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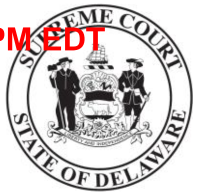

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DARREN WIGGINS,	)	
	)	
Plaintiff-Below,	)	
Appellant,	)	
	)	
v.	)	No. 46, 2019
	)	
STATE OF DELAWARE	)	
	)	
Defendant-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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DATED: June 27, 2019

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§ 2D1.1.Unlawful Manufacturing, Importing,
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I. NO RATIONAL TRIER OF FACT COULD FIND WIGGINS GUILTY BEYOND REASONABLE DOUBT OF AGGRAVATED POSSESSION AS THE STATE FAILED TO MEET ITS BURDEN TO PROVE THAT WIGGINS POSSESSED A TIER 3 WEIGHT OF A MIXTURE CONTAINING PCP.

Significantly, the State does not claim to know the composition of the brown chunky substances that were in the vial with the liquid PCP. The State does not dispute that the trial court engaged in speculation as to the composition of the unknown substances. Further, the State agrees that the unknown substances and the liquid were physically distinct from each other. It appears the State's argument is that the composition of the unknown brown chunky substances is irrelevant and that the description in the forensic chemist's report of the vial as a "glass bottle containing an amber liquid with brown chunks" somehow establishes that the unknown substances were "dispersed" or "distributed through the amber liquid"[1] and, therefore, were part of a mixture with the liquid. Yet, there is absolutely no evidence in the record as to the manner in which the unknown brown substances were contained within the vial at the time it was seized, when it was tested or anytime thereafter.[2] And, because there was no evidence as to the composition of the unknown substance, there is no evidence that the substance could in any way or did, in fact, disperse throughout the liquid.

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[1] State's Ans.Br. at 9-10.
[2] A-14, 16, 19, 22.

The State criticizes Wiggins' "attempt to narrow the definition of mixture beyond its common understanding by introducing concepts of marketability and usability."[3] The State is mistaken. This Court, in *Traylor v. State*,[4] and the United States Supreme Court in *Chapman v. United States*,[5] not Wiggins, introduced the concepts defining "mixture" for purposes of sentencing in cases involving controlled substances. The State then seems to suggest that this Court should follow a line of cases in an initial circuit split that interpreted *Chapman* as requiring, in the calculation of the weight of the mixture of a controlled substance, to include foreign objects or other materials that have to be separated from the substance before it can be used.[6] This suggestion is puzzling given the Federal Sentencing Guidelines have essentially superseded the holdings in those cases:

> [a m]ixture or substance does not include materials that must be separated from the controlled substance before the controlled

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[3] State's Ans.Br. at 10.

[4] 458 A.2d 1170, 1177 (Del. 1983).

[5] 500 U.S. 453 (1991).

[6] State's Ans.Br. at 12-13. *See United States v. Lopez-Gil,* 965 F.2d 1124, 1127-28 (1st Cir.) (holding weight of entire suitcase manufactured of fiberglass-cocaine mixture correctly considered to determine weight); *United States v. Walker,* 960 F.2d 409, 412-13 (5th Cir.) (holding entire amount of wastewater solution containing trace amount of methamphetamine should be used to determine weight); *United States v. Restrepo-Contreras,* 942 F.2d 96, 99 (1st Cir.1991) (finding entire weight of beeswax statues containing cocaine correctly considered in determining weight).

> substance can be used. Examples of such materials include the fiberglass in a cocaine/ fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.
>
> An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.[7]

The State also argues that this Court's holdings in *Lloyd v. State*,[8] *Simmons v. State*[9] and *Shy v. State*[10] somehow require the inclusion of the weight of the unknown substances in our case. To the contrary, these cases illustrate the point explained in *Traylor* and are distinguishable from our case. Each of the cases cited by the State involved substances composed of uniform powder contained in a bag to be sold as one unit of a controlled substance. It was only after the powder was tested that it was determined

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[7] § 2D1.1.Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy, FCJ Federal Sentencing Guidelines Manual § 2D1.1. *See United States v. Turner*, 59 F.3d 481, 490 (4th Cir. 1995) ("the Commission responded to this inter-circuit conflict by adding to the Guidelines that '[m]ixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used'").

The State acknowledges this amendment to the comments of the sentencing guidelines. State's Ans.Br. at 13 n.65.

[8] 534 A.2d 1262, 1264 (Del. 1987).

[9] 528 A.2d 415 (Del. 1987).

[10] 459 A.2d 123, 124 (Del. 1983).

that a portion of the powder was not a controlled substance. In *Shy*, police testified that this was typical of street-level heroin sold in the Wilmington area.[11] Thus, punishing the defendants for the weight of the entire mixture in each of those cases is consistent with the purpose expressed in *Traylor* – to punish individuals with "possession of large, but diluted, amounts of illegal drugs." Here, there was no evidence that the unknown substances were used to dilute or conceal a portion of the controlled substance. Because no testing was done on the substances, there is no way of knowing whether they had to be removed before use (i.e. consumption) or that they were tools of the trade. And, punishing Wiggins in this case would contribute only to a wide disparity in sentences for individuals in possession of the same amounts of actual unlawful mixtures.

Because the State failed to establish a mixture, the weight of the two substances should not have been used to establish the weight element of the offense of Aggravated Possession. Therefore, the State failed to establish the actual weight of the PCP and Wiggins could only be convicted of the lesser-included offense of misdemeanor possession of PCP.

[11] 459 A.2d at 124.

CONCLUSION

For the reasons and upon the authorities cited herein, Wiggins' conviction must be vacated.

Respectfully submitted,

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DATED: June 27, 2019