EFiled: Jul 27 2016 04:51PM EDT
Filing ID 59337984
Case Number 44,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DJAVON P. HOLLAND,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	No. 44, 2016
v.	)	
	)	
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

WOLOSHIN, LYNCH & NATALIE, P.A.

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DATED: July 27, 2016

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NATURE OF THE PROCEEDINGS

Appellant, Djavon Holland, was arrested on April 11, 2014.[1] On July 21, 2014, a Grand Jury returned an indictment as to the following offenses:

I. Home Invasion (underlying offense of Assault First/Second Degree)
II. Possession of a Firearm During the Commission of a Felony[2]
III. Assault First Degree (as to Nemesis Moore)
IV. PFDCF
V. Assault First Degree (as to Semaj Deshields)
VI. PFDCF
VII. Assault Second Degree (as to Vanessa Grier)
VIII. PFDCF
IX. Aggravated Menacing (as to Vanessa Grier)
X. PFDCF
XI. Wearing a Disguise During the Commission of a Felony
XII. Possession of a Firearm by a Person Prohibited
XIII. Possession of Ammunition by a Person Prohibited
XIV. Criminal Mischief.[3]

Mr. Holland's trial was scheduled to commence on January 21, 2016.[4] On the day of trial, the court denied Mr. Holland's request for a continuance so as to seek private counsel, as he was dissatisfied with his public defender.[5] Mr. Holland subsequently indicated to the court that he wished discharge his public defender and represent himself *pro se*.[6] The trial court engaged in a colloquy with Mr. Holland, and subsequently approved Mr. Holland's request to represent himself at

[1] A001.
[2] Hereinafter referred to as "PFDCF".
[3] A002; A017-22.
[4] A004. Upon motion by the defense, the trial court severed Counts XII and XIII. A042.
[5] A043-44; A046-47.
[6] A047.

trial and appointed his public defender as standby counsel.[7] The jury voted to acquit Mr. Holland of Counts III through VI, but was unable to reach a unanimous verdict as to any other charge.[8]

Days after verdict, the trial court issued a scheduling order for trial as to the remaining charges.[9] On March 2, 2015, the State presented Mr. Holland's case to a second Grand Jury, resulting in an indictment for the following charges:

I. Home Invasion (underlying offense of Robbery First Degree)
II. PFDCF
III. Attempted Robbery First Degree (as to Nemesis Moore)
IV. PFDCF
V. Attempted Robbery First Degree (as to Semaj Deshields)
VI. PFDCF
VII. Attempted Robbery First Degree (as to Vanessa Grier)
VIII. PFDCF
IX. Assault Second Degree (as to Vanessa Grier)
X. PFDCF
XI. Wearing a Disguise During the Commission of a Felony
XII. Possession of a Firearm by a Person Prohibited
XIII. Possession of Ammunition by a Person Prohibited
XIV. Criminal Mischief.[10]

On March 3, 2015, private counsel[11] entered his appearance on behalf of Mr. Holland.[12] On May 18, 2015, Counsel filed a Motion to Dismiss Counts in

[7] A049.
[8] A004; A274-76.
[9] A004.
[10] A005; A282-88.
[11] Hereinafter referred to as "Counsel".
[12] A006.

Reindictment.[13] After further briefing, the Court denied Mr. Holland's motion on August 25, 2015.[14] Counsel filed a Motion to Reargue on September 4, 2015.[15] On September 8, the trial court received a letter from Mr. Holland that the defendant sought docketed.[16] On September 14, 2015, a *pro se* letter from Mr. Holland concerning the Motion to Dismiss was docketed by the Prothonotary.[17] Both *pro se* filings raised a claim of vindictive prosecution.[18]

The second trial commenced on September 15, 2015.[19] Prior to jury selection, Mr. Holland again informed the trial court of his desire to proceed to trial *pro se*.[20] The trial court engaged in a colloquy with the defendant and determined that he knowingly, intelligently, and voluntarily waived his right to counsel.[21]

Next, the trial court heard argument from Mr. Holland and the State on the pending Motion to Reargue previously filed by Counsel, instructing the defendant

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[1313] A007; A297-377. Despite that Mr. Holland faced new charges, he was never haled to court for arraignment as to those offenses. *See generally* A005-10.
[14] A009; A395-401.
[15] A009; A402-06.
[16] A009; A407-11
[17] A009; A412-16.
[18] A409; A415.
[19] A009.
[20] A419.
[21] A420-21.

that he could argue "over and beyond what was set forth" in the written Motion to Reargue.[22] The Court ultimately denied the motion, and trial began.[23]

Mr. Holland was convicted of all charges excluding Counts V and VI of the Reindictment—the Attempted Robbery of Semaj Deshields and the accompanying Possession of a Firearm During the Commission of a Felony charges—as well as Count XI, Wearing a Disguise During the Commission of a Felony.[24]

Mr. Holland was sentenced on January 15, 2016.[25] As to Home Invasion, the defendant was sentenced to six years at Level V.[26] As to the two counts of Attempted Robbery in the First Degree, Mr. Holland was sentenced to a total of six years of Level V.[27] The trial court sentenced Mr. Holland to a total of twelve years in prison for the four Possession of a Firearm During the Commission of a Felony convictions.[28] As to the Assault in the Second Degree, Mr. Holland was sentenced to eight years of Level V, suspended immediately for eight years at Level IV, which itself was suspended after six months for two years of Level III.[29] Finally, Mr. Holland was ordered to pay a fine in the amount of $500.00 for the Criminal

[22] A425.
[23] A426.
[24] A010; A614-16.
[25] A011; A630.
[26] Exhibit B; A630.
[27] Exhibit B; A630.
[28] Exhibit B; A630.
[29] Exhibit B; A630.

Mischief conviction, all of which was suspended.[30] The trial court's sentencing order was signed and filed on January 26, 2016.[31]

A timely notice of appeal was filed on February 26, 2016.[32] This is Mr. Holland's Opening Brief.

[30] Exhibit B; A630. At the conclusion of the Sentencing Hearing, the State entered a *nolle prosequi* on the two previously-severed Person Prohibited charges. A630
[31] A011.
[32] A008.

SUMMARY OF ARGUMENT

1. The trial court abused its discretion by failing to dismiss the newly-indicted charges brought against Mr. Holland by the State after the conclusion of the first trial. The court misconstrued statutory language that should have acted as a bar to prosecution under a plain reading of the statute. Moreover, by securing a reindictment against Mr. Holland after he had been acquitted of four felonies that carried minimum mandatory periods of incarceration for more severe charges it could have presented to the initial Grand Jury, the State engaged in a vindictive prosecution of the defendant. Finally, the jury's acquittal as to the Assault and Firearm charges, viewed practically with an eye to all the circumstances of the first proceeding, should have estopped the State from contending at the second trial that Mr. Holland caused the victims injury or possessed a firearm during the alleged incident.

2. The trial court committed plain error in failing to engage in a thorough colloquy with Mr. Holland about his desire to discharge his attorney and represent himself *pro se* at trial. Such failure caused the defendant to forfeit his right to counsel in a manner that was not knowing, intelligent, or voluntary; and requires reversal.

3. The trial court committed plain error by failing to declare a mistrial *sua sponte* when it allowed the State to admit into evidence a highly technical

expert report despite that the court was aware that Mr. Holland had only seen the report for the first time that morning. Mr. Holland did not have sufficient time to review such complex materials or consult with an independent expert, and his ability to effectively cross-examine the expert witness was consequently hindered in such a way that requires reversal.

STATEMENT OF FACTS[33]

On the evening of April 8, 2014, Vanessa Grier and her two adult sons, Nemesis Moore and Semaj Deshields, were at home in their apartment located in the Hampton Walk Apartment complex.[34] Grier and Deshields were smoking marijuana[35] and watching television when the front door to the apartment burst open and an armed man entered the residence, who immediately pointed his weapon at Grier's face and demanded that she provide her money.[36]

Moore—an admitted drug dealer who was smoking marijuana prior to the incident[37]—ran to the living room upon hearing the commotion from his bedroom and attacked the intruder.[38] The only words Moore recalled hearing the individual say to him was "you think it's a game."[39] While her son struggled with the armed man, Grier went into her kitchen and retrieved a knife.[40] Moore, still wrestling with the suspect, was shot in the chest.[41] Grier returned from the kitchen with her

[33] The facts contained herein are based on the evidence the State introduced at trial and are not meant to reflect the Appellant's rendition of what occurred on the night of the incident.
[34] A500.
[35] A468.
[36] A463; A500-01.
[37] A437.
[38] A435.
[39] A436.
[40] A502.
[41] A436.

knife and stabbed the intruder.[42] At some point during the encounter, Grier called the police a number of times.[43]

After Moore was shot, Deshields inserted himself into the altercation by striking the intruder over the head with an object he picked up from his home.[44] Because of how close Moore and the intruder were, Deshields inadvertently struck his brother as well.[45]

The residents of the apartment managed to get the firearm away from the intruder.[46] Deshields picked up the weapon and began to strike the man with it repeatedly.[47] During the melee, but prior to picking up the gun, Deshields had been shot in the hand as well.[48]

Eventually the man, later identified as Mr. Holland, was subdued.[49] Police arrived approximately twenty to twenty-five minutes after the incident began and found Grier, Moore, Deshields, and Mr. Holland at the residence.[50] Responding officers observed that all of the parties were injured.[51]

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[42] A502.
[43] A502.
[44] A436.
[45] A436.
[46] A466.
[47] A465.
[48] A466.
[49] A466.
[50] A451; A456.
[51] A452.

Upon arresting Mr. Holland, police seized his cellular telephone and subsequently conducted a forensic examination of the device.[52] Text messages on the device revealed that Mr. Holland was in Delaware on the day of the incident.[53] The digital content also uncovered that Mr. Holland was in need of money to pay bills.[54] Police also conducted a search of the victims' residence and found marijuana and miscellaneous drug paraphernalia belonging to the occupants.[55]

During both of Mr. Holland's trials, the State introduced a multitude of evidence demonstrating that Moore[56] and Deshields[57] suffered serious physical injury related to their gunshot wounds, including medical records and the witnesses' descriptions of their continuing injuries.

[52] A539-42.
[53] A550.
[54] A550.
[55] A083-84; A481.
[56] A493-94.
[57] A139-40; A466-67.

ARGUMENT

CLAIM I. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DISMISS NEWLY-INDICTED CHARGES AGAINST MR. HOLLAND AS THEY RAN AFOUL OF THE UNITED STATES AND DELAWARE CONSTITUTIONS, THEREBY DEPRIVING MR. HOLLAND OF DUE PROCESS OF LAW.

A. Question Presented

Whether the trial court violated Mr. Holland's due process rights and abused its discretion by allowing the State to proceed on more severe, previously unindicted charges in a retrial against the defendant after the first jury did not vote to convict, where (1) the court failed to bar the prosecution as mandated by statute, (2) the Reindictment was the product of a vindictive prosecution, and (3) the State was collaterally estopped from arguing that Mr. Holland injured the victims or possessed a firearm. This issue was preserved via a Motion to Dismiss, a Motion to Reargue, *pro se* written motions by the defendant, and argument by the defendant at trial.[58]

B. Standard and Scope of Review

This Court reviews issues of statutory construction and interpretation *de novo*.[59] This Court reviews claims of a constitutional violation *de novo*.[60]

[58] A007-08; A297-377; A402-16; A425-27.
[59] *CML V, LLC v. Bax*, 28 A.3d 1037, 1040 (Del. 2011).
[60] *Hall v. State*, 788 A.2d 118, 123 (Del. 2001).

C. Merits of Argument

1. *The trial court's construction of* 11 Del. C. § 208 *created an internally inconsistent reading of the statute as a whole that requires reversal.*

The trial court committed reversible error by failing to dismiss Counts I through VIII of the Reindictment, charges the State was foreclosed from seeking in a subsequent prosecution under 11 *Del. C.* § 208(1)(a).

"It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"[61] Under 11 *Del. C.* § 208, a subsequent prosecution of a different statutory provision is barred if, in pertinent part, "The former prosecution resulted in an acquittal which has not been subsequently set aside . . . and the subsequent prosecution is for. . . any offense of which the defendant could have been convicted on the first prosecution."[62] The trial court narrowly interpreted subsection (1)(a) to mean an offense for which the defendant had been previously indicted, not any offense for which he *could* have been indicted.[63] Such an interpretation creates an internal inconsistency in light of the statute as a whole.

The statute specifically bars prosecution for a "*different* statutory provision" if a former prosecution resulted in acquittal and the subsequent prosecution is for

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[61] *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000)).
[62] 11 *Del C.* § 208(a)(1).
[63] *See* A400.

"any offense of which the defendant could have been convicted on the first prosecution."[64] Under the trial court's interpretation, subsection (1)(a) only bars prosecution of those specific offenses for which a defendant has already been indicted.[65] Such a reading is wholly inconsistent with the clear language of the statute, however, which specifies that section 208 only applies to offenses for which a defendant has *not* been previously charged. Moreover, the trial court's construction of the provision creates a redundancy when looking to section 207 of Title 11, which bars prosecution of the same statutory provision after acquittal.[66]

The only reading of subsection (1)(a) that is internally consistent with section 208 as a whole is one which bars prosecution of an offense for which the State could have indicted the defendant prior to the the first prosecution, but failed to do so. Such is the case here. The night of the incident, police were informed by Vanessa Grier that the armed suspect, "upon entering the residence[,] demanded that they hand over their money."[67] That information, in conjunction with the evidence tending to support the various Assault charges for which Mr. Holland was initially indicted, provided the State with all of the information it needed to present

[64] *Id*. (emphasis added).
[65] A400.
[66] *See* 11 *Del. C.* § 207 (entitled "When prosecution is barred by former prosecution for the *same offense*.") (emphasis added).
[67] A015; A030.

charges of Attempted Robbery in the First Degree in the initial Grand Jury proceeding as to the three victims.[68]

The trial court's reliance on its prior holding in *Esham v. State*[69] when interpreting section 208 was similarly misplaced. The *Esham* defendant was charged with possession of a dangerous drug with intent to deliver, an offense that occurred on September 28, 1972.[70] To prove the element of intent, the State introduced evidence at trial that the defendant had engaged in drug sales with an undercover police officer two weeks prior to the charged offense date.[71] After securing a conviction, the State thereafter charged the defendant with the illegal drug sale to the undercover officer.[72] The subsequent prosecution did not at all touch on the September 28 incident for which the defendant first stood trial.[73] The Court held that subsection (1)(a) did not apply to "any charge known to the prosecution for which defendant could have been prosecuted at the time of the first prosecution," and thus did not foreclose prosecution for conduct that occurred during a criminal transaction different than that for which the defendant was previously tried.[74]

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[68] *See* 11 *Del. C.* § 832(a)(1)-(2).
[69] 321 A.2d 512 (Del. Super. 1974).
[70] *Id*. at 513.
[71] *Id*.
[72] *Id*.
[73] *Id*.
[74] *Id*. To the extent that the *Esham* decision supports a construction of section 208 congruent with that of the the trial court's, Mr. Holland contends such an interpretation is erroneous.

In contrast to *Esham*, the newly-indicted charges here stemmed from the same event as the offenses for which Mr. Holland was first tried. Because the same transaction formed the bases for the charges included in the first Indictment, the State was barred from proceeding on a Reindictment alleging the same facts and conduct.[75] Moreover, a reading of subsection (1)(a) that requires the State to proceed on all offenses arising out of the same transaction in one proceeding not only protects criminal defendants from having to defend themselves multiple times for the same conduct, but also is sound policy. Such a requirement serves the public interest by conserving scarce judicial resources, and promotes prosecutorial efficiency.

As in civil cases involving the doctrine of *res judicata*, 11 *Del. C.* § 208 requires the State to thoroughly prepare its cases prior to indictment and trial, promoting efficiency and leading to sounder prosecutions. Subsection (1)(a) prevents the unnecessary expenditure of additional time and money, as courtrooms, judicial officers and staff, law enforcement officers, and members of the public

[75] *See generally Jones v. Thomas*, 491 U.S. 376, 387-88 (1989) (Brennan, J., dissenting); *Morris v. Matthews*, 475 U.S. 237, 257 (1986) (Brennan, J., dissenting); *Harris v. Oklahoma*, 433 U.S. 682, 683 (1977) (Brennan, J., concurring); *Brown v. Ohio*, 432 U.S. 161, 170 (1977) (Brennan, J., concurring); *Simpson v. Florida*, 403 U.S. 384, 387 (1971) (Brennan, J., concurring); *Waller v. Florida*, 397 U.S. 387, 395-96 (1970) (Brennan, J., concurring); *Ashe v. Swenson*, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring); *Abbate v. United States*, 359 U.S. 187, 197-98 (1959) (opinion of Brennan, J.) (all urging the adoption of a federal rule requiring the State to prosecute, in one proceeding, all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction).

selected as jurors will not be procured in the State's repeated attempt to prosecute a single defendant in multiple trials for the same criminal episode.

The State's decision not to present the Attempted Robbery charges to the first Grand Jury, despite its ability to do so, barred a subsequent prosecution of those offenses as to Nemesis Moore and Semaj Deshields due to the acquittal by the first jury of Mr. Holland for Assault in the First Degree and Possession of a Firearm During the Commission of a Felony. Accordingly, but for its improper construction of the statute, the trial court was required to dismiss Counts III through VI of the Reindictment. Failure to do so requires reversal.

2. *The Reindictment was the product of vindictive prosecution.*

Generally, where probable cause exists to believe an individual has committed a criminal offense, the decision as to how to prosecute the matter is generally within the State's discretion.[76] A prosecutor does not enjoy unlimited discretion, howeverm when making such charging decisions.[77] Indeed, "[w]hen the State reindicts a defendant after a mistrial, there is good cause of concern."[78]

In *Blackledge v. Perry*, the Supreme Court of the United States considered the State's decision to reindict a defendant after he appealed his misdemeanor

[76] *Holmes v. State*, 2014 WL 3559686, *2 (Del. Supr. Jul. 17, 2014).
[77] *Albury v. State*, 551 A.2d 53, 61 n.13 (Del. 1988) ("Nevertheless, prosecutorial discretion is not unlimited. However, abuses of prosecutorial discretion in this area of the law generally involve either selective prosecution, which is a denial of equal protection, or vindictive prosecution, a violation of due process.") (internal citations omitted).
[78] *State v. Moran*, 820 A.2d 381, 384 (Del. Super. 2002).

conviction but prior to his *de novo* trial on the misdemeanor offense in a higher trial court.[79] The *Blackledge* Court looked to its prior decision in *North Carolina v. Pearce*, in which the Court held that "imposition of a penalty [by a sentencing court] upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process of law."[80] In widening the scope of the *Pearce* rule to include prosecutors, the *Blackledge* Court held:

> A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals - - by 'upping the ante' through felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy - - the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial.[81]

The Court held that a defendant claiming vindictive consequences resulting from his assertion of available rights and remedies in the course of a criminal proceeding need not establish actual bad faith or vindictiveness, as such behavior gives rise to a presumption of vindictiveness.[82] Ultimately, the Court reversed the defendant's conviction and remanded for a new trial, holding that "[a] person convicted of an

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[79] 417 U.S. 21 (1974).
[80] *Id*. at 25 (citing *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969)).
[81] *Blackledge*, 417 U.S. at 27-28.
[82] *Id*. at 28.

offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration."[83]

This Court was confronted with a similar issue in *Johnson v. State*, where the State reindicted a defendant after a mistrial because, as it claimed, he was "undercharged."[84] Relying on *Blackledge*, this Court reversed the convictions under the second indictment.[85] This Court did not find any actual bad faith on the part of the State, and specifically noted that its ruling did not suggest that "an indictment on a more serious charge is impermissible after a mistrial when the facts have changed."[86]

The Supreme Court of the United States has suggested—in *dicta*—that the presumption of vindictiveness is rebuttable.[87] When confronted with a claim of vindictive prosecution, the Superior Court of this State concluded that an analysis involving a "'rebuttable presumption' of vindictiveness is most in keeping with the lofty notions of due process which animated *Blackledge* and *Johnson* and yet also

[83] *Id*.
[84] 396 A.2d 163, 164 (Del. 1978).
[85] *Id*. ("This case is governed by the principles announced in *Blackledge v. Perry*.") (internal citations omitted).
[86] *Id*. at 165.
[87] *See Thigpen v. Roberts*, 468 U.S. 27, 32 n.6 (1984).

is in step with the realities of criminal prosecutions."[88] There, the trial court reasoned that not all reindictments after mistrial are motivated by "vindictiveness and retribution," as "[s]ome are pursued by prosecutors who, for legitimate reasons, were unable to present the new charge to the first grand jury that considered the case."[89]

In *State v. Moran*, a Delaware Superior Court case, the defendant was indicted by the Grand Jury on thirty-eight counts of Rape in the Third Degree and one count of Rape in the Second Degree.[90] A mistrial was declared because, at trial, the fifteen-year-old victim testified about sexual contact she had had with the defendant for which he was not facing trial.[91] Within two weeks of the mistrial, the State again interviewed the victim, who now appeared "remarkably at ease" while telling her story.[92] Thereafter, the State reindicted the defendant based upon the new information that had come to light following the first trial.[93] The *Moran* court refused to dismiss the reindictment, holding that the State had successfully rebutted the presumption of vindictiveness as it was clear that "[t]he State did not

[88] *State v. Moran*, 820 A.2d 381, 388 (Del. Super. 2002).
[89] *Id*.
[90] *Id*. at 382-83.
[91] *Id*. at 383-84.
[92] *Id*. at 384, 389.
[93] *Id*. at 389.

charge the additional offenses [in the first indictment] because it did not know about them."[94]

Such is not the case here. Mr. Holland was first indicted by a grand jury on multiple offenses, including two counts of Assault in the First Degree as to Nemesis Moore and Semaj Deshields.[95] After the first trial, the jury acquitted Mr. Holland of Counts III through VI of the indictment and were unable to reach a unanimous verdict as to any of the remaining counts.

Subsequent to the first trial, the State reindicted Mr. Holland, replacing the two Assault charges with Attempted Robberies of the same victims, and added new firearm charges.[96] Ultimately, the Reindictment presented a more serious period of incarceration, as the Robbery charges each carried a three-year minimum mandatory sentence, whereas the Assault charges each only carried two years.[97]

The State addressed the reason for the newly-charged offenses in its Response to Defendant's Motion to Dismiss:

> The decision to reindict was based upon the testimony presented at trial. Namely, that Nemesis Moore was dealing marijuana at the time and that he was known for a specific type of marijuana. This provided the motive for the home invasion. Up until the eve of trial, the State was

[94] *Id*. at 389.
[95] A017-22.
[96] A283-85.
[97] *Compare* 11 *Del. C.* § 832(b)(1) ("[A]ny person convicted of robbery in the first degree shall receive a minimum sentence of . . . three years at Level V.") *with* 11 *Del. C.* § 613(c) (classifying Assault First Degree as a Class B felony) *and* 11 *Del. C.* § 4205(b)(2) ("The term of incarceration which the court may impose for a . . . Class B Felony not less than 2 up to 25 years to be served at Level V.").

> not aware that Nemesis Moore was a drug dealer at the time this offense occurred. This fact was explored in detail – much of which was elicited through the Defendant on cross examination. Had these facts been known at the time of the indictment, the State would have included them in the original indictment.[98]

The State's contention that it was unaware that Moore was a drug dealer at the time of the incident is wholly disingenuous based upon the information known to it in advance of presenting Mr. Holland's case to the Grand Jury.

The sworn affidavit of probable cause used to secure an arrest warrant for Mr. Holland states that Grier informed police that the armed suspect entered her home and "demanded that they hand over their money."[99] In the initial discovery provided to Mr. Holland via cover letter dated October 2, 2014[100], the State provided a search warrant authored by Detective Breslin of the New Castle County Police Department.[101] The warrant was sought to investigate a violation of Drug Dealing pursuant to 16 *Del. C.* § 4754(a).[102] Within his sworn affidavit—authored three months before indictment—Detective Breslin asserted, in pertinent part, as follows:

> 13. Your affiant is aware that during Det. Shahan's interviews with [Nemesis Moore] and [Semaj Deshields], they both indicated that there was Marijuana in the residence.
>
> [. . .]

[98] A382-83.
[99] A015.
[100] A023-26.
[101] A027-33.
[102] A031.

> 17. On 04-09-2014, your affiant completed a neighborhood canvass. During the course of the canvass, your affiant was approached by a subject, herein referred to as a witness. The witness indicated that *one of the residents of 1533 New Jersey Avenue sells Marijuana and is known as the "weed man."*
>
> 18. On 04-09-2014, Detective McCabe executed a search warrant at the residence located at 1533 New Jersey Avenue, Apartment 3. During the course of the search warrant, Detective McCabe located 103 grams of suspected Marijuana and numerous clear glassine baggies. Your affiant is aware through training and experience that such *clear glassine baggies are commonly used for packaging/distributing dangerous controlled substances*.[103]

Moreover, the State demonstrated its knowledge of Mr. Holland's alleged motive during the testimony of its first witness in the first trial. While at a sidebar, the State stated to the trial court that "*[t]here was a claim that this was over marijuana*, which the testimony is obviously, probably going to come in."[104]

Here, as in *Blackledge* and *Johnson*, a presumption of vindictive prosecution exists, as Mr. Holland was reindicted for new offenses not only after a mistrial, but after he had been acquitted of four felony charges. While the *Johnson* Court warned that reindictment could be appropriate where the "facts have changed" after the first trial, such is not the case here.

The State learned nothing during the first trial about Moore's status as a drug dealer that it did not already know within days of the incident. This case differs

[103] A031 (emphasis added).
[104] A067 (emphasis added).

from *Moran*, as the State was aware of the facts underlying the Attempted Robbery charges when it first presented the matter to the Grand Jury. Finally, the State's representation to the trial court that it did not have such knowledge until the midst of the first trial, despite clear evidence otherwise, tends to suggest actual bad faith on behalf of the State in seeking reindictment. The only logical conclusion is that the State, angered at Mr. Holland's fortune in securing an acquittal to four serious charges that carried minimum mandatory terms of incarceration, sought reindictment against the defendant for more serious offenses to place him, yet again, at risk of a considerable period of incarceration.

"[I]n the context of a colorable claim of prosecutorial vindictiveness by an 'upping the ante' situation, the prosecutor must justify bringing a more serious charge in the same manner as would a judge under *Pearce* when inflicting increased punishment on retrial."[105] As the State cannot rebut the presumption of vindictive prosecution, the trial court deprived Mr. Holland of his right to due process by failing to dismiss the newly-indicted charges.[106] Consequently, this Court must vacate Mr. Holland's convictions of Counts I through IV and VII and VIII of the indictment.

[105] *Johnson*, 396 A.2d at 166.
[106] *See Moran*, 820 A.2d at 384 ("If a reindictment is pursued by a 'vindictive' prosecutor, the Court will answer by dismissing the indictment as a violation of the defendant's due process rights.") (citing *Johnson v. State*, 396 A.2d 163, 165 (Del. 1978)).

3. *The State was estopped from arguing Mr. Holland possessed a firearm and that he caused Nemesis Moore injury.*

Because Mr. Holland was acquitted by the first jury of Assault in the First Degree and PFDCF as to Nemesis Moore[107], the trial court erred in allowing the State to proceed with Attempted Robbery and PFDCF at retrial. Where a prior judgment of acquittal is based upon a general verdict, a court must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."[108] Such an inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings."[109] The trial court engaged in no such analysis, and thus Mr. Holland's conviction of the Attempted Robbery of Moore, as well as the related PFDCD, must be vacated.

In *Ashe v. Swenson*, the Supreme Court of the United States was confronted with whether the State could prosecute the same defendant in a subsequent prosecution for robbery when the first trial—relating to a different victim from the same criminal transaction—resulted in acquittal.[110] There, six individuals were

[107] Although the first verdict should have foreclosed the State's ability to argue that Mr. Holland committed an Attempted Robbery of Semaj Deshields, his acquittal of the Robbery and accompanying firearm charge as to Deshields makes such an argument moot.
[108] *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (internal citations omitted).
[109] *Id*. (quoting *Salfon v. United States*, 332 U.S. 575, 579 (1948)).
[110] 397 U.S. at 444-46.

playing poker in a residence when a number of men broke into the home and demanded the players' money and personal property before fleeing the scene.[111] The *Ashe* defendant was arrested and tried for the robbery of one of the six victims.[112] The evidence presented by the State that "an armed robbery had occurred and that personal property had been taken from [the victim] as well as from each of the others was unassailable" but it struggled to prove that the defendant was one of the assailants.[113] The trial court instructed the jury that if it found the defendant was one of the participants in the robbery, any theft would sustain a conviction, or that if it found he participated in the crime but had not directly robbed the specific victim at issue, such was enough to find the defendant guilty.[114] The jury voted to acquit.[115]

Subsequently, the defendant was brought to trial for the robbery of one of the other six poker players.[116] Though the State called the same witnesses, the testimony as to identity was "substantially stronger."[117] Moreover, the "State further refined its case at the second trial by declining to call one of the participants . . . whose identification testimony at the first trial had been conspicuously

[111] *Id*. at 437.
[112] *Id*. at 437-38.
[113] *Id*. at 438.
[114] *Id*. at 439.
[115] *Id*.
[116] *Id*.
[117] *Id*. at 439-40.

negative."[118] The jury received instructions virtually identical as those given at the first trial and convicted the defendant.[119]

Relying on the doctrine of collateral estoppel, the Court overturned the conviction.[120] The Court noted that:

> The record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that [the victim] had not been a victim of that robbery. The single rationally conceivable issue in dispute between the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not.[121]

Armed with the principle that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit," the Court held that the first jury's finding that the defendant was not one of the robbers estopped the State from arguing "the same or different identification evidence in a second prosecution . . . in the hope that a different jury might find that evidence more convincing."[122] In reversing the conviction, the Court observed:

> In this case the State in its brief has frankly conceded that following the petitioner's acquittal, it treated the first trial as no more than a dry run for the second prosecution: "No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn

[118] *Id*. at 440.
[119] *Id*.
[120] *Id*. at 443-47.
[121] *Id*. at 445.
[122] *Id*. at 443, 446.

> of events at the first trial." But that is precisely what the constitutional guarantee forbids.[123]

At Mr. Holland's first trial, the State failed to convict Mr. Holland of two counts each of Assault in the First Degree and PFDCF, relating to Moore and Deshields, respectively. To prove Assault, the State was required to convince the jury beyond a reasonable doubt that Mr. Holland intentionally caused serious physical injury to the victim by means of a firearm, a deadly weapon as defined by Delaware law.[124] To prove PFDCF, the State needed only to prove that the defendant possessed a firearm during the commission of the Assault charge.[125]

As in *Ashe*, where the jury's verdict only could have meant that, despite evidence of a theft, the defendant had not been one of the robbers, the jury in Mr. Holland's first trial only could have concluded that, despite the serious physical injuries Moore and Deshields sustained, the defendant did not intentionally cause them by means of a firearm. The State introduced substantial evidence proving Moore and Deshields suffered serious physical injury. Specifically, the State elicited testimony that both had suffered serious gunshot wounds that resulted in long-term side effects. Furthermore, the State introduced into evidence the medical records of all the victims which conclusively showed the seriousness of the injuries the victims sustained. Yet, despite this evidence, the jury voted to

[123] *Id*. at 447.
[124] *See* A018-19; *see also* 11 *Del. C.* § 613(a)(1).
[125] *See* A018-19; *see also* 11 *Del. C.* § 1447A(a).

acquit Mr. Holland for the Assault of both Moore and Deshields, and the accompanying firearm charges.

The jury's acquittal of Mr. Holland despite overwhelming evidence of serious physical injury to Moore as a result of a gunshot wound collaterally estopped the State from arguing that he caused physical injury to Moore during an Attempted Robbery or possessed a firearm. Since both were necessary elements of the new charges related to Moore, the trial court erred in allowing the State to proceed on those charges. Accordingly, *Ashe* mandates reversal of Mr. Holland's convictions related to a robbery of Moore or possession of a firearm in general.

<u>CLAIM II</u>: MR. HOLLAND DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HIS CONSTITUTIONAL RIGHT TO COUNSEL BEFORE THE TRIAL COURT PERMITTED HIM TO PROCEED *PRO SE*.

A. Question Presented

Whether the defendant knowingly, intelligently, and voluntarily waived his right to counsel at trial where the trial court failed to conduct a penetrating and comprehensive examination of all the circumstances prior to finding such waiver was valid. This issue was preserved by Mr. Holland's request to represent himself prior to trial on September 15, 2015.[126]

B. Scope and Standard of Review

This Court reviews questions of law *de novo*.[127] Claims of a constitutional violation are also reviewed *de novo*.[128]

C. Merits of the Argument

The trial court failed to ascertain whether Mr. Holland's waiver of counsel prior to trial was knowing, intelligent, and voluntary as it did not follow the guidelines adopted by this Court in *Briscoe v. State*.[129] This failure resulted in the defendant's *pro se* representation at trial without having been fully informed of the dangers of self-representation and requires reversal.

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[126] A420-21.
[127] *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).
[128] *Hall v. State*, 788 A.2d 118, 123 (Del. 2001).
[129] 606 A.2d 103, 108 (Del. 1992).

Pursuant to the Sixth Amendment of the United States Constitution[130] and Article I, Section 7 of the Delaware Constitution[131], a criminal defendant enjoys the right to be represented by counsel at trial. The Supreme Court of the United States has held that a defendant in a criminal proceeding may proceed without counsel and represent himself *pro se* if the defendant knowingly, intelligently, and voluntarily waives the right to counsel after a thorough colloquy advising the accused of the dangers of self-representation at trial.[132] As the right to counsel automatically attaches, the importance of a proper waiver is critical.[133]

Once a criminal defendant clearly and unequivocally asserts his right to represent himself at trial *pro se*, a trial court must conduct a pretrial hearing to ascertain whether the defendant is knowingly, intelligently, and voluntarily waiving his right to be represented by counsel.[134] Such waiver "depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[135]

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[130] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI; *see also Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (holding that the Sixth Amendment right to counsel in criminal proceedings applies to the States through the Fourteenth Amendment).

[131] Article I, Section 7 states, in relevant part, that a defendant "has the right to be heard by himself and counsel"; *see also Hooks v. State*, 416 A.2d 189, 199 (Del. 1980) (setting forth the history of Delaware's constitutional right to counsel).

[132] *Faretta v. California*, 422 U.S. 806, 835 (1975); *see also Edwards v. Arizona*, 451 U.S. 477, 482 (1981); *and Buhl v. Mr. Cooksey Warden*, 233 F.3d 783, 789 (3d Cir. 2000).

[133] *See Faretta*, 422 U.S. at 835.

[134] *Id*. at 826-32; *Smith v. State*, 996 A.2d 786 (Del. 2010); *Briscoe v. State*, 606 A.2 103 (Del. 1992).

[135] *Edwards*, 415 U.S. at 482 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

The Third Circuit promulgated guidelines for a waiver of counsel inquiry in *United States v. Welty*, holding that, "at a minimum, to be valid, a [defendant's] waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation and all other facts essential to a broad understanding of the whole matter."[136] The Circuit Court noted that a "judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances, and only after bringing home to the defendant the perils he faces in dispensing with legal representation."[137] The *Welty* Court enunciated a number of guidelines a trial court should use in assessing whether a defendant's waiver of counsel is knowing, intelligent, and voluntary.[138]

This Court adopted the *Welty* guidelines in *Briscoe v. State*.[139] Thus, a trial court in this State should advise the defendant:

> (1) That he will have to conduct his defense in accordance with the rules of evidence and criminal procedure, rules with which he may not be familiar;
>
> (2) That he may be hampered in presenting his best defense by his lack of knowledge of the law;
>
> (3) That the effectiveness of his defense may well be diminished by his dual role as attorney and accused;

[136] 674 F.2d 185, 188-89 (3d Cir. 1982).
[137] *Id*. at 189 (quoting *Johnson*, 304 U.S. at 465) (internal quotations omitted).
[138] *Id*. at 185.
[139] 606 A.2d at 108.

(4) The nature of the charges;

(5) The statutory offenses included within them;

(6) The range of allowable punishments thereunder;

(7) Possible defenses to the charges and circumstances in mitigation thereof; and

(8) All other facts essential to a broad understanding of the whole matter.[140]

Only after undertaking such an inquiry should the trial court determine, on the record, whether the waiver is proper.[141]

In three cases similar to Mr. Holland's, this Court reversed and remanded a defendant's conviction for a new trial due to the Superior Court's failure to adhere to the *Welty/Briscoe* factors when assessing whether the defendants were knowingly, intelligently, and voluntarily waiving their right to counsel.[142] In *Smith v. State*, the trial court advised a defendant wishing to proceed *pro se* only "that he would be bound by the rules of evidence and procedure, that most defendants proceeding *pro se* are convicted, and that he was facing a good deal of mandatory time."[143] The defendant was found guilty of some of the charges.[144] This Court held that the trial court "did not ascertain enough information to establish a basis

[140] *Briscoe*, 606 A.2d at 108 (quoting *Welty*, 674 F.2d at 188-89).
[141] *Briscoe*, 606 A.2d at 108 (quoting *Johnson*, 304 U.S. at 465).
[142] *Morrison v. State*, 135 A.3d 69 (Del. 2016); *Boyer v. State*, 2009 WL 3841973 (Del. Supr. Nov. 16, 2009); *Smith v. State*, 996 A.2d 786 (Del. 2010).
[143] *Smith*, 996 A.2d at 787, 791 (internal quotations omitted).
[144] *Id*. at 789.

for a knowing and intelligent waiver of the right to counsel," and reversed the conviction.[145]

In *Boyer v. State*, the defendant expressed dissatisfaction with his attorney and advised the trial court he wished to represent himself.[146] During the *Faretta* colloquy, the trial court advised the *Boyer* defendant only that "he would have to adhere to the rules of the court, the rules of evidence, and all those things" before finding his waiver of counsel knowing, intelligent, and voluntary.[147] The defendant was found guilty.[148] Holding that the colloquy was deficient, this Court noted:

> We recognize that a judge may face a defendant who adamantly states that he is aware of his right to counsel and wishes to waive that right; however, those statements do not alleviate the judge's responsibility to conduct a comprehensive evidentiary hearing to explore and explain defendant's options.[149]

Ultimately, this Court reversed and remanded the *Boyer* defendant's conviction.[150]

Just this year, this Court reversed and remanded another conviction for failure to conduct an adequate *Faretta* colloquy in *Morrison v. State*.[151] There, the trial court "discussed [the defendant's] criminal history, level of education, warned

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[145] *Id*. at 792.
[146] 2009 WL 3841973 at *1.
[147] *Id*. at *2 (internal quotations omitted).
[148] *Id*.
[149] *Id*.
[150] *Id*.
[151] 135 A.3d at 76.

him about having to abide by the court's rules, and addressed the challenges of having a trained attorney as an adversary."[152] However, the court failed to address a number of the *Briscoe*/*Welty* factors, including "the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses, possible circumstances in mitigation, and the dangers of the dual roles of being an attorney and the accused."[153] This Court held that, despite the defendant's desire to proceed *pro se*, the trial court "was still responsible for conducting a comprehensive evidentiary hearing to explore and explain the defendant's options."[154] This Court reversed, as the trial court "did not ascertain enough information to establish a basis for a knowing and intelligent waiver of the right to counsel."[155]

As in *Smith*, *Boyer*, and *Morrison*, the trial court here failed to conduct a comprehensive evidentiary hearing to explore and explain Mr. Holland's options. The trial court discussed that a trained attorney would be more knowledgeable about court procedure, rules of evidence, and the law than Mr. Holland[156]; that if he failed to conduct himself with due respect for the laws and rules governing the trial, that the trial court could appoint an attorney to represent the him[157]; and that it

[152] *Id*. at 74.
[153] *Id*.
[154] *Id*. at 75 (quoting *Boyer*, 2009 WL 3841973 at *2).
[155] *Id*. at 76.
[156] A420.
[157] A420.

was solely his choice as to whether he testified in his own defense.[158] The trial court also incorporated by reference its finding from Mr. Holland's first trial that the defendant had knowingly, intelligently, and voluntarily waived his right to counsel—though the court failed to inquire as to whether Mr. Holland recalled the prior colloquy, or if the defendant still understood the previously-discussed matters.[159] During the prior colloquy, the trial court actually enumerated all of the *Briscoe*/*Welty* factors prior to questioning Mr. Holland[160], yet failed to discuss each factor with the defendant. Instead, the trial court—in addition to what was covered at the second trial—advised Mr. Holland of the statutory offenses for which he stood charged, as well as the range of allowable punishments if convicted of those offenses.[161]

At no point, however, did the trial court discuss with Mr. Holland that the effectiveness of his defense could be diminished by his dual role as attorney and accused; the nature of the charges for which he stood accused; or possible defenses to those charges and circumstances in mitigation thereof. Moreover, while the trial court did advise the defendant of the statutory offenses for which he was charged during the first trial, it failed to do so at the second trial—despite that Mr. Holland

[158] A420-21.
[159] A421.
[160] A047.
[161] A048.

had been reindicted for additional, previously-uncharged offenses. Such failure is increasingly problematic as Mr. Holland never had an arraignment on the new charges under the reindictment, and thus had never had an opportunity to be informed of the specific allegations against him in advance of trial.[162]

Additionally, the Court failed to inform Mr. Holland during the *Faretta* colloquy at the second trial of the range of allowable punishments he was facing under the new indictment, merely telling him that the total period of incarceration could exceed 200 years.[163] Such failure is especially troubling because of the variance of the minimum-mandatory period of incarceration Mr. Holland was facing if convicted, as discussed in Claim I, *supra*. Thus, the trial court's incorporation by reference of its discussion as to the range of allowable punishments Mr. Holland was facing if convicted was mooted by the variance in the minimum penalty that the defendant was facing if convicted of all charges at trial.

Ultimately, the trial court failed to fully and adequately cover six of the eight *Welty*/*Briscoe* guidelines in determining whether Mr. Holland had knowingly, voluntarily, and intelligently waived his right to counsel. The precedent of this

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[162] *See generally* A005-10.

[163] Admittedly, the trial court informed Mr. Holland of the minimum mandatory penalty he was facing if convicted of all charges in ascertaining whether the defendant was knowingly, intelligently, and voluntarily rejecting the State's final plea offer, but did so after the defendant had already waived his right to counsel. *See* A422-24.

Court dictates that the *Faretta* colloquy employed by the trial court here was constitutionally deficient and did not provide an adequate basis for finding a knowing, intelligent, and voluntary waiver of counsel. Accordingly, Mr. Holland's conviction must be reversed and remanded for a new trial.

<u>CLAIM III</u>: THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO DECLARE A MISTRIAL *SUA SPONTE* SO AS TO PROVIDE MR. HOLLAND ADEQUATE TIME TO THOROUGHLY REVIEW COMPLEX SCIENTIFIC MATERIAL NOT PREVIOUSLY PROVIDED TO HIM BY COUNSEL.

A. Question Presented

Whether the trial court committed plain error by failing to declare a mistrial *sua sponte* after learning that the defendant had just received an expert report involving complex scientific evidence that the State sought to admit into evidence. This issue was not preserved in the trial court, but the interest of justice exception applies because the error was so clearly prejudicial as to jeopardize the fairness of the trial.

B. Scope and Standard of Review

Because Mr. Holland did not seek such relief, this Court reviews a trial court's decision not to declare a mistrial *sua sponte* for plain error.[164] Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.[165]

[164] *Widgeon v. State*, 2005 WL 580304 at *1 (Del. Supr. Mar. 7, 2005).
[165] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (citing *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982)).

C. Merits of the Argument

The trial court committed plain error in failing to declare a mistrial *sua sponte* after discovering that Mr. Holland first learned of and reviewed a DNA report, that the State sought to introduce into evidence, in the midst of the State's case-in-chief. A defendant must be afforded adequate time to "prepare for cross examination or consult with a forensic expert" when confronted with evidence of a "highly technical nature."[166] By proceeding with trial and allowing the State to ultimately admit the report, despite the defendant's consent to its admission, the trial court fundamentally prejudiced Mr. Holland and undermined the fairness of the proceeding.

In *Oliver v. State*, this Court held that a 24-hour continuance was an insufficient remedy for the State's violation of the discovery rules relating to a mid-trial disclosure to the defense of a forensic chemist's notes.[167] In *Oliver*, the defense, well in advance of trial, requested discovery materials from the State, including any expert evidence the State would seek to introduce at trial.[168] While the State provided the final report of the forensic chemist who tested the controlled substances at issue, it did not produce the chemist's notes.[169] After ruling that the

[166] *See generally Oliver v. State*, 60 A.3d 1093, 1099 (Del. 2013).
[167] *Id*.
[168] *Id*. at 1094-95.
[169] *Id*. at 1095. The chemist testified at trial that he provided those notes to the Office of the Attorney General along with his report. *Id*.

State had committed a discovery violation, the trial court denied the defendant's request for dismissal and instead ordered an overnight continuance to allow counsel to review the newly-provided materials.[170]

On review, this Court held that "given the highly technical nature of [the chemist's] notes . . . , less than 24 hours was insufficient time for [the defendant] to prepare for cross examination or consult with a forensic expert."[171] This Court found that the lost time to prepare for cross-examination was "a colorable claim of significant prejudice."[172] The Court also noted that, because the data in question directly addressed elements the State had to prove beyond a reasonable doubt in order to convict the defendant, the discovery violation "was central to the case."[173]

While the procedural posture of Mr. Holland's case differs from that in *Oliver*, its holding is still applicable. Here, the State timely provided the DNA Report to Counsel well in advance of trial.[174] Counsel, however, never reviewed the report—and never provided a copy to Mr. Holland prior to trial—as it was misplaced in another file.[175] Only after the State attempted to introduce the report

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[170] *Id*.
[171] *Id*. at 1059.
[172] *Id*.
[173] *Id*.
[174] *See* A006; A291-96; A517; A519.
[175] A519. It is worth noting that Mr. Holland is precluded from raising any claims of ineffective assistance of counsel on direct appeal. *See Dobson v. State*, 2013 WL 5918409 at *2 (Del. Supr. Oct. 31, 2013) (noting that this Court ordinarily "will not hear any claims of ineffective assistance of counsel, which were not raised below) (quoting *Duross v. State*, 494 A.2d 1265, 1267 (Del. 1985)).

at trial did Mr. Holland realize it even existed.[176] The following day, Counsel informed the trial court of his error and stated that "I had never seen the report and neither has Mr. Holland."[177]

After Mr. Holland conferred with Counsel, the defendant hastily decided to consent to the admission of the previously unseen report.[178] While Mr. Holland informed the trial court that he saw nothing "wrong" with the report, review of the material demonstrates otherwise. The report indicates that Moore and Deshields were excluded as possible contributors to the mixture found on the magazine and ammunition swabs, thereby foreclosing Mr. Holland's ability to argue that the weapon belonged to either of the two men.[179]

It is clear from the record that Mr. Holland did not see the DNA report for the first time until that morning. Within two hours, he consented to its admission.[180] Although *Oliver* addressed late-disclosed expert materials in the context of a discovery violation, its rationale is applicable to this case. Mr. Holland's consent to the report's admission, given his *pro se* status, does not his

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[176] A515-17.
[177] A519. It should be noted that the report in question was an updated version of a report entered into evidence during the first trial. *See* A515. The first report compared samples collected at the scene against Mr. Holland's DNA profile, as well as the profile of an individual unrelated to the incident. A035-38. The updated report included comparisons against DNA swabs taken from Grier, Moore, and Deshields. A292-94.
[178] A519.
[179] A294.
[180] *See* A519 (noting that the proceedings began at 10:47 a.m.).

extinguish his right to challenge its effect on the trial on direct appeal as his right to a fair trial was fundamentally undermined by his inability to adequately review highly technical material prior to cross-examination. In *Oliver*, this Court found that an overnight recess was insufficient time for a trained defense attorney to review technical expert materials. Here, Mr. Holland, a *pro se* litigant, was not provided with the report until the morning of the expert's testimony and thus had no meaningful opportunity to review the report or prepare for cross-examination prior to the expert's testimony. Exacerbating the prejudice Mr. Holland suffered is that the DNA report directly related to a central issue in the case: whether it was Mr. Holland, Moore, or Deshields who possessed and fired the weapon in question.

Moreover, Mr. Holland's trial strategy was inadvertently sabotaged by his absence of knowledge as to the DNA report. At the first trial, Mr. Holland focused on the State's failure to compare the DNA samples collected at the scene with the victims' DNA, namely Moore and Deshields.[181] Such strategy was seemingly successful there, considering the jury acquitted Mr. Holland of the charges related to Moore and Deshields. However, the DNA report provided to Counsel in advance of the second trial included results of tests of the samples collected against the victims' DNA.[182] Thus, Mr. Holland proceeded to trial armed with a strategy

[181] *See, e.g.*, A125; A132-34.
[182] A292.

that was wholly unviable, yet was unaware of its flaws until days into the proceeding.

The trial court had an obligation to ensure Mr. Holland a fair trial. The court should have recognized the inherent prejudice that would inevitably pervade the second trial by admitting the DNA report into evidence when Mr. Holland was not even aware of its existence until the middle of trial. The only option, then, was to *sua sponte* declare a mistrial so as to allow Mr. Holland sufficient time to review the DNA report to prepare for cross-examination and, if necessary, consult with an independent expert. Failure to do so fundamentally undermined the fairness of the proceeding and requires reversal.

CONCLUSION

For the reasons stated herein, Mr. Holland respectfully requests that this Honorable Court reverse his convictions and remand the case for a new trial.

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Dated: July 27, 2016