EFiled: Mar 01 2016 05:59PM EST
Filing ID 58652018
Case Number 690,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

FRANK DAVENPORT,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 690, 2015
	)	
STATE OF DELAWARE,	)	
	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF

Ross A. Flockerzie [#5483]
Gerard M. Spadaccini [#4604]
Brett A. Hession [#6041]
Assistant Public Defenders
Office of the Public Defender
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-5150

DATE: March 1, 2016

TABLE OF CONTENTS

TABLE OF CITATIONS ii

NATURE AND STAGE OF THE PROCEEDINGS 1

SUMMARY OF THE ARGUMENT 2

STATEMENT OF FACTS 3

ARGUMENT

I. APPELLANT'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THE STATE BREACHED THE PLEA AGREEMENT IN ITS PRE-SENTENCE CONDUCT, ITS SENTENCING PRESENTATION, AND IN ITS ULTIMATE SENTENCING RECOMMENDATION 6

II. APPELLANT'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN HE WAS SENTENCED ON THE BASIS OF INFORMATION WHICH WAS EITHER FALSE OR LACKED MINIMAL INDICIA OF RELIABILITY 23

III. THE TRIAL COURT ERRED WHEN IT ORDERED RESTITUTION BE PAID IN DIRECT CONTRADICTION OF *STATE V. CHIANESE* 29

CONCLUSION 32

Defense Counsel's Opposition to the State's Case Summary .... Exhibit A

Defense Counsel's Opposition to the Aggravating Factors .... Exhibit B

Sentence Order .... Exhibit C

TABLE OF CITATIONS

Cases

Chavous v. State, 953 A.2d 282 (Del. 2008) 6, 9, 13

Cont'l Ins. Co. v. Rutledge & Co., 750 A.2d 1219 (Del. Ch. 2000) 9

Fink v. State, 817 A.2d 781 (Del. 2003) 23

Mayes v. State, 604 A.2d 839 (Del. 1992) 17, 24, 25, 28

Moore v. State, 15 A.3d 1240 (Del. 2011) 29

Norman v. State, 976 A.2d 843 (Del. 2009) 23

Santobello v. New York, 404 U.S. 257 (1971) 10, 19

Scarborough v. State, 945 A.2d 1103 (Del. 2008) 10

State v. Chianese, 128 A.3d 628, 2015
Del. LEXIS 574 (Del. Nov. 2, 2015) 2, 29, 30, 31

State v. LaMere, 900 P.2d 926 (Mont. 1995) 12

State v. Miller, 223 P.3d 157 (Haw. 2010) 10, 11, 12, 16, 17

State v. Williams, 637 N.W.2d 733 (Wisc. 2002) 12

Townsend v. Burke, 334 U.S. 736 (1948) 24

United States v. Alcala-Sanchez, 666 F.3d 571 (9th Cir. 2012) 20

United States v. Canada, 960 F.2d 263 (1st Cir. 1992) 19, 21

United States v. DeWitt, 366 F.3d 667 (8th Cir. 2004) .... *passim*

United States v. E.V., 500 F.3d 747 (8th Cir. 2007) 14, 16, 17

United States v. Gonczy, 357 F.3d 50 (1st Cir. 2004) 20

United States v. Robin, 545 F.2d 775 (2d Cir. 1976) 24, 25, 28

United States v. Taylor, 77 F.3d 368 (11th Cir. 1996) 20

United States v. Voccola, 600 F. Supp. 1534 (D. R.I. 1985)..................................19

Wilgus v. Salt Pond Inv. Co., 498 A.2d 151 (Del. Ch. 1985)..................................9

Zebroski v. State, 12 A.3d 1115 (Del. 2010) 23

Constitutional Provisions

U.S. Const. Amend. V 2, 6, 23

U.S. Const. Amend. XIV 2, 6, 23

Statutes

11 *Del. C.* § 602(b) 10

11 *Del. C.* § 632(1) 9

11 *Del. C.* § 1447(a)...9

11 *Del. C.* §4101 30

11 *Del. C.* §4106 30

11 *Del. C.* §9014(c)...31

Court Rules

DEL. SUP. CT. R. 8. ....6, 29

Other Authority

Delaware Sentencing Accountability Commission
Benchbook (2016)............................ ....5, 25, 26, 27

NATURE AND STAGE OF PROCEEDINGS

In May of 2011, the assigned prosecutor told police that after careful review by the Attorney General's Office, there was insufficient evidence at that time to move forward with the case.[1] Notwithstanding this fact, on January 27, 2014, Mr. Davenport was indicted on one count of Murder in the First Degree, one count of Aggravated Menacing, and two counts of Possession of a Firearm During the Commission of a Felony ("PFDCF") for incidents alleged to have occurred in October 2009 and January 2010.[2] Because of the State's offer to cap its recommendation at ten years of incarceration, Mr. Davenport entered a no contest plea to the reduced charge of manslaughter and PFDCF on May 27, 2015.[3] These charges carried a minimum of five years of incarceration and a maximum of fifty years.[4] Prior to sentencing, the State sent a case summary to the Court which included inflammatory materials.[5] This case summary, dated eleven days before sentencing, was not provided to the Appellant until the day before sentencing.[6]

On November 20, 2015, Davenport was sentenced to twenty years of incarceration.[7] This is his Opening Brief in support of his timely-filed appeal. *See* Sentencing Order, attached as Exhibit C.

---

[1] A-80.
[2] A-19-20.
[3] A-29-30.
[4] A-29-30.
[5] A-31-74.
[6] A-79.
[7] Exhibit C.

SUMMARY OF ARGUMENT

I. Appellant's Due Process rights under the Fifth and Fourteenth Amendments to the United States were violated when the State breached the plea agreement in its pre-sentence conduct, its sentencing presentation, and in its ultimate sentencing recommendation.

II. Appellant's Due Process rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated when he was sentenced on the basis of information which was either false or lacked minimal indicia of reliability.

III. The trial court erred when it ordered restitution be paid in direct contradiction of *State v. Chianese*.

STATEMENT OF FACTS

On October 18, 2009, Mr. Davenport was charged with Terroristic Threatening for conduct involving Holly Wilson ("Wilson" or "decedent") and a no contact order was put in place.[8] On January 16, 2010, Mr. Davenport called 911 because Wilson shot herself.[9] She later died from the gunshot wound.[10] Davenport was arrested for violating the no contact order in place from the October 2009 misdemeanor charge.[11] Davenport was incarcerated in lieu of bail and held until his trial date in March of 2010 when he entered a plea to time served and was released.[12]

An autopsy was conducted and the Medical Examiner who performed the autopsy ruled that the manner of death would be undetermined.[13] Davenport was investigated, but not charged, with the death of Wilson.[14] In June of 2010, the assigned Deputy Attorney General advised police there were no additional leads to move on and the case was designated pending inactive.[15]

In December 2010, police were directed by the assigned Deputy Attorney General to set up one hundred and twenty hours of audio surveillance at the

---

[8] A-77.
[9] A-78.
[10] A-79.
[11] A-85.
[12] A-85.
[13] A-79-80.
[14] A-79.
[15] A-80.

gravesite of the decedent.[16] Nothing of evidentiary value was obtained.[17]

In May of 2011, the assigned Deputy Attorney General told police that after careful review by the Attorney General's Office, there was insufficient evidence at that time to move forward with the case.[18] Nevertheless, Davenport was indicted in January of 2014.[19]

In February of 2014, the State decided to test the firearm for DNA.[20] Davenport was excluded as a possible contributor to any of the DNA.[21] Additionally, there was no blood spatter on Davenport.[22]

On May 27, 2015 Mr. Davenport entered a no contest plea to the reduced charge of manslaughter and possession of a firearm during the commission of a felony.[23] These charges carried a minimum mandatory sentence of five years of incarceration and a maximum of fifty years of incarceration.[24] The State, as part of its plea agreement, agreed to cap its sentencing recommendation at ten years of incarceration.[25]

Prior to sentencing, the State provided a case summary to the Court which

---

[16] A-80.
[17] A-80.
[18] A-80.
[19] A-80.
[20] A-80.
[21] A-80.
[22] A-81.
[23] A-29-30.
[24] A-29-30.
[25] A-29-30.

included, *inter alia*, bloody photographs of the decedent and home videos of the decedent dating at least as far back as the early 1990's.[26] This case summary, dated approximately eleven days before sentencing, was not provided to the Appellant until the day before sentencing.[27]

The State's case summary contained SENTAC aggravating factors which were either incorrectly defined or which did not apply to Davenport.[28] The case summary contained secondhand allegations of conduct for which Davenport was never charged.[29] Additionally, the case summary included allegations regarding counts of the indictment in which the State entered a *nolle prosequi*.[30]

On November 20, 2015, the trial court cited these inaccurate aggravating factors and sentenced Davenport to twenty years of incarceration, twice the amount of time ostensibly recommended by the State and the sentencing guidelines,[31] and four times more than the minimum mandatory sentence.[32]

---

[26] A-31-74
[27] A-31-74, 79.
[28] A-31-74.
[29] A-31-74.
[30] A-31-74.
[31] A-29-30, 85-86.
[32] A-29-30.

I. APPELLANT'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THE STATE BREACHED THE PLEA AGREEMENT IN ITS PRE-SENTENCE CONDUCT, ITS SENTENCING PRESENTATION, AND IN ITS ULTIMATE SENTENCING RECOMMENDATION

Question Presented

Whether the State violated the defendant's right to due process by breaching the plea agreement when, prior to the sentencing of the defendant, the State submitted inflammatory materials to the trial court which were irrelevant to the alleged conduct in the case, referenced alleged, uncharged conduct of the Defendant during the sentencing hearing, and recommended that the Defendant serve no less than ten years of incarceration in violation of the plea agreement. With respect to the submitted materials and references to alleged conduct, defense counsel preserved the issue at sentencing. A-82. With respect to the objection to the State's ultimate sentencing recommendation, the issue is of a magnitude so clearly prejudicial to substantial rights as to jeopardize the fairness of the proceeding. DEL. SUP. CT. R. 8.

Standard and Scope of Review

This Court applies the general principles of contract law when reviewing a claim of a breach of a plea agreement.[33] This Court reviews the interpretation of a plea agreement *de novo*, and reviews factual determinations regarding the

[33] *Chavous v. State*, 953 A.2d 282, 285 (Del. 2008).

agreement for abuse of discretion.[34]

Argument

The State breached the plea agreement in its case summary and in its sentencing presentation by extensively referencing uncharged alleged conduct by the defendant, by referencing charges in which a *nolle prosequi* was eventually entered, by attaching inflammatory photos of the decedent to its case summary, and by enclosing home movies of the decedent to the case summary. Additionally, the State breached the plea agreement in its ultimate sentencing recommendation for the defendant.

The State sent a case summary dated November 9, 2015 regarding the case to the trial court in anticipation of sentencing on November 20, 2015. The case summary contained a narrative portion detailing the State's view of events that allegedly occurred before the incident in question. The case summary was not delivered to the defense until the day before the sentencing hearing, on November 19, 2015.[35]

A section of the State's case summary is entitled "Relevant Background."[36] In this section, the State details two alleged incidents of injury to the decedent. One of the alleged incidents is purportedly supported by a statement from an unnamed

[34] *Id.* at 285-86.
[35] A-79.
[36] A-32-33.

neighbor of the decedent stating the decedent told the neighbor that Mr. Davenport caused an injury.[37] The other alleged incident involving injury to the decedent implies that Mr. Davenport was responsible for the injuries.[38] Mr. Davenport was not charged with any criminal offense in connection with either alleged incident.

In another section of the State's case summary entitled "October 18, 2009 Aggravated Menacing and Terroristic Threatening, the State details alleged conduct that Mr. Davenport was charged with in connection with this case.."[39] The State eventually entered a *nolle prosequi* on the charges that covered this alleged conduct. Making matters worse, enclosed with the case summary were inflammatory photographs of the decedent and a disc that contained home movies of the decedent. In fact, the photographs were so graphic that the State did not include them with its copy of the case summary to the Prothonotary "due to the sensitivity of the exhibits, which include photographs of the deceased."[40] The videos are from many years before the alleged incident and go as far back as the early 1990s. As such, the videos neither depict Mr. Davenport nor do they depict the decedent at any time near the alleged incident in this case.

Prior to the imposition of sentence, defense counsel noted that the State's submission was inappropriate, and that the reason the State would make such a

---

[37] A-32-33.
[38] A-32-33.
[39] A-32-33.
[40] A-31.

submission is to attempt to inflame the Court.[41] The Court responded by indicating it was familiar with the case and was not a jury.[42]

The analysis of a claim of breach of a plea agreement rests on contract principles.[43] In contract law, "[t]he implied covenant of good faith 'requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the contract.'"[44] In determining whether the conduct of the alleged breaching party is reasonable, a court should take into account the reasonable expectations of the parties to the contract.[45] While it is true that cases in which the implied covenant of good faith is invoked should be the exception, rather than the rule, Mr. Davenport's case represents this delineated exception: a case in which "issues of compelling fairness arise."[46]

Here, the State offered Mr. Davenport a no contest plea to Manslaughter[47] and Possession of a Firearm During the Commission of a Felony ("PFDCF").[48] As part of the plea, the State offered to enter a *nolle prosequi* on the remaining counts

---

[41] A-82.
[42] A-82.
[43] *Chavous*, 953 A.2d at 285.
[44] *Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1234 (Del. Ch. 2000) (quoting *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985)).
[45] *Id.*
[46] *Id.*
[47] 11 *Del. C.* § 632(1).
[48] 11 *Del. C.* § 1447(a).

in the indictment—one count of Aggravated Menacing,[49] and one count of PFDCF. Additionally, the State offered to make a recommended sentence in the case. Specifically, the State agreed to "cap its total unsuspended Level 5 recommendation at 10 years."[50]

The State's astonishing behavior before and during the sentencing hearing, however, stands in contrast to its obligations under the plea agreement. For instance, in its presentation, the State brought up the alleged conduct which formed the bases of the Menacing charge and one of the PFDCF charges.[51] However, as part of the plea agreement, a *nolle prosequi* was entered on these charges. In its sentencing presentation, the State still sought to use these charges against Mr. Davenport.

"[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."[52] When a plea agreement is breached by the State, two remedies are available: (1) the defendant may withdraw the plea; or (2) the sentencing judge may order specific performance of the plea agreement.[53]

In *State v. Miller*, the defendant pled no contest to the amended charge of

---

[49] 11 *Del. C.* § 602(b).
[50] A-29.
[51] A-77.
[52] *Santobello v. New York*, 404 U.S. 257, 262 (1971).
[53] *Scarborough v. State*, 945 A.2d 1103, 1115 (Del. 2008).

assault in the third degree.[54] In exchange for this no contest plea, the prosecution agreed to take no position on the defendant's motion for a Deferred Acceptance of No Contest Plea and to recommend that the defendant be required to serve two days of incarceration followed by a year of probation, write an apology letter, and to comply with other sentencing conditions.[55] During the sentencing proceeding, however, the prosecutor stated that the defendant had committed significant violence against the victim, and that though the defendant was fifty-one years old and had no criminal history, stated to the court that "this type of beating and brutality should not be accepted in our society."[56] The trial judge denied the defendant's motion for a Deferred Acceptance of No Contest Plea, and the defendant was convicted.[57] The defendant appealed.

The court stated that the prosecution "'clearly attempted to accomplish indirectly what it had promised not to do directly,' by emphasizing the 'brutality of [the defendant's] crime" and addressing issues related to the defendant's motion.[58] Because the prosecutor breached the plea agreement in the sentencing comments, the court vacated the sentence and remanded the case for sentencing before a different judge.[59] Similar factual circumstances have yielded similar results in

---

[54] *State v. Miller*, 223 P.3d 157, 160 (Haw. 2010).
[55] *Id.*
[56] *Id.* at 161.
[57] *See id.* at 162.
[58] *Id.* at 170.
[59] *Id.* at 198.

multiple other state courts.[60]

The facts of *Miller* are strikingly similar to the facts of Mr. Davenport's case. In both cases, defendants agreed to enter no contest pleas to reduced charges. In both cases, the defendant relied on the promised recommendation of the prosecutor in pleading no contest. And in both cases, the prosecution breached the plea agreement by "clearly attempt[ing] to accomplish indirectly what it had promised not to do directly."[61]

Breaches of plea agreements are not exclusive to the state court system, however. In *United States v. DeWitt*, the defendant pled guilty to drug possession.[62] As part of the plea agreement, the Government and the defendant stipulated that a certain quantity of drugs was applicable to the defendant's case.[63] At sentencing, however, the Government sought to introduce evidence of a higher quantity.[64] The defense objected, but the Government argued the evidence was "relevant conduct"

---

[60] *State v. Williams*, 637 N.W.2d 733 (Wisc. 2002) (prosecutor agreed to recommend specific sentence; at sentencing prosecutor asserted that recommendation, but then recited at length negative information in the presentence investigation report; finding that prosecutor "did not merely recite the unfavorable facts," but "covertly implied to the sentencing court that the additional information ... raised doubts regarding the wisdom of the terms of the plea agreement," breach of plea agreement because "State cannot cast doubt on or distance itself from its own sentence recommendation"); *State v. LaMere*, 900 P.2d 926 (Mont. 1995) (breach where prosecutor agreed to recommend deferred sentence but at sentencing represented that defendant had alcohol problem, spent most of his time drinking, and did not want to undergo treatment and prosecutor then recommended without explanation the deferred sentence, plea bargain was breached).

[61] *Miller*, 223 P.3d at 170.

[62] *United States v. DeWitt*, 366 F.3d 667, 668 (8th Cir. 2004).

[63] *Id.*

[64] *Id.* at 669.

under the United States Courts Sentencing Guidelines.[65] The court permitted the Government to put on the evidence, and the defendant's presumptive sentence was increased.

On appeal, the court held that the Government breached the plea agreement.[66] The court first noted that general contract principles apply when interpreting plea agreements.[67] Since Delaware plea agreements also rest on basic contract principles,[68] *DeWitt* is an instructive example for Mr. Davenport's case. The Government argued that the introduction of evidence of a higher quantity of drugs constituted "relevant conduct" that was appropriate to introduce during the defendant's sentencing.[69] The court noted that if it accepted the Government's interpretation of the plea agreement, it would render the stipulation regarding the quantity a nullity; no matter what the Government and defendant agreed to in the plea, the Government would be free to shoehorn in whatever evidence of a higher quantity it desired under the "relevant conduct" exception.[70] In ruling that the Government breached the plea agreement by introducing evidence of a higher drug quantity, the court remanded the case to the district court for resentencing before a

---

[65] *Id.*
[66] *Id.* at 669-70.
[67] *Id.* at 669.
[68] *Chavous*, 953 A.2d at 285.
[69] *DeWitt*, 366 F.3d at 670.
[70] *See id.* at 670.

different judge.[71]

In *DeWitt*, both the Government and the defense agreed to a specific severity of conduct to which Ms. DeWitt would plead guilty. At sentencing, however, the Government introduced evidence of conduct more severe than the Government alleged Ms. DeWitt committed and for which Ms. DeWitt had been convicted. Similarly, in the present case, the State and the defense agreed to a specific severity of conduct to which Mr. Davenport would plead *nolo contendere*, and at sentencing, the State introduced evidence of more severe alleged conduct. In addition to the type of information introduced in *DeWitt*, however, the information introduced in Mr. Davenport's sentencing hearing also included alleged conduct that was wholly unrelated to the alleged crime committed. This similarity in conduct by the Government (in *DeWitt*) and the State (in this case), combined with the additional, unrelated information submitted by the State, renders the plea agreement in both cases breached.

Similarly, in *United States v. E.V.*, the defendant pled guilty to conspiracy to distribute marijuana.[72] As part of the plea agreement, the Government and the defendant agreed that a particular set of aggravating factors was not applicable.[73] One of the listed aggravating factors was that the offense was committed while the

---

[71] *Id.* at 672.
[72] *United States v. E.V.*, 500 F.3d 747, 749 (8th Cir. 2007).
[73] *See id.* at 751.

defendant possessed a firearm; if applicable, defendant's presumptive sentence would increase.[74] Prior to sentencing, the defense informed the Government that it planned on submitting certain mitigation evidence at sentencing; the Government interpreted this mitigation as attempting to litigate the defendant's guilt, and notified the defendant that it would be seeking to introduce evidence that the defendant possessed a firearm during the commission of the offense.[75] The defense objected, but the trial judge allowed the Government to put on the evidence.[76] The defendant was sentenced to forty-six months of incarceration.[77]

On appeal, the court (again referring to the "general contractual principles"[78] that govern plea agreement interpretation both in that court and in Delaware) ruled that the Government breached the plea agreement by introducing evidence of the firearm possession.[79] Citing *DeWitt*, the court stated:

> We have previously held that the introduction of evidence contrary to a specific stipulation amounts to a breach of the plea agreement. In *DeWitt*, the parties stipulated to an applicable drug quantity and base offense level, but the government introduced evidence at sentencing in support of a higher drug quantity. After noting that under ordinary rules of contract interpretation, we give effect to the specific drug quantity and base offense level stipulations . . . over the plea agreement's more general provisions relating to 'relevant conduct, we rejected the government's argument that the evidence was permissible rebuttal evidence, and held that the prosecutor breached the plea

[74] *Id.*
[75] *See id.*
[76] *Id.* at 751-52.
[77] *Id.* at 751.
[78] *Id.*
[79] *Id.* at 752.

> agreement. Similarly, the parties' specific agreement in this case that the offense characteristics of section 2D1.1(b) did not apply precluded the government from introducing evidence to the contrary, either as purported rebuttal evidence or pursuant to the more general agreement that the parties could seek departures from the applicable guideline range.[80]

In fashioning the remedy for the breach, the court restated its standard,[81] which is identical to Delaware's. The court ultimately found that the Government's breach did not affect the ultimate sentence beyond a reasonable doubt, partly because the sentencing judge explicitly stated that "there's not going to be a gun enhancement,"[82] and the court affirmed the sentence.

The difference between *E.V.* and Mr. Davenport's case, however, is that the court in *E.V.* seemed unaffected by the breach by explicitly stating it would not enhance the sentence based on the firearm evidence. In this case, however, the trial court specifically accepted the State's other evidence in its sentence of Mr. Davenport, and sentenced him beyond the guidelines and beyond the State's purported recommendation.

Miller, *DeWitt*, and *E.V.* make clear that when the prosecution and the defendant enter into a plea agreement, the prosecution is under an obligation to refrain from seeking a greater punishment than agreed to, either through explicit or

---

[80] *Id.* at 753 (internal citations omitted).

[81] *Id.* at 754 ("When the government breaches a plea agreement, the defendant is typically given the option of withdrawing his guilty plea or demanding specific performance.") (internal quotation marks omitted).

[82] *Id.* at 755.

implicit means. In Mr. Davenport's case, the State went even further than the prosecution in all three cases. In those cases, the prosecution introduced harmful evidence that was at least tangentially related to the offenses committed. In *Miller*, the evidence was related to the original charge that had been amended as part of the plea. In *DeWitt*, the evidence was related to a separate count in the indictment. And in *E. V.*, the evidence was related to a potential aggravating factor.

In Mr. Davenport's case, however, the State not only introduced evidence related to separate counts of the indictment, but also introduced evidence of conduct that was not even related to legal issues in this case. Further, the submission of home movies depicting the decedent do not carry even a tangential relationship to the facts of this case. These videos were submitted for no other reason than to inflame the passions of the trial court, and to attempt to convince the court to impose a sentence higher than the recommendation agreed to by the State.

It is true that the introduction of uncharged conduct during sentencing has been approved by Delaware courts in the past.[83] However, the introduction of evidence of this uncharged conduct, combined with evidence of conduct in which the State entered a *nolle prosequi* and the submission of wholly unrelated home movies depicting the decedent, rise to an implicit request to increase Mr. Davenport's punishment above the recommended sentence, and thus constitute a

---

[83] *Mayes v. State*, 604 A.2d 839, 841, 844-45 (Del. 1992).

breach of the plea agreement. The State sought, and obtained, a sentence well beyond what it promised to recommend in plea negotiations.

The State also breached the plea agreement and violated the defendant's right to due to process by agreeing to "cap" its sentencing recommendation at ten years of incarceration, but arguing at sentencing that ten years of incarceration should be the minimum the trial judge should consider.

In the plea form signed by the State, by defense counsel, and by Mr. Davenport, the State agreed that it would make a sentencing recommendation to the trial court. Specifically, the State agreed that "it would cap its total unsuspended Level 5 recommendation at 10 years."[84] To translate the State's plea agreement promise into plain English, the State promised to recommend to the trial court no more than ten years of Level V incarceration. What the State actually said, however, was that "any sentence less than [ten] years at Level V would be another tragedy...."[85] Additionally, the State noted that "[a]ny sentence less than [ten] years would unduly depreciate and ignore the violence and the abuse [the decedent] endured at the hands of the defendant."[86]

The distinction between the plea agreement's sentencing recommendation and the State's comments at sentencing is not merely semantic. As stated above,

---

[84] A-29.
[85] A-79.
[86] A-77.

"when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."[87] "*Santobello* prohibits not only 'explicit repudiation of the government's assurances, but must in the interest of fairness be read to forbid end-runs around them.'"[88]

In *United States v. Canada*, the defendant pled guilty to several charges in exchange for a specific sentencing recommendation.[89] At sentencing, the prosecutor informed the court of the recommended sentence, but never affirmatively advocated for it.[90] Additionally, the prosecutor told the court that "[t]he government feels a substantial period of incarceration in this case [sic]," and "[i]t is important, the government feels, that a very strong message be sent by the Court."[91] The prosecutor emphasized the severity of the defendant's conduct.[92]

On appeal, the court commented that the prosecutor had paid "'lip service' to the negotiated agreement.... Nevertheless, she herself failed affirmatively to recommend 36 months, as promised, and she went on to emphasize Canada's supervisory role in the offense and then to urge the judge to impose 'a lengthy

---

[87] *Santobello*, 404 U.S. at 262.
[88] *United States v. Canada*, 960 F.2d 263, 269 (1st Cir. 1992) (quoting *United States v. Voccola*, 600 F. Supp. 1534, 1537 (D. R.I. 1985)).
[89] *Id.* at 265.
[90] *Id.* at 268.
[91] *Id.* at 269.
[92] *Id.* ("This is one of the largest, if not the largest advance fee scheme, which the Office of the Unites States Attorney has been involved in the last several years.").

period of incarceration' and to send 'a very strong message.'"[93] The court then noted that while explicit repudiation of the plea agreement is an obvious violation, a breach can still occur by an implicit "end-run" around the agreement.[94] The court ruled that the prosecutor had breached the plea agreement by advocating for a lengthy prison sentence, implicitly telling the sentencing judge that the Government actually wanted a longer sentence imposed in the case.[95] The court also stated that, even though the sentencing judge was "intimately familiar" with the case, and even though it was possible that the prosecutor's presentation did not affect the ultimate sentence imposed in the case, these considerations were immaterial in determining whether to afford relief.[96] The court ultimately vacated the sentence and remanded the case for sentencing before a different judge.[97] Cases with similar facts and results are legion.[98]

Mr. Davenport does not suggest that the State be required to adhere to a rigid

---

[93] *Id.*
[94] *See id.*
[95] *Id.* at 270.
[96] *Id.* at 270-71.
[97] *Id.* at 271.
[98] *E.g.*, *United States v. Alcala-Sanchez*, 666 F.3d 571, 576-577 (9th Cir. 2012) ("equivocations left room for doubt about the government's position on the issue ... integrity of our judicial system requires that the government strictly comply with its obligations under a plea agreement"); *United States v. Gonczy*, 357 F.3d 50 (1st Cir.2004) (where prosecutor promised to recommend incarceration at lower end of guidelines range and did so, but "the substance of the prosecutor's argument at the sentencing hearing can only be understood to have emphasized defendant's wrongdoing and his leadership role in the offense, bargain broken); *United States v. Taylor*, 77 F.3d 368 (11th Cir.1996) (if the prosecutor promises to recommend a specific sentence and does make such recommendation, "[a]dvocacy of a position requiring a greater sentence is flatly inconsistent with recommendation of a lesser sentence").

formula at sentencing, or even that the State be required to enthusiastically endorse its sentencing recommendation. The *Canada* court stated that this would be a bridge too far.[99]

However, the State's sentencing recommendation in the instant case is a bridge too far in the other direction. In this case, the agreement between the State and Mr. Davenport obligated the State to recommend that Mr. Davenport serve no more than ten years in prison. However, the thinly-veiled implication of the State's actual recommendation was: (1) ten years of incarceration is acceptable; (2) nine years and three-hundred and sixty-four days of incarceration would be "another tragedy"[100] and would "unduly depreciate the violence"[101] the State alleges occurred; and (3) if Mr. Davenport receives a sentence longer than ten years of incarceration, all the better. If Mr. Davenport knew the State was going to induce him into entering a plea by making promises it was not going to honor, he never would have entered the plea. That the State did not plan on honoring its agreement is bolstered by the fact that the State waited to provide its case summary to the defense until one day before sentencing despite being completed eleven days before sentencing.

Even if the State's true recommendation is insufficient by itself to constitute

---

[99] *See Canada*, 960 F.2d at 269-70 (also noting that the prosecution's "overall conduct must be reasonably consistent with making such a recommendation, rather than the reverse.").
[100] A-79.
[101] A-77.

a breach, when placed in the context of the State's case summary and sentencing presentation, the State impliedly requested a longer sentence than what was explicitly recommended. The case summary and presentation included references to uncharged conduct, alleged conduct for which the State had entered a *nolle prosequi*, graphic and inflammatory photographs of the decedent, and unrelated home videos of the decedent. In short, in its case summary and at the sentencing hearing, the State attempted, and successfully completed, an end-run around the plea agreement.

As such, Mr. Davenport respectfully requests that this court vacate the Superior Court's sentence and remand the case, either for Mr. Davenport to withdraw the plea or for sentencing before a different judge.

II. APPELLANT'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN HE WAS SENTENCED ON THE BASIS OF INFORMATION WHICH WAS EITHER FALSE OR LACKED MINIMAL INDICIA OF RELIABILITY

Question Presented

Whether the trial court violated Appellant's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution when it sentenced him on the basis of information which was either false or lacked minimal indicia of reliability. The issue was preserved by defense counsel informing the Court that the Appellant did not have a violent criminal history. A-82.

Standard and Scope of Review

Typically this Court's review of a trial judge's sentence is reviewed under an abuse of discretion standard.[102] However, a sentencing can also raise constitutional implications, specifically, due process.[103] This Court reviews constitutional issues *de novo*.[104] Thus, the appropriate standard is *de novo*.

Argument

"[T]he due process clause of the Fifth Amendment prohibits a criminal

---

[102] *Fink v. State*, 817 A.2d 781, 790 (Del. 2003).
[103] *Norman v. State*, 976 A.2d 843 (Del. 2009).
[104] *See Zebroski v. State*, 12 A.3d 1115, 1119 (Del.2010).

defendant from being sentenced on the basis of information which is either false or which lacks minimal indicia of reliability. Material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process."[105] Further, the United States Supreme Court has noted that when a sentence is imposed "on the basis of assumptions concerning [Defendant's] criminal record which were materially untrue...whether caused by carelessness or design, [it] is inconsistent with due process of law, and such a conviction cannot stand."[106] Additionally, this Court has explained that "a sentencing court abuses its discretion if it sentences on the basis of inaccurate or unreliable information.[107]

Prior to sentencing, the State provided a case summary to the trial court. The document contained a narrative portion detailing the State's view of events that allegedly occurred before the incident in question and it contained a section regarding the aggravating factors the State believed applied in this case. During sentencing, the Court referenced the conduct referred to in the case summary.[108]

The State argued in its case summary, and the Court cited in its sentencing, aggravating factors which were either incorrectly defined or inapplicable to Mr. Davenport. As such, the trial court sentenced Mr. Davenport on the "basis of

---

[105] *Mayes*, 604 A.2d at 843 (citing *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976)) (internal quotation marks omitted).
[106] *Townsend v. Burke*, 334 U.S. 736, 741 (1948).
[107] *Mayes*, 604 A.2d at 843.
[108] A-85-86.

information which is either false or which lacks minimal indicia of reliability."[109]

Prior Violent Criminal Conduct

The aggravating factor of prior violent criminal conduct is met when the "Defendant has demonstrated, by his prior criminal history, a propensity for violent criminal conduct."[110] The trial court erroneously cited this aggravating factor in sentencing Mr. Davenport to double the sentence requested by the State and to double the recommendation of the sentencing guidelines.[111]

Mr. Davenport does not have a violent criminal history. Prior to the instant case, Mr. Davenport's criminal history consisted of traffic offenses, including DUI offenses, and one misdemeanor conviction for non-compliance with bond involving the decedent in this case.[112] None of these offenses are violent. Further, Mr. Davenport's sole felony was a non-violent DUI third offense,[113] which occurred after the alleged events in this case.[114] Regardless of the timing, Mr. Davenport had no violent offenses in his history.[115] To state otherwise is to put forth "unreliable and inaccurate information." [116] The trial court's reliance on prior

---

[109] *Mayes v. State*, 604 A.2d at 843 (citing *Robin*, 545 F.2d at 779 (internal quotation marks omitted)).
[110] Delaware Sentencing Accountability Commission Benchbook 2016, p. 133 (hereinafter "SENTAC").
[111] A-85-86.
[112] A-21-28.
[113] A-21-28.
[114] A-83.
[115] A-21-28.
[116] *Mayes*, 604 A.2d at 843.

violent criminal conduct as an aggravating factor is clearly erroneous and unsupported by the record.

Repetitive Criminal Conduct

The aggravating factor of repetitive criminal conduct is defined as: "conviction or adjudication for the same or similar offense on two or more previous, separate occasions." Here, the trial court explained during sentencing that it found the aggravating factor of "repetitive criminal conduct with respect to Holly Wilson as a [sic] identified victim...."[117] This is clearly wrong. As stated previously, prior to the instant case, Mr. Davenport's criminal history consisted of traffic offenses, including DUI offenses, and one misdemeanor conviction of non-compliance with bond involving the decedent in this case.[118]

First, this lone offense clearly does not constitute a "conviction or adjudication for the same or similar offense on two or more previous, separate occasions."[119] Second, the non-compliance with bond charge actually originated as part of the instant case, and so should not be construed as constituting repetition. In summary, this one offense does not constitute repetitive criminal conduct and is actually part of the instant case and not part of his prior history. The trial court erroneously cited repetitive criminal conduct as an aggravating factor and as a

[117] A-85.
[118] A-21-28.
[119] SENTAC, p. 134.

basis for its sentence. This, too, is incorrect.

Vulnerability of the Victim

According to SENTAC, the aggravating factor of vulnerability of the victim applies when the "Defendant knew, or should have known, that the victim of the offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health."[120] The State, in its case summary, incorrectly claimed that the aggravating factor of vulnerability of the victim was met because the "defendant knew that the victim of the offense was particularly vulnerable or incapable of resistance due to the destructive and abusive relationship."[121] This is a false statement and a mischaracterization of this aggravating factor. The correct statement of this aggravating factor from SENTAC involves vulnerability "due to extreme youth, advanced age, disability, or ill health."[122]

Even considering the correct description of this aggravating factor, there is simply nothing in the record to suggest that the decedent suffered from "extreme youth, advanced age, disability, or ill health." The decedent was a fifty-four year old female who was out at various bars the night of her death. This aggravating factor simply does not apply.

---

[120] SENTAC, p. 134.
[121] A-42.
[122] SENTAC, p. 134.

Prior Abuse of the Victim and Minimal Indicia of Reliability

The case summary mentions instances of past alleged conduct by Davenport for which he was never charged. The supporting sources for these allegations are "everyone" and unnamed "neighbors, colleagues and friends...."[123] These claims were therefore unable to be refuted due to their unknown sources and vague nature. Consequently, these claims lacked "minimal indicia of reliability." [124]

In sentencing Mr. Davenport, the trial court cited multiple aggravating factors which simply did not apply to Mr. Davenport.[125] In so doing, the trial court sentenced Mr. Davenport on the "basis of information which is either false or which lacks minimal indicia of reliability."[126] Further, the material false assumptions as to these relevant facts in Davenport's sentencing, rendered the entire sentencing procedure "invalid as a violation of due process."[127] As such, this Court must now vacate the Superior Court's sentence and remand the case, for sentencing before a different judge.

---

[123] A-32-33.
[124] *Mayes v. State*, 604 A.2d at 843 (citing *Robin*, 545 F.2d at 779 (internal quotation marks omitted).
[125] A-85-86.
[126] *Mayes v. State*, 604 A.2d at 843 (citing *Robin*, 545 F.2d at 779 (internal quotation marks omitted).
[127] *Id.*

III. THE TRIAL COURT ERRED WHEN IT ORDERED RESTITUTION BE PAID IN DIRECT CONTRADICTION OF *STATE V. CHIANESE*

Question Presented

Whether the trial court violated this Court's decision in *State v. Chianese*[128] by ordering a defendant to pay compensation to the Victim's Compensation Assistance Program when the law at the time of the alleged incident in that defendant's case was identical to the law as it stood at the time in *Chianese*. This issue is of a magnitude so clearly prejudicial to substantial rights as to jeopardize the fairness of the proceeding. DEL. SUP. CT. R. 8.

Standard and Scope of Review

When a challenge to a restitution order involves a legal question, this Court reviews the challenge *de novo*.[129]

Argument

As part of the Superior Court's sentence, Mr. Davenport was ordered to pay $7339.89 in restitution.[130] The trial court stated that this restitution is to be paid to the Victim Compensation Assistance Program ("VCAP").[131] VCAP had previously paid the decedent's family to compensate them for funeral expenses.

In *State v. Chianese*, this Court held that, as the law existed at the time, a

---

[128] *State v. Chianese*, 128 A.3d 628, 2015 Del. LEXIS 574 (Del. Nov. 2, 2015).
[129] *Moore v. State*, 15 A.3d 1240, 1244 (Del. 2011).
[130] Exhibit C.
[131] A-84.

Delaware trial court has no authority to award compensation to the Victim Compensation Assistance Program.[132] The defendant had pled guilty to one count of Offensive Touching. The trial court ordered that a pre-sentence investigation be conducted for the purposes of determining restitution to be imposed.[133] While the restitution matter was under investigation, VCAP awarded the victim $12,107.35 to cover medical expenses and lost wages.[134] The court investigator recommended the defendant be ordered to pay this amount to VCAP, and the defendant objected.[135] The Court of Common Pleas refused to order the restitution, ruling in part that it could only order payment to the victim of a crime, and not a third party seeking reimbursement.[136] The Superior Court summarily affirmed the Court of Common Pleas, and the State appealed.[137]

This Court ruled that, as the law existed at the time of the restitution hearing, the Court of Common Pleas had no authority to award VCAP restitution. The Court noted that "[11 *Del. C.* § 4101] contemplates that the restitution award be ordered against 'the convicted person,' not a third party."[138] The Court then ruled that 11 *Del. C.* § 4106 was inapplicable, in part because it only applies to crimes

---

[132] *Chianese*, 2015 Del. LEXIS 574, at *10-13.
[133] *Id.* at *2.
[134] *Id.* at *3-4.
[135] *Id.* at *4-5.
[136] *Id.* at *5-6.
[137] *See id.* at *6.
[138] *Id.* at *11.

involving property damage.[139] The Court then turned to Chapter 90 of the Criminal Code. The Court ruled that, as Chapter 90 existed at the time, restitution could only be awarded to victims, not third parties.[140] On August 12, 2014, the General Assembly enacted an amendment to Chapter 90 which provides that VCAP may recover restitution from defendants in compensation for funds paid to victims.[141] However, the Court applied the pre-amendment law, and ruled that Chapter 90 did not entitle VCAP to recover from the defendant.[142] Therefore, the Court affirmed the Superior Court.[143]

This Court's holding in *Chianese* is applicable in the instant case. In *Chianese*, the conduct which gave rise to the restitution claim occurred prior to the 2014 statutory amendment. Similarly, in the instant case, the alleged conduct which gave rise to VCAP's restitution claim occurred before the General Assembly amended Chapter 90 of the Criminal Code. As such, the applicable law to Mr. Davenport's case is the law of *Chianese*—the trial court lacked authority to order the defendant to compensate VCAP for funds paid to the decedent. Mr. Davenport respectfully requests that this Court remand this case for resentencing.

---

[139] *Id.*
[140] *Id.* at *11-12.
[141] 11 *Del. C.* § 9014(c).
[142] *Chianese*, 2015 Del. LEXIS 574, at *11-12.
[143] *Id.* at *13-14.

CONCLUSION

For the reasons and upon the authorities set forth herein, Mr. Davenport respectfully requests that this court vacate the Superior Court's sentence, and either allow Mr. Davenport to withdraw his plea or remand the matter for resentencing by a different judge.

/s/ Ross A. Flockerzie
/s/ Gerard M. Spadaccini
/s/ Brett A. Hession

Ross A. Flockerzie [#5483]
Gerard M. Spadaccini [#4604]
Brett A. Hession [#6041]
Assistant Public Defenders
Office of the Public Defender
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-5150

Date: March 1, 2016