lab[44] and began to make changes in late November or early December.[45] In particular, she stripped Bailey of the FES duties and revoked her access to the vault.[46] Bailey quit the OCME soon thereafter.[47]

The Delivery Of Williams' Evidence To The Crime Lab

DSP claimed that they seized approximately 6.6 grams of cocaine and 17.7 grams of marijuana from Williams on November 4, 2013 and placed the substances in the evidence locker at Troop 4.[48] The approximate weights reported by police included that of the little plastic baggies in which the substances were packaged. The officers did not know the weight of those baggies. Nor did they know whether the scale had been tested or was accurate.[49] Detective Maher, evidence custodian for Troop 4, and J. Daneshgar both testified that J. Daneshgar picked up the

[41] A328.
[42] A325, 337-339.
[43] A327-328.
[44] A326, 329, 335-336, 338-341, 351-352.
[45] A327-328, 342.
[46] A327, 330.
[47] A403, 425.
[48] A142-143, 249-251.
[49] A252-253.

substances from Troop 4 on November 6, 2013.[50] J. Daneshgar placed the substances in a lock box and drove them to the lab. He claimed that he placed the substances in the vault that day. He stated that the chain of custody report erroneously reflects that he received the evidence on November 7, 2013 and simultaneously placed it in the vault because he did not get around to logging in the evidence until the 7th.[51]

Tampering Of Drug Evidence Discovered By DSP

On January 14, 2014, during a trial in Kent County Superior Court, 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 [ ] had opened the package, and that there were no overt signs of tampering to the exterior packaging."[52] After that aborted trial, "a small cut was discovered concealed beneath a folded flap of OCME evidence tape."[53]

[50] A144, 254-262.
[51] A145, 262-271, 275-277.
[52] A79-80.
[53] *Id.*

OCME Internal Audit Of The Crime Lab

Upon discovery of evidence tampering, OCME began an internal audit of the crime lab.[54] Jack Lucey, a manager at OCME, was placed in charge of that endeavor for which there were no written procedures.[55] Quinn monitored from afar.[56] Because she was informed by employees that Lucey was reopening the evidence envelopes at the same spot they had previously been opened and resealed with evidence tape,[57] she expressed concerns about his competency to Hal Brown, the Deputy Director of OCME. The jury was not informed about this audit.

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

On or about February 21, 2014, DSP put an end to the OCME internal audit, shut down the crime lab, confiscated the drugs at the lab and launched a criminal investigation into the crime lab's operation.[58] Upon entry into the crime lab's vault, Sgt. McCarthy, of the DSP, found, among other things, a variety of evidence tape. He found "red tape, white tape, every type of tape, clear …tape."[59] Nichols also informed police that at one point she saw blue evidence tape in the lab that disappeared shortly thereafter.[60]

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[54] August 19, 2014 Transcript at p.21.
[55] August 19, 2014 Transcript at p.21, 56.
[56] A344.
[57] A345.
[58] A334, 378, 385-386, 409.
[59] A413.
[60] A427-428.

Each agency has its own color tape.[61] For example, blue evidence tape is used by the DSP and white evidence tape is used by OCME.[62] Quinn testified that she would have been suspicious had she found blue or white tape in the vault.[63] The only possible need for evidence tape was in the office area for use by law enforcement officers to make sure their evidence container was properly sealed. No one kept track of whether or how much evidence tape was being used.[64]

Also in the vault, police found 705 unaccounted-for pieces of drug evidence.[65] Quinn testified that from the lack of documentation, it appeared to her that an inventory of the evidence in the vault had never been done.[66]

The Removal Of Williams' Evidence From The OCME Vault

On March 4, 2014, the evidence in our case was removed from the OCME vault and transported to a DSP vault.[67] The OCME chain of custody report reflects J. Daneshgar removed the substance from the OCME and, simultaneously put it into storage in the DSP vault at Troop 2.[68] Like the entries made when the evidence was delivered to OCME, these entries are incorrect. J. Daneshgar was not the one who took the evidence out of OCME, transported it or put it in storage at DSP. He

[61] A412-415.
[62] A346, 412.
[63] A350.
[64] A347-348.
[65] A98, 410-411.
[66] A359, 364-365.
[67] A147, 272.
[68] A145, 288.

performed the data entry used to document the removal of the evidence.[69] According to J. Daneshgar, his name is listed on the report only due to the inflexibility of the software program and a need to somehow document the transfer of the evidence.[70] Additionally, the time is not accurate as it reflects the time that they started to enter a batch of cases, not necessarily the time the evidence in this particular case was removed.[71]

McCarthy explained that he and two other officers put the evidence in their cars and drove them to Troop 2.[72] However, he does not know whose vehicle the substances our case were placed.[73] Additionally, while one of those same three officers put evidence in the locker at Troop 2, he did know which one.[74] No explanation was given to the jury as to why DSP removed the evidence from OCME and delivered it to Troop 2.[75]

The DSP Review Of The Evidence In Williams' Case

Members of the DOJ and DSP developed a plan that, after removing the substances from OCME, police would review the evidence in each case.[76] As part of this review, police purportedly examined the evidence in this case on March 6,

[69] A285-286.
[70] A272, 279.
[71] A273-274.
[72] A290-291.
[73] A291-292.
[74] A292.
[75] A284.
[76] A396.

2014.[77] The jury was not told why this audit was conducted.[78] An officer involved in this review could not recall the method used to review the evidence in this case. There are no notes describing the condition of the evidence containers, evidence tape or the evidence itself. It is not clear whether the evidence was ever weighed.[79] The scant "audit form" only indicated there was no discrepancy between what they "found" in the review and what was on the label of the evidence envelopes.[80] The officer did recall that, in this case, he opened the envelopes then resealed them with blue tape.[81]

Discovery of A Variance In The Quantity Of Evidence In Williams' Case

On April 10, 2014, Officer Kleckner took the evidence to the NMS lab, a private lab retained by the State.[82] There was an opening in the tape on each envelope that was large enough for someone to reach in with a finger.[83] She 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

[77] A148, 289.
[78] A293.
[79] A295-299.
[80] A148.
[81] A294.
[82] A149-153, 300.
[83] A305, 308.

than what police claimed was seized from Williams.[84]

Custody After Testing Of Evidence In Williams' Case

On June 5, 2014, Kleckner picked up the evidence from NMS and returned it to Troop 2.[85] Then, Detective Marvel picked the evidence up on July 16, 2014 and delivered it to Troop 4 where it remained until it was retrieved for trial.[86]

[84] A151.
[85] A149, 301.
[86] A154, 302-303.

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.

Question Presented

Whether the State sufficiently established the reliability of "drug-related evidence" introduced at trial and whether the trial court improperly prohibited Williams from challenging the reliability of that evidence at trial.[87]

Standard and Scope of Review

This Court reviews evidentiary issues for an abuse of discretion.[88]

Argument

The trial court abused its discretion and violated Williams' constitutional rights to a fair trial when it permitted the State to present unreliable evidence at trial to support a claim that the substances seized from Williams were unlawful.[89] This evidence included: the substances the State claimed were seized from Williams; the OCME chemist's lab report asserting that the substances were unlawful; and the chemist's testimony about the lab report. Neither the expert testimony nor the lab results met the standard of scientific reliability set forth in *Daubert v. Merrell Dow Pharms.*[90] and there was insufficient evidence to

[87] A10, 54, 65, 160-180.
[88] *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519 (Del. 2006).
[89] Art.I, §7, Del.Const.; Amend. V, U.S.Const.
[90] *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

reasonably establish, as required under *D.R.E.* 901 (a), that the substances the State introduced were those which were seized from Williams. Thus, none of this evidence should have been admitted. Assuming, *arguendo*, the evidence was admissible, the trial court abused its discretion when it prevented Williams from fully challenging the reliability of the evidence at trial. Therefore, this Court must reverse Williams' convictions.

A. Neither The Chemist's Lab Report Nor Her Testimony Rise To The Level Of Scientific Reliability Required By *Daubert*.

In *Daubert*, the United States Supreme Court held that scientific evidence, if questioned, must be subjected to a reliability assessment and found to be sound before it can be presented to a jury. "[T]he burden [i]s on the proffering party" to establish scientific reliability by focusing "on the methodology applied by the expert rather than the conclusions he generates."[91] A *Daubert* analysis encompasses more than just one step in the methodology, it extends to the entire methodology upon which the expert's testimony is based.[92] If "the foundational data underlying opinion testimony are unreliable," the data upon which the expert relied "is likewise unreliable."[93] Thus, the *Daubert* analysis in our case must not

[91] *In re Asbestos Litigation*, 911 A.2d 1176, 1200-1201 (Del.Super. 2006) (*citing Daubert*, 509 U.S. 579 and *Minner v. State*, 791 A.2d 826, 843 (Del. 2000)).

[92] "The Third Circuit has recognized: '[A]ny step that renders the analysis unreliable … renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.'" *United States v. Diaz*, 2006 WL 3512032 (N.D.Cal.) (*quoting In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994)).

[93] *Tumlinson v. Advanced Micro Devices, Inc.*, 81 A.3d 1264, 1270 (Del. 2013) (*quoting Merrell*

only focus on the actual test performed by the chemist at NMS but also upon the handling, storing and transporting of the evidence from the time it was seized until the time it was tested.

Five non-exclusive factors typically assessed in determining reliability under *Daubert* include:

a) Whether the theory or technique has been tested and found to be accurate and reliable;
b) Whether it has been subjected to peer review and publication;
c) Whether there is a high known or potential rate of error;
d) Whether there are standards controlling the application of the technique;
e) Whether the theory or technique enjoys general acceptance within the relevant scientific community.

In *Kumho Tire Co. v. Carmichael*,[94] the United States Supreme Court clarified that the *Daubert* "gatekeeping inquiry must be 'tied to the facts' of a particular 'case.'" Thus, when determining reliability of expert testimony, a court may consider several factors other than those specifically listed in *Daubert*.

Notwithstanding a satisfaction of the *Daubert* standard, scientific evidence remains inadmissible unless it: is otherwise admissible, relevant, and reliable;[95] is based on that which is reasonably relied upon by experts in the field;[96] is helpful to the trier of fact to understand the evidence or determine a fact in issue;[97] and does

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Dow Pharms. Inc. v. Havner, 953 S.W.2d 706, 714 (Tx. 1997)).
[94] 526 U.S. 137, 151 (1999).
[95] *See Nelson v. State*, 628 A.2d 69 (Del. 1993); *D.R.E.* 401 and 402.
[96] *D.R.E.* 703.
[97] *D.R.E.* 702.

not create unfair prejudice, confuse the issues or mislead the jury.[98]

Here, the State had conceded that, during the time the evidence in our case was housed there, "[s]ystemic operation failings of the OCME resulted in an environment in which drug evidence could be lost, stolen and altered, thereby negatively impacting the integrity of many prosecutions." This concession alone required the court to grant Williams' request for a *Daubert* hearing because it raised a valid question as to whether the methodology used at OCME could generate reliable scientific results. However, Williams' request also relied upon further information questioning the reliability of OCME.

Williams provided the court with a declaration by Joseph Bono, a former President of the American Academy of Forensic Sciences and an independent Forensic Science Consultant who opined that the conditions at the lab rendered the results unreliable under *Daubert*.[99] Yet, the trial court failed to conduct a *Daubert* analysis. In fact, it appears that the trial court failed to even consider the Bono declaration when it denied Williams' motion. This failure was an abuse of discretion.[100] The court erred "both as a matter of process and substance" when it permitted the introduction of the expert testimony.[101]

Had the trial court properly conducted a *Daubert* analysis, it would have

[98] *D.R.E.* 403.
[99] A61.
[100] *Wonnum v. State*, 942 A.2d 569, 57 (Del. 2007) (finding trial court abused its discretion when it excluded expert report without reviewing it).
[101] *Id.*

found the scientific evidence to be unreliable because of the crime lab's failure to comply with methods that are generally accepted by the forensic community and because the "methodology" the lab did employ yielded several compromised cases.

1. Methods Employed At OCME For Handling, Storing And Preparing Evidence For Testing Are Not Generally Accepted By The Forensic Community.

In forensic labs, established protocols and quality controls are required to ensure the integrity of the scientific evidence that passes through there. This is so critical that Forensic Quality Services (FQS), an accreditation organization for forensic labs,[102] requires compliance with the standards of the International Organization of Standardization (ISO) in order to be considered a lab that engages in the best forensic practices. Among other things, the ISO standards require the lab: to use "appropriate methods and procedures" for sampling, handling, transporting, storing and preparing evidence to be tested[.]" The lab must keep

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[102] Accreditation generally refers to a credential for the institution, office, or laboratory that performs the testing, examination, or analysis. Accreditation is itself both a set of standards and an enforcement tool for compliance of those standards, as failure to achieve the standards will result in the withholding of full accreditation.

DEPARTMENT, PRACTICE POINTERS ASK EXPERTS ABOUT FORENSIC CERTIFICATION AND ACCREDITATION, 25 Crim. Just. 48, 49.

> Crime laboratories may be accredited by the American Society of Crime Laboratory Directors/ Laboratory Accreditation Board (ASCLD/LAB) or Forensic Quality Services (FQS). These accreditation programs are based on the ISO 17025 international standards for testing laboratories. In turn, ASCLD/LAB and FQS are recognized by the International Laboratory Accreditation Cooperation (ILAC).

Id.

written procedures up to date, develop and maintain methods for quality assurance and provide training where deficiencies are identified.[103]

According to Bono, "[b]ased on the accepted accreditation requirements in legitimate forensic science laboratories, [t]he OCME drug laboratory does not meet the requirement for reliability."[104] There has never been any dispute that the crime lab in our case deviated significantly from the generally accepted standards in the field of forensics. Among many other deviations, there were no policies or procedures in place for the handling and transporting of evidence; the few written policies and procedures that did exist "were not always followed;" and "changes in

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[103] The International Organization for Standardization (ISO) offers an international standard for lab quality. ISO 17025 applies to testing and calibration labs, and ISO suggests that accreditation organizations use its standards to measure quality through both managerial and technical requirements. The management requirements focus on policy-oriented changes within labs to ensure quality, including policies, standards, and procedures. The technical requirements emphasize scientist competence, environmental conditions, methodology, reporting requirements, and equipment management.

CRIMINAL LAW: REALIZING RELIABILITY IN FORENSIC SCIENCE FROM THE GROUND UP, 104 J. Crim. L. & Criminology 283, 343. Examples of the standards relevant to the OCME crime lab include: "where the absence of such instructions could jeopardize the results of tests;" keep "[a]ll instructions, standards, manuals and reference data relevant to the work of the laboratory" up to date and "readily available to personnel;" ISO 17025 4.2.1, 5.4.1 have policies and procedures to be implemented "when any aspect of its testing and/or calibration work, or the results of this work, do not conform to its own procedures[;]" have policies and procedures to ensure that "correction is taken immediately;" ISO 17025 4.9.1 ensure that the appropriate areas of activity are audited" as soon as possible when there have been "nonconformities or departures from the standards that cast[] doubts on the laboratory's compliance with its own policies and procedures, or on its compliance with this International Standard; ISO 17025 4.11.5 conduct internal audits on a regular bases to ensure compliance with ISO standards; ISO 17025 4.14.1 and maintain policies and procedures for identifying training needs and providing training of personnel. ISO 17025 5.2.2

[104] A64.

policy and procedures were not always properly updated or communicated."[105] The consequences of the lab's failure to follow the generally accepted forensic methodology are borne out in the laundry list of egregious misconduct that infested the lab for several years.

Bono opined that "any evidence that was present in Delaware's Crime Lab for any amount of time is neither sufficiently reliable to meet the standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), nor can such evidence be considered to meet the standards for ensuring integrity as required by recognized forensic science accrediting bodies."[106] He explained that any "subsequent positive test results from an independent laboratory, evidence that passed through the crime lab is inherently suspect and unreliable. There are serious questions as to whether the evidence that is being reanalyzed by the 'independent laboratory' is the evidence which was seized from any individual."[107]

In addition to being subjected to the inherently unreliable conditions at the lab, the substances in our case were present during two forensically flawed reviews of evidence that took place after the discovery of misconduct. The jury was never informed of the first flawed review which was an internal audit of cases by OCME that took place in February, 2014 and involved opening of "probably hundreds" of

[105] A77-78, 328-329.
[106] A61.
[107] A63.

evidence envelopes.[108] "There were no written policies and procedures"[109] for this audit.

During the internal audit, at least one employee, Jack Lucey, grossly deviated from "Forensics 101"[110] and opened evidence envelopes at the same spot they had previously opened and resealed with evidence tape. This inexcusable departure from standard practices made it difficult, if not impossible, to know whether there had been tampering. It is not clear which and how many evidence envelopes he handled. Nor did the State ever disclose whether the evidence in our case was subjected to this improper process. This information is clearly relevant to the reliability of the evidence, yet, due to the court's ruling, the jury never heard about it.

When DSP put an end to the flawed internal review, it began its own forensically flawed review of the evidence, including that in our case. As the *Irwin* Court found, "the audit performed by police was not consistent with any reasonable forensic review of the evidence." Even though prosecutors were involved in planning to some undisclosed extent,

> [t]here were no standards or guidelines established and no forensic expert was consulted to ensure compliance with standards for such a review. The oversight process was inconsistent and the significance of the finding by the audit team, to a large degree, depended upon the

[108] August 19, 2014 Transcript at p.75.
[109] August 19, 2014 Transcript at p.56.
[110] August 19, 2014 Transcript at p.75.

> supervisory officer on duty that day. Without consistent guidelines, the determination of whether there were any discrepancies from the original description of the evidence was left to the discretion of the auditing officer.

The unreliability of the methodology employed at OCME, including the two flawed reviews of evidence, is evidenced by the number of cases that were subsequently deemed compromised. In its June 9, 2014 report, the State listed 46 cases that it deemed to be "compromised." The evidence in several of those cases, including ours, was never tested at OCME. By the time of an evidentiary hearing in August, 2014, the number of compromised cases had grown to fifty.[111]

Regardless of what process the chemist ultimately employed at NMS to obtain the results, the methodology for handling and storing the evidence at the OCME already rendered the results unreliable under *Daubert*. A lab that fails to comply with generally accepted methodology and employs unqualified and non-proficient employees and suspected criminals does not maintain an environment conducive to protecting the integrity of the substances housed there. Here, the NMS chemist performed a test on unreliable data (the substances). Thus, the results of her tests are necessarily unreliable and inadmissible.

B. The State Failed To Meet Its Burden To Establish That The Substances Introduced At Trial Were Those Seized From Williams.

Even if this Court finds that the *Daubert* standard does not apply in this case,

[111] August 19, 2014 Transcript at p.27-30, 68.

or that the State satisfied that standard, it must also conclude that the State failed to meet its "burden of presenting other 'evidence sufficient to support a finding that the matter in question is what its proponent claims.'" [112] The State was required to "convince the Court that it is improbable that the original item had been exchanged with another or otherwise tampered with."[113] To do this, "the State [wa]s obliged to account for its careful custody of evidence from the moment the State [wa]s in receipt of the evidence until trial."[114] The "relevant factors in a chain of custody analysis included 'the nature of the article, the circumstances surrounding its preservation in custody, and the likelihood of intermeddlers having tampered with it.[115] Considering these factors in our case reveals the State failed to adequately establish a proper chain of custody.

1. The Nature of the Evidence.

Because drug evidence does not have "any unique characteristic that would distinguish it from other drugs,"[116] no witness can "positively identify" the

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[112] *Demby v. State*, 695 A.2d 1127, 1133 (Del. 1997). *See Tricoche v. State*, 525 A.2d 151, 152 (Del. 1987) (*quoting Whitfield v. State,* 524 A.2d 13, 16 (Del. 1987) ("Under *D.R.E.* 901(a), the party offering an item for evidence at trial is required to present other 'evidence sufficient to support a finding that the matter in question is what its proponent claims.'")). *D.R.E.* 901 (a)

[113] *Tricoche*, 525 A.2d at 153 (*quoting United States v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir. 1982) and *citing United States v. Mendel*, 746 F.2d 155, 167 (2nd Cir. 1984)); *Clough v. State*, 295 A.2d 729, 730 (Del. 1972) ("The test is reasonable probability that no tampering occurred.").

[114] *Tatman v. State*, 314 A.2d 417, 418 (Del. 1973). *See Clough v. State*, 295 A.2d at 730 (*citing* 2 Wharton, Criminal Evidence (12th Ed.) § 665).

[115] *Whitfield*, 524 A.2d at 16.

[116] *Irwin*, 2014 Del.Super. LEXIS 598, *34.

substance at a trial as the actual substance seized from the defendant.[117] Therefore, proper authentication of the drugs relies heavily on a continuous chain of custody "from the time of their seizure at the crime scene until the time of trial."[118] In addressing cases involving evidence that was housed at OCME, the *Irwin* Court found that the improprieties at the lab required the State to establish "a more complete chain of custody" in order to meet its burden. Here, the State failed to meet either the "regular" standard or the "heightened" *Irwin* standard for authentication.

Not a single entry in the OCME chain of custody report in this case is accurate.

- The report represents that the evidence was submitted to the lab on November 7, 2013; yet it was actually submitted on November 6, 2013.

- Neither the report nor any other documentation informs whether and/or how the evidence was handled during the lab's flawed internal audit of hundreds of unidentified cases.

- The report represents that the evidence was removed on March 4, 2014 by J. Daneshgar; yet, the evidence was actually removed by one of three possible law enforcement officers.

[117] *Tricoche*, 525 A.2d at 153.

[118] *Tricoche*, 525 A.2d at 153. *See Whitfield*, 524 A.2d 13 (finding that because no witness could identify a sawed-off shot gun as the actual weapon used by the defendant in the robbery, the State was required to adequately trace the continuance whereabouts of the weapon allegedly used by the defendant); *State v. Roche*, 59 P.3d 682, 691 (2002) (concluding that looking at photos of a substance to see if it appears to have been tampered with is insufficient for identification that it is the same substance seized from the defendant, "[t]hat is precisely why a chain of custody must be laid for evidence that is not readily identifiable").

State witnesses were unable to identify which officer handled the evidence in this case.

- The report implies that J. Daneshgar transported the substances to Troop 2; yet, the evidence was actually transported by one of three possible law enforcement officers. State witnesses were unable to identify which officer transported the evidence in this case.

- The report represents that J. Daneshgar placed the evidence in the vault at Troop 2; yet, it was actually placed in the vault by one of three possible law enforcement officers. State witnesses were unable to identify which officer placed the evidence in the vault.

The inability of the State to establish all those who handled the evidence from the time it was placed at OCME until trial was a failure to establish the complete chain of custody required for authentication. The State did not establish whether and who handled the evidence during the forensically flawed internal audit. Nor did the State establish who handled the evidence from the time it was removed from OCME until it was placed in the vault at Troop 2. Due to this failure, the evidence should not have been admitted at trial.

The variance in the weight of the fungible evidence also points to a finding of unreliability. The chemist weighed 14.25 grams of marijuana, 3.35 grams less than what police claimed they seized from Williams. The chemist also weighed 4.10 grams of cocaine, 2.5 grams less than what police claimed they seized from Williams. The chemist acknowledged that the differences were "significant." She

also noted that when she received the envelopes, they each had holes big enough for someone to reach their finger inside.

2. Surrounding Circumstances Of Custody Of The Evidence.

Misconduct thrived for years at OCME in many forms, including: unfettered access to the drug evidence vault; improper presence of several hundred pieces of unaccounted-for evidence; improper presence in the vault of evidence tape; improper grant of authority and vault access to unqualified employees; theft of suspected drug evidence; tampering with suspected drug evidence; and a meaningless chain of custody tracking program. The *Irwin* Court found the conditions at the lab was "outrageous, unacceptable and a violation of a public trust[.]"[119]

3. The Likelihood of Intermeddlers

The conditions at the lab were conducive to the infestation of theft and tampering of all evidence housed at OCME regardless of whether it was ultimately tested there. Thus, there was a strong possibility of intentional theft in this case. [120] The *Irwin* Court commented: "As a result of the conditions found at this lab, it should not be surprising to anyone that the criminal conduct discovered to date

[119] *Irwin*, 2014 Del.Super. LEXIS 598, *31.

[120] This Court has previously expressed concern for the reliability of a substance that has been placed in an environment where it is unlikely that someone would intentionally tamper with evidence, but where "inadvertent tampering is a serious possibility. *See Loper v. State*, 1994 Del. LEXIS 15, *15 (Del. Jan. 3, 1994).

occurred, or that the unmonitored circumstances have allowed others to go uncharged."[121] The court even identified one of the likely methods used for theft at the lab. It explained that the extra evidence and tape in the vault "would have assisted employees who were inclined to steal drug evidence from the lab. They could use unaccounted-for evidence as a substitute for what was stolen and use the tape color routinely used by that police agency to hide their entry into the drug envelopes."[122] The tampering uncovered by DSP and in the Tyrone Walker case is consistent with this method of theft. In many, if not all, of the compromised packages police identified, someone was able to open the package, swap evidence then reseal the package with clean tape matching the color of that which was removed. Where no point of entry was uncovered, officers had never looked under the evidence tape.

Neither of the substances introduced at trial were "properly authenticated in accordance with *D.R.E.* 901(a)."[123] Thus, "the trial court abused its discretion in finding that it was improbable that the [substances] originally seized had been exchanged with another, piece of evidence or otherwise tampered with."[124]

[121] *Irwin*, 2014 Del.Super. LEXIS 598, *31.
[122] *Id.* at *17.
[123] *Loper*, 1994 Del. LEXIS 15, *14-16.
[124] *Id.*

C. Assuming The "Drug-Related" Evidence Was Admissible, Williams Was Entitled To Cross Examine On And Present Evidence Of The OCME Investigation For The Jury To Make Its Own Assessment Of The Scientific Evidence.

The Sixth Amendment to the United States Constitution and Article I, §7 of the Delaware Constitution guarantee the defendant the right to be confronted with witnesses against him."[125] Additionally, *Delaware Rule of Evidence* 607 establishes the right to impeach a witness.[126] Impeachment evidence is part of an effective cross examination which is essential to the defendant's right to confront witnesses against him.[127] 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. Williams should have been given wide latitude in cross examining crime lab witness and presenting evidence of the OCME conditions.[128] Thus, the trial court's blanket prohibition of evidence of the OCME

[125] *See Davis v. Alaska*, 415 U.S. 308, 315 (1974); *Weber v. State,* 457 A.2d 674, 680 (Del. 1983).
[126] *See Weber*, 457 A.2d at 680.
[127] *Jackson v. State,* 770 A.2d 506, 515 (Del. 2001) *(citing Davis*, 415 U.S. 308 at 316).
[128] In *Weber v. State*, 457 A.2d at 681, the Delaware Supreme Court set forth a four-part test to determine how much latitude a court must give counsel to impeach a witness on cross examination: "(1) whether the testimony of the witness being impeached is crucial; (2) the logical relevance of the specific impeachment evidence to the question at bar; (3) the danger of unfair prejudice, confusion of issues, and undue delay; and (4) whether the evidence is cumulative."

investigation violated Williams' Federal and State Constitutional rights as well as the *Delaware Rules of Evidence.*[129]

To prove its case beyond a reasonable doubt, the State presented results of scientific tests conducted on substances it claimed to have seized from Williams. Therefore, the reliability of that evidence was relevant. Thus, Williams should have been permitted to present to the jury all the information affecting the reliability of the scientific evidence. This information includes 'the nature of the article, the circumstances surrounding its preservation in custody, and the likelihood of intermeddlers having tampered with it.[130] However, the trial court erroneously prohibited Williams from exercising his constitutional rights to cross examination and presentation of evidence on the issue of reliability.

In reaching its erroneous decision, the trial court improperly found facts which were for the jury to decide: "the envelope was never opened at the Office of the Chief Medical Examiner's Officer in Wilmington" and "[t]here was no opportunity if the evidence was not opened to take out, replace, substitute or in some way contaminate the contents of the envelope[.]"[131] The trial court then based its ruling on this conclusion and found that "that the circumstances surrounding all of the investigation in the Office of Chief Medical Examiner is

[129] *See Weber*, 457 A.2d at 680; *Snowden v. State*, 672 A.2d 1017, 1026 (Del. 1996).
[130] *Id.*
[131] Ex.A @ 34-35.

irrelevant and I will not allow it."[132] The court went on to state that the only issues before the jury were "what did this defendant do and what did he do it with" and concluded that "nothing about the Office of Chief Medical Examiner investigation is relevant to those two questions."[133] The trial court's ruling ignores that reliability of evidence presented by the State is also a question for the jury and the OCME investigation was relevant to that question. [134]

The trial court ruling denied the jury additional relevant information with which it could assess" the reliability of the State's scientific evidence.[135] A thorough cross examination regarding the OCME would have given the jury a complete picture of the facts. However, when the trial court prevented Williams from addressing the investigation, it denied the jury the opportunity to put the issue of reliability of scientific evidence into perspective.[136]

In fact, part of the logic behind allowing some questionable scientific evidence to be admitted into evidence is that, in addition to a careful instruction on the burden of proof on the proffering party, there is an opportunity to attack that evidence through "vigorous cross-examination" and "presentation of contrary evidence[.]"[137] As the *Irwin* Court explained, in cases where evidence was

[132] Ex.A @ 34-35.
[133] Ex.A @ 36-37.
[134] *Tumlinson.*, 81 A.3d at 1268.
[135] *Weber*, 457 A.2d at 682-683.
[136] *Id.*
[137] *Daubert* at 596. *United States v. Mitchell*, 365 F.3d 215, 245, (3d Cir. 2004).

housed at OCME, it would be "unfair to prohibit the defense from reasonably exploring, with witnesses, the OCME investigation as an explanation for a reduction in weight or for some other discrepancy in the evidence."[138] Often the State tries to explain a weight discrepancy by pointing to the weight of the baggies that are weighed when the evidence is seized but not when it is tested. The court noted that while the State's explanation may be reasonable, "it does not eliminate the alternative possibility that a discrepancy is the result of drugs being mishandled or stolen as a result of the mismanagement at the OCME drug lab."[139]

Absent a reasonable exploration into the OCME investigation, the State was permitted to and did "openly capitalize on all aspects of this patently one-sided situation.[140] 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.[141] 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,

[138] *Irwin*, 2014 Del.Super. LEXIS 598, *42.
[139] *Id.*
[140] *Weber*, 457 A.2d at 682-683.
[141] A316-317.

transported, and tested[;]"[142] it had answered any questions regarding chain of custody and established "its careful custody[;]"[143] it had "presented to [the jury] each person who has opened the evidence envelope[;]"[144] and that J. Daneshgar's practice of logging in evidence the day after he retrieved it was "normal practice[.]"[145] Those were all facts which were for the jury to consider in the 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.[146] Thus, Williams' convictions must be reversed as he was denied his right to a fair trial.

[142] A318.
[143] A315.
[144] A315.
[145] A314.
[146] *Mitchell*, 365 F.3d at 245.

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.

Question Presented

The question presented is whether the State exercised its peremptory challenge against an African-American venire-person on a race-neutral basis. The Defendant preserved the issue by objection to the challenge.[147]

Standard and Scope of Review

The standard of review for whether there was a race neutral basis for the State's peremptory challenge is *de novo*.[148]

Argument

At trial, the State exercised two of three peremptory challenges against African-American jurors.[149] The Defendant objected under *Batson v. Kentucky*.[150] The Superior Court invited a race-neutral explanation and the State responded that it struck Richard Johnson because he was a retired correctional officer and the State did not believe that would be "appropriate" because he "may have rehabilitative duties as a correctional officer."[151] The State further explained that Mr. Johnson did not disclose during jury *voir dire*, as the court requested of the venire, that he was a correctional officer and

[147] A207-211.
[148] *Jones v. State*, 938 A.2d 626, 631-32 (Del. 2005).
[149] A204-206.
[150] 476 U.S. 79 (1986). A207.
[151] A207-208.

implied that this deceit and bias on his part provided a race neutral reason for the State's challenge.[152] The Superior Court eventually ruled that "there was a no-race basis given for the exercise of the peremptory challenges."[153]

The Superior Court erred and the State's proffered race-neutral explanation for its peremptory challenge of Mr. Johnson appears pre-textual on this record under *Batson*. First, the State explained that Mr. Johnson appeared biased and sought to exclude him because he was a retired correctional officer and may have had "rehabilitative duties as a correctional officer."[154] That explanation was undermined by the Superior Court's previous exchange during *voir dire* with a white Department of Corrections counselor who disclosed that she was biased for law enforcement due to her employment.[155] Similarly, a second white Department of Correction employee, an assistant to the Commissioner, expressed bias for law enforcement.[156] The State also contended that Mr. Johnson could be challenged on a race-neutral basis because he did not come forward during jury *voir dire* questioning and disclose that he was a correctional officer. The State suggested that this was evidence of deceit and bias on his part and provided a race-neutral basis for its challenge.[157] However, the State's

[152] A208-209.
[153] A319.
[154] A207-208.
[155] A200-201.
[156] A202-203. "A prospective white juror, Angelo LePore, provided the exact same answers to the court's questions, yet he was not stricken and actually served on Riley's jury." *Riley v. Taylor*, 277 F.3d 261, 279 (3d Cir. 2001).
[157] A208-209.

premise was factually wrong because the jury was never asked on *voir dire* if a juror was a law enforcement officer and to come forward if they were.[158] On the basis of the *voir dire* questions that were asked, however, it is apparent on this record that Mr. Johnson responded honestly to all questions, contrary to the State's representation during trial, and that the State's peremptory challenge of Mr. Johnson was therefore pre-textual and did not provide a race-neutral basis for its peremptory challenge.

In addition, the Superior Court's ruling permitting the peremptory challenge was erroneous because it was inadequate on its face. The Superior Court found that "there was a non[-]race base basis given for the exercise of the peremptory challenges…."[159] While it is true that the State proffered a race neutral explanation for its peremptory challenge, that alone is inadequate because it is only the second step in the *Batson* analysis. The purported non-race basis for the challenge also must not be pre-textual in light of all of the relevant facts.[160] The relevant facts in the record contrasted with the State's proferred race-neutral basis showed otherwise.

[158] A196-198.
[159] A319.
[160] *Jones v. State*, 938 A.2d 626, 632-33 (Del. 2005); *see also Riley v. Taylor*, 277 F.3d 261, 283 (3rd Cir. 2001).

III. THE CONVICTION FOR TAMPERING WITH PHYSICAL EVIDENCE MUST BE REVERSED.

Question Presented

The question presented is whether the proof supported a conviction of tampering with physical evidence, a Class G felony.[161]

Standard and Scope of Review

The standard of review is plain error. The issue should, nonetheless, be reviewed in the interest of justice because the error is clear on the record and it is purely a question of a law unaffected by any interpretation of the evidence.[162]

Argument

As the Defendant exited the vehicle, he attempted to swallow a plastic bag and officers forcibly dislodged it, seizing that package which appeared to contain cocaine. As a result, the Defendant was charged with tampering with physical evidence.[163] In *Harris v. State*,[164] the Court found that a defendant's attempt to swallow a plastic bag containing a controlled substance did not establish tampering with physical evidence. Under the identical circumstances here, the Defendant's conviction must also be vacated.

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[161] 11 *Del. C.* § 1269(2).
[162] *Williams v. State*, 796 A.2d 1281, 1284 (Del. 2002); *Supreme Court Rule* 8.
[163] A221-223, 243-244.
[164] 991 A.2d 1135, 1143 (Del. 2010) ("Harris [20] could not suppress any evidence here by merely 'attempting to' swallow an item in plain view of the police, even if a rational person could believe that he intended to "swallow" both the baggie and its contents").

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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